

STUDENT, B/N/F PARENT	§	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER
	§	
RICHLAND SPRINGS INDEPENDENT SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

STUDENT, by next friend PARENT (hereinafter "Petitioner" or "the student"), brought a complaint pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400, et seq., complaining of the Richland Springs Independent School District (hereinafter "Respondent" or "the district").

Petitioner was represented by Christopher Jonas, an attorney in Corpus Christi, Texas. Respondent was represented by Holly B. Wardell, an attorney with Schwartz & Eichelbaum in Austin, Texas. Petitioner's request for hearing was filed on August 20, 2007. The resolution session in the matter did not result in a resolution in the parties' disputes. The matter came on for hearing by agreement of the parties and order of the hearing officer on April 28, 2008. At the conclusion of the hearing, the parties were offered an opportunity to file written closing arguments prior to the issuance of the decision. The parties filed closing arguments and agreed that the decision in this matter would be timely issued on or before June 2, 2008.

Petitioner alleged that the district failed to provide STUDENT with a free appropriate public education. Specifically in Petitioner's amended request for hearing, Petitioner alleged that the district failed to provide aide assistance for STUDENT in physical education and recess during the 2006-2007 school year. Petitioner also alleged that the district failed to conduct an

appropriate functional behavioral assessment (“FBA”) and implement an appropriate behavior intervention plan (“BIP”). And Petitioner alleged that the district failed to provide a water fountain in the gymnasium for STUDENT during his physical education class.

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

#### Findings of Fact

1. STUDENT is a student residing with the student’s parents within the Richland Springs Independent School District. [Petitioner’s Exhibits 1, 2, and 3]

2. The student was born in \*\* and receives special education and related services based upon eligibility criteria of speech impairment (“SI”) and other health impairment (“OHI”). [Petitioner’s Exhibits 1 through 8]

3. The OHI eligibility criteria is based upon the student’s heart condition involving transposition of the great vessels and premature ventricle contractions. [Transcript Pages 17-18]

4. If the student’s heart rate becomes too rapid, the student could become unconscious and potentially die. [Transcript Page 18]

5. The student also has a higher metabolism rate than normal which requires appropriate hydration. [Transcript Pages 2, 22-23]

6. In admission, review, and dismissal (“ARD”) meetings for the student for the school years 2006-2007 and 2007-2008, the student’s individual education plan (“IEP”) provided for aide assistance in physical education class and recess. [Petitioner’s Exhibits 1 through 4]

7. The special education director for the district said the district intended that the aide assistance was provided “...to serve as an extra set of eyes...” for the student because of concerns for the student’s health. [Transcript Page 237 and 239]

8. The student's parent provided a water bottle each day to ensure appropriate hydration for the student. [Transcript Page 22]

9. The student's physical education class was generally conducted in the school's gymnasium. There are two water fountains in the gym – one in the girls' locker-room and another up a short set of stairs. [Transcript Pages 23, 42 and 56-57]

10. Aides provided for STUDENT during physical education in the 2006-2007 and 2007-2008 school years testified that on numerous occasions the coach serving as the physical education teacher did not attend the physical education class, and the aide for the student was required to handle the class alone. The class was forty-five (45) minutes in length. [Transcript Pages 66-67]

11. The student's paraprofessional – or aide – during the 2006-2007 school year testified that the physical education teacher was not in the student's physical education class a total of seventeen or eighteen times and that a substitute teacher was made available only twice. The aide is not a certified teacher. [Transcript Pages 66-67]

12. When the teacher was not in the class, the aide testified that she would be alone with thirty or more \*\* children and the student did not receive instruction in class from a certified teacher for a significant period of time. [Transcript Page 67]

13. The aide for the student that school year testified that she made her concerns about the lack of a physical education teacher in the class known to the administration, and she was relieved of her responsibilities with the school. [Transcript Pages 70-72]

14. Also, on a number of occasions various individuals observed the aide provided for the student during the 2007-2008 school year was assigned both for the student and another special education student during recess. [Transcript Page 86]

15. The student's parent requested that an additional water fountain be installed in the gym so that the student would not have to climb some steps to one water fountain or go in the girls' locker-room to get water. [Transcript Pages 116-117]

16. The student's IEP does not contain any requirements regarding the availability or proximity of a water fountain in the gym. [Respondent's Exhibits 1-7]

17. District officials believe that the installation of an additional water fountain in the gym could cause injury to students running in the gym and that a water fountain previously in the gym was removed because of such injuries. [Transcript Pages 134, 178-179 and 207-208]

18. The student has not suffered any injury or complications during his physical education class because of a lack of hydration. The student's educational program provided that the student was to receive frequent breaks during physical education and provided with appropriate hydration but that the student was not restricted from any activities in class. [Respondent's Exhibit 6]

19. The student has suffered no problems with becoming unconscious or being injured because of a lack of hydration at school. [Transcript Pages 40-41]

20. Because of the district's concerns about the allegations of the student's aide during the 2006-2007 school year the district investigated whether or not the aide was left alone with the physical education class on a number of occasions. The district made its own conclusions that the student was rarely if ever without a teacher or substitute in the class. The student's aide for the 2006-2007 school year also prepared a memorandum indicating that no teacher was present for fifteen or sixteen days. [Petitioner's Exhibit 20 & Respondent's Exhibit 25]

21. The principal for the student's school interviewed a number of district personnel who confirmed their presence during the absences of the PE teacher. District personnel testified

that they were present on the days that the aide maintains she handled the class alone. [Transcript Pages 200-208, 210-212 and 220-226]

22. Petitioner's evidence on the issue of the absence of a teacher was credible. Respondent's evidence was not credible.

### Discussion

Petitioner alleges that the student was denied an appropriate educational placement because the provision in the student's IEP for aide assistance in physical education and recess was not implemented on approximately fifteen occasions. Petitioner further alleges that, although there was no provision in the IEP for an additional water fountain in the gym, a water fountain should have been installed to ensure the appropriate hydration for the student. Though Petitioner alleged that an FBA should have been provided to the student and a BIP provided for him, Petitioner offered no evidence at the hearing on these issues.

Because the aide making the allegations about the absence of the PE teacher during PE class during the 2006-2007 school year was relieved of her work within the district, the testimony of the aide may be called into question. The evidence presented by the district, however, was not persuasive or credible. Based upon the preponderance of the evidence, a conclusion must be reached that the aide during that school year was alone in the class for approximately fifteen class periods. In failing to provide "the extra set of eyes" for the student, the district failed to implement the student's IEP. The aide providing the extra set of eyes was utilized as the teacher for the entire class. And in failing to implement the IEP, the district's action or inaction was not de minimis. The student did not receive instruction from appropriate personnel. The student's IEP was not followed, and the student was denied educational opportunity for a significant time which should have been provided to him.

Issues raised by Petitioner concerning the work of the aide during recess do not give rise to relief. Any deficiencies were de minimis.

Petitioner's allegations that the school should have provided an additional water fountain in the gym did not involve a failure to implement the student's IEP, and Petitioner failed to prove by preponderance of the evidence that an additional water fountain should have been installed in the gym or that IDEA would require its installation. Based upon the foregoing findings of fact, the Hearing Officer makes the following conclusions of law:

#### Conclusions of Law

1. STUDENT is a student eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The Richland Springs Independent School District is the local education agency responsible for the provision of an appropriate educational placement for STUDENT
3. The district failed to implement the student's IEPs and provide special education and related services under the standard of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 34 CFR 300.552, and 19 T.A.C. §89.1055.
4. The district's failure caused violations of IDEA which were not de minimis; and STUDENT did not receive appropriate instruction in physical education for at least fifteen (15) school days. STUDENT is entitled to compensatory educational services in an amount of fifteen (15) physical education classes of forty-five (45) minutes in length with a certified teacher and a paraprofessional for STUDENT present for each class. School Committee of Burlington vs. Department of Education, 471 U.S. 359 (1985) and Alamo Heights Independent School District vs. State Board of Education, 790 F.2d 1153 (5<sup>th</sup> Circuit 1986).

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that:

1. The district offer to STUDENT compensatory services of fifteen (15) physical education classes for forty-five (45) minutes each staffed by appropriate personnel.
2. Respondent shall timely implement this decision by making an offer of a plan to implement the decision within ten (10) school days.
3. To demonstrate their compliance with this decision, the Respondent shall furnish to the Texas Education Agency within fifteen (15) school days from the date of this decision documentation (with copies to Petitioner) demonstrating that the decision is being implemented within the prescribed time. The district shall include a signed assurance from the superintendent that the orders in this decision will be implemented.

All other relief requested by Petitioner is DENIED.

SIGNED this 2<sup>nd</sup> day of June, 2008.

/s/ Lucius D. Bunton  
Lucius D. Bunton  
Special Education Hearing Officer

DOCKET NO. 323-SE-0807

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SYNOPSIS

**ISSUE:** Whether the Respondent failed to provide the student with a free appropriate public education so that the student is entitled to compensatory educational services.

**CFR CITATIONS:** 34 CFR 300.552.

**TEXAS CITATION:** 19 T.A.C. §89.1055.

**HELD:** For Petitioner.