

DOCKET NO. 015-SE-0906

HOUSTON INDEPENDENT
SCHOOL DISTRICT,
Petitioner

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BEFORE A DUE PROCESS

VS.

HEARING OFFICER FOR

STUDENT BNF PARENT,
Respondent

THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

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Houston Independent School District
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Pro Se

HOUSTON INDEPENDENT	§	BEFORE A DUE PROCESS
SCHOOL DISTRICT,	§	
Petitioner	§	
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VS.	§	HEARING OFFICER FOR
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*** BNF ***,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, Houston Independent School District (hereafter “Houston ISD”) brought this action against *** (hereafter “student”), by his next friend, *** (hereafter “parent”) pursuant to the Individuals with Disabilities Education Improvement Act (hereafter “IDEA”), 20 U.S.C. §1400 *et seq.* Houston ISD seeks to override the lack of parental consent for a psychological examination and counseling evaluation of the student and seeks authorization to obtain medical information from two healthcare providers of the student.

Procedural History

Houston ISD filed this request for a due process hearing with the Texas Education Agency (hereafter “TEA”) on September 19, 2006. The hearing in this matter was initially set for October 19, 2006.

On October 18, 2006, the parent filed a request for a due process hearing against Houston ISD which was assigned TEA docket number 041-SE-1006. As a result of this filing, the parent sought a continuance of the October 19, 2006, hearing and consolidation of these hearing requests. The parent’s motion for continuance was granted. The two hearing requests were consolidated with mutual agreement of the parties and a hearing date was set for December 7, 2006.

During a telephone prehearing conference held on October 27, 2006, the parent raised issues not contained in her request for a due process hearing. By letter dated November 7, 2006, the parent was advised that the IDEA prohibits a hearing on any issues not contained in the due process hearing complaint and that to raise such issues in this proceeding would require the filing of an amended complaint. On November 14, 2006, the parent filed an amended complaint which resulted in a recommencement of the timelines for the consolidated cases and a new hearing date of January 4, 2007.

On December 19, 2006, the parent filed a motion to compel the production of documents, which she had not yet received from Houston ISD under a Public Information

Act request. On January 3, 2007, the parent stated she had still not received any of the documents sought from Houston ISD. The parent's Motion to Compel was set for oral argument prior to the hearing on January 4, 2007, and the parent stated she would be at the hearing. However, the parent failed to appear at the hearing. As a result of the parent's failure to appear, the consolidated cases were severed, and Houston ISD's due process complaint proceeded to hearing.

The parent's hearing request in TEA Docket Number 041-SE-1006 was continued and the parent's Motion to Compel Production of Documents was granted.

The decision due date in this matter was extended by the parties to February 3, 2007. Houston ISD was represented by its legal counsel, Mr. Hans P. Graff.

Based on the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:

Findings of Fact

1. The student resides with his mother within the jurisdictional boundaries of Houston ISD. [Petitioner's Exhibit #11, hereafter P. Exh. ___].

2. The student receives special education services from Houston ISD as a student with a serious emotional disturbance. [P. Exh. #11].

3. During the 2004-2005 school year, the student was enrolled in the *** grade at *** an alternative, non-disciplinary educational placement for children with behavioral issues. [P. Exh. #11].

4. The student's three year reevaluation was due April 24, 2005. Houston ISD did not timely request consent from the parent to conduct a reevaluation and parent filed a due process hearing request with TEA. It was assigned TEA Docket No. 362-SE-0605 and the Honorable Sharon M. Ramage was appointed as the Hearing Officer. [P. Exh. #11].

5. The parent refused to provide consent for Houston ISD to conduct the reevaluation. Houston ISD did not file a responsive due process hearing to override the lack of consent, but rather sought an order to conduct an evaluation. [P. Exh. #11].

6. On December 5, 2005, the hearing was held in TEA Docket Number 362-SE-0605 to determine the appropriateness of the student's educational program and placement. A final decision was rendered by the Honorable Sharon M. Ramage on January 16, 2006, wherein she found it impossible to determine the extent of the denial of a free appropriate public education without further assessment. Accordingly, Hearing Officer Ramage ordered Houston ISD to complete a full and individual evaluation of the student which complied with 34 C.F.R. §§ 300.532-300.536, no later than 45 days from the date of her Order. Houston ISD was also ordered to include in such evaluation,

recommendations from the student's psychiatrist and the staff where he had been hospitalized, including the hospital's educational personnel, regarding the content of the student's individualized education plan and behavior intervention plan, and his educational placement. The evaluation was also to include a functional behavioral assessment of the student. Upon completion of the evaluation, an ARD Committee was to convene and implement the recommendations of the evaluator. Additionally, the parent was ordered to cooperate with the District in conducting the full and individual evaluation and to present the student for the evaluation. [P. Exh. #11].

7. Beginning on or about January 27, 2006, Houston ISD sought informed consent from the parent for the full and individual evaluation of the student, including psychological and counseling evaluations. [Petitioner's Exh. #16].

8. Houston ISD also sought from the parent a release of student's confidential medical information maintained by his psychiatrist and hospital staff. [P. Exh. #16].

9. The parent sent written informed consent for the psychoeducational component of the full and individual evaluation, which was received by Houston ISD on or about February 8, 2006. The psychoeducational portion of the full and individual evaluation was completed by Houston ISD on February 14, 2006. [P. Exh. #18].

10. Parent also sent written informed consent for the psychological and counseling assessments and a signed release for access to confidential medical information of the student to Houston ISD, but Houston ISD never received them. [P. Exh. #15, 18.].

11. Parent thereafter refused to sign any additional consent or release of medical information forms for these assessments and medical input. [P. Exh. #18].

12. Houston ISD declined to proceed with its psychological evaluation and counseling evaluation of the student without consent of the parent since the order of the hearing officer did not specifically override the lack of parental consent for these evaluations.

Discussion

Full and Individual Evaluation

Hearing Officer Ramage's Order in TEA Docket No. 362-SE-0605 was clear and concise. Pursuant to its terms, Houston ISD was required to complete a full and individual reevaluation of the student which complied with 34 C.F.R. §§ 300.532-300.536 within 45 days of the date of the Order, and the parent was to cooperate in the conduct of the full and individual reevaluation, including presenting the student for the reevaluation. Neither occurred, thus necessitating this due process hearing.

The sole issue in this proceeding is whether to allow Houston ISD to complete a full and individual reevaluation of the student as ordered by Hearing Officer Ramage in TEA Docket No. 362-SE-0605, without parental consent. To complete the reevaluation, Houston ISD seeks a psychological examination and counseling assessment of the student and recommendations from the student's psychiatrist and staff where the student had been hospitalized regarding the content of the student's individualized education plan, behavior intervention plan, and his educational placement

A full and individual reevaluation is one that assesses the child in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. *See* 34 C.F.R. §300.532 (g). Additionally, the reevaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. *See* 34 C.F.R. §300.532 (h).

The student has been identified and is receiving special education services as a student with a serious emotional disturbance. The student is also receiving counseling as a related service. Accordingly, at a minimum, the full and individual reevaluation of the student should consist of a psychoeducational assessment, psychological examination, a functional behavioral assessment, and a counseling assessment, as these various assessments would address the student's previously recognized areas of disability.

Instead of seeking global consent from the parent for the full and individual reevaluation, that is, one consent form providing notice and describing the types of the assessments sought, including the psychological examination and counseling assessment, Houston ISD sent to the parent separate consent forms for each component part of its proposed full and individual reevaluation. Although parent claims she fully cooperated and signed and returned all of the consent and release forms, Houston ISD only received a signed consent form for the psychoeducational component. The record further shows that subsequent attempts by Houston ISD to obtain signed consent forms from the parent for the remaining components of the full and individual reevaluation were unsuccessful.

Houston ISD brought this action to override the lack of parental consent for the psychological and counseling components of its full and individual reevaluation so that it could complete the reevaluation required by the Hearing Officer. The IDEA specifically authorizes educational agencies to use the due process hearing procedures to override the lack of parental consent for an initial evaluation, but is silent as to whether a right exists to use these procedures to override the lack of parental consent for a reevaluation. *See* 20 U.S.C. §1414 (a)(1)(D)(ii)(I) and (a)(2). However, the newly enacted federal regulations address this issue and allow educational agencies to use the due process hearing procedures to override the lack of parental consent for a reevaluation. 34 C.F.R. §300.300 (c)(ii) (effective October 13, 2006). Although this new regulation was not in effect at the time this hearing was initiated, I find the intent of the IDEA was that the due process hearing procedures could also be used to override the lack of parental consent for a reevaluation. Moreover, the federal regulation applicable to this hearing request also

allowed use of the due process hearing procedures to override the lack of parental consent for reevaluations. *See* 34 C.F.R. §300.505 (b).

To effectively implement the Order of Hearing Officer Ramage, Houston ISD shall be granted the right to complete a full and individual reevaluation of the student by completing its recommended psychological examination and counseling evaluation, despite the lack of parental consent. This right, however, shall not include the right to obtain confidential medical information or recommendations from the student's psychiatrist and hospital and educational staff, unless the parent cooperates and executes a release and authorization form for this purpose. Since the student's psychiatrist and hospital and educational staff were not parties to this or the prior proceeding, they cannot be compelled to be a part of or assist the evaluation team or ARD Committee in making recommendations for the student's educational program. Any such cooperation would be solely discretionary on their part and will be subject to providing them with the necessary release and consent forms from the parent.

Unfortunately, approximately another year has passed since Hearing Officer Ramage issued her order in this matter and the student is still without a completed full and individual reevaluation.

Conclusions of Law

1. The decision of Hearing Officer Ramage in TEA Docket No. 362-SE-0605 involving these parties was final and appealable to federal or state district court as to those issues adjudicated in that hearing. Hearing Officer Ramage did not address in her decision the issue presented in this case - whether to allow Houston ISD to complete its full and individual reevaluation of the student without parental consent. Only issues raised in the due process complaint notice of a party can be adjudicated at a due process, unless the parties agree otherwise. 20 U.S.C. §1415 (f)(3)(B).
2. The full and individual reevaluation of the student is one that assesses the student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. *See* 34 C.F.R. §300.532 (g). Additionally, the evaluation must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. *See* 34 C.F.R. §300.532 (h).
3. The full and individual reevaluation of the student should consist of a psychoeducational assessment, psychological examination, a functional behavioral assessment, and a counseling assessment, as these various assessments would address the student's previously recognized areas of disability. 34 C.F.R. §300.532 (g).
4. Prior to conducting the full and individual reevaluation of the student ordered by Hearing Officer Ramage in TEA Docket No. 362-SE-0605, Houston ISD was required to obtain from the parent prior written consent. "Consent" means: "(i) The parent has been

fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (ii) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (iii) (A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. (B) If the parent revokes consent, that revocation is not retroactive (i.e. it does not negate an action that has occurred after the consent was given and before the consent was revoked).” 34 C.F.R. §300.500.

5. Since the parent failed to provide prior written consent for all components of the reevaluation, Houston ISD may use the due process hearing procedures to override the lack of parental consent for the reevaluation. See 34 C.F.R. §300.505 (b).

6. To effectively implement the prior Order of the Hearing Officer requiring a full and individual reevaluation of the student, Houston ISD needs authorization overriding the lack of parental consent to complete the remaining components of its reevaluation. See 34 C.F.R. §300.505 (b).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby ORDER that the following relief is GRANTED:

1. Houston ISD is authorized to initiate and complete a psychological examination and counseling assessment of the student without parental consent.

2. Houston ISD shall complete its full and individual evaluation of the student, including the psychological examination and counseling assessment within 30 days of the date of this ORDER.

3. Prior to conducting its psychological examination of the student, Houston ISD shall provide the parent with written notice containing the following information: (1) the name and type of the psychological examination or test; and (2) an explanation of how the psychological examination or test will be used to develop an appropriate individualized education program for the student.

4. The parent shall fully cooperate with Houston ISD in presenting the student for the psychological examination and counseling assessment. The psychological examination shall be conducted during the normal school day at the student’s school or in the office of the evaluating psychologist. The counseling assessment shall be conducted during the normal school day at the student’s school or in the office of the evaluator. If the student must be transported to a location other than the student’s school, then Houston ISD shall provide transportation at no cost to the parent. Should the parent fail to cooperate by presenting the student timely for these assessments, then Houston ISD shall be absolved of any responsibility to provide a free appropriate public education to

the student until such time as it is allowed to complete its reevaluation. Should the student be ill or not attend school or be hospitalized during the 30 day time period for completing these assessments, the time period shall be extended for the period of the illness, absence or hospitalization.

5. Within 5 school days of this Order, Houston ISD shall hand deliver to the parent the release of medical and/or confidential information form(s) it needs to obtain input and recommendations from the student's psychiatrist and hospital and educational staff. The parent shall fully cooperate in making herself available for and shall accept the hand delivery of the release form(s) and shall have 3 days in which to return this form(s) to the legal department of Houston ISD, properly executed. Should the parent fail to cooperate in making herself available to accept this form(s) or if she fails to execute and/or deliver this form(s) within the time period prescribed, then Houston ISD is hereby absolve of its duty to contact the student's psychiatrist and staff where the student had been hospitalized or to seek their recommendations regarding the content of the student's individualized education plan, behavior intervention plan, and his educational placement.

6. Upon obtaining timely signed release form(s) from the parent, Houston ISD shall contact the student's psychiatrist and the relevant staff where the student had been hospitalized and seek their cooperation in obtaining recommendations and input regarding the content of the student's individualized education plan, behavior intervention plan, and his educational placement. Houston ISD shall pay any reasonable fee of these health care providers for their participation, pursuant to its guidelines for Independent Educational Evaluations, where applicable, and with regard to expert fees, where applicable. Should one or more of the healthcare providers refuse to participate, Houston ISD shall document that fact, notify the parent, and shall thereafter be absolved of any further duty to obtain from that person or persons any recommendations regarding the content of the student's individualized education plan, behavior intervention plan, and his educational placement.

7. Within 10 school days after completion of the full and individual reevaluation, including psychological examination and counseling assessment, the parties shall convene an ARD Committee meeting to review the results of the full and individual reevaluation.

8. Nothing in this Order relieves any party of its obligations and responsibilities set forth in the Order of the Hearing Officer entered in TEA Docket No. 362-SE-0605.

9. All other relief not specifically granted herein is DENIED.

NOTICE TO PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 Texas Administrative Code §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency, and copied to the parent within 15 school days from the date of this Decision: 1) Documentation demonstrating that the Decision has been implemented; or 2) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 3rd day of February 2006.**

/s/ James W. Holtz

James W. Holtz
Special Education Hearing Officer

TEA: It appears that this is a typographical error and that the correct date/year is 3rd day of February, 2007.

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SYNOPSIS

Issue: Whether School District, under prior Order of issued by a Hearing Officer to complete a full and individual reevaluation of the student with serious emotional disturbance, should be authorized to complete the reevaluation without parental consent?

Held: For School District. In prior proceeding between the parties, School District was ordered to complete a full and individual evaluation of the student within 45 days and parent was ordered to cooperate. Parent consented to a psychoeducational component of the reevaluation but consent for the psychological and counseling components was not obtained. School District may use the due process hearing procedures to seek to override the lack of parental consent for a reevaluation.

Cite: 34 C.F.R. §300.505 (b)..

Issue: Whether School District, when ordered by a Hearing Officer to seek recommendations from the student’s psychiatrist and hospital and educational staff for development of IEP, BIP and determining educational placement, may contact and obtain such information without medical release forms executed by the parent?

Held: For Parent: Since the student’s psychiatrist and hospital staff were not parties to this or the prior proceeding, they cannot be compelled to be a part of or assist the evaluation team in making recommendations for the student’s educational program. Any such cooperation would be solely discretionary on their part and will be subject to providing them with the necessary release and consent forms from the parent. However, upon receiving the necessary release forms from the parent, school officials will be responsible for contacting these healthcare providers to seek their cooperation and input in developing an appropriate educational program for the student.

Cite: None.

Issue: Whether School District’s proposed full and individual reevaluation of the student complied with applicable law?

Held: For the School District. The full and individual reevaluation of the student is one that assesses the student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. Additionally, the evaluation must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. In this case, the full and individual reevaluation of the student should consist of a psychoeducational assessment, psychological examination, a functional behavioral assessment, and a counseling assessment, as these various assessments would address the student's previously recognized areas of disability.

Cite: 34 C.F.R. §300.532 (g) (h).