

STUDENT b/n/f PARENT PETITIONER	§ § §	SPECIAL EDUCATION
VS.	§	HEARING OFFICER
COMMERCE ISD, RESPONDENT	§ §	STATE OF TEXAS

DECISION OF HEARING OFFICER

This matter was presented to this Hearing Officer after ***, the parent of the child, filed for a Due Process Hearing pursuant to the Individuals with Disabilities Education Act (“IDEA04”), 20 U.S.C. §1400 et.seq., on November 15, 2006.

On the 13th day of February, 2007, the petitioner and the respondent appeared at the Commerce ISD campus for a Due Process Hearing pursuant to IDEA04, and the hearing concluded on the same date.

***, the parent of ***, (“the petitioner”) appeared in person and Pro Se, and announced ready.

Commerce ISD (“the respondent”) appeared through its district representative, *** and through its attorneys, Nona Matthews and Gigi Norman, and announced ready.

Issues Raised and Relief Sought

The petitioner raised three issues/complaints about the district in the Prehearing Conference held on December 11, 2006:

1. The district denied the child a free, appropriate public education (“FAPE”) and violated his rights by failing to follow the accommodations and modifications as outlined in the child’s Individualized Education Plan (“IEP”);
2. The district denied the child FAPE and violated his rights by failing to follow the child’s Behavior Intervention Plan (“BIP”); and
3. The district gave the child grades which he did not earn.

The petitioner sought the following relief from the outcome of the Due Process Hearing:

1. An order requiring the district to reimburse the cost to enroll the child in a private school;
2. An order requiring the district to provide one-on-one tutoring in the core courses for a total of two hours per week beginning immediately and continuing through June 2008;
3. An order requiring the district to provide for the child a lap top computer with software that corresponds to his core academic instruction beginning immediately and continuing through June 2008;
4. An order requiring the district to pay for the cost of enrolling the child in Summer School in the Summer 2007 if the child is not on track at that time to graduate in June 2008;
5. An order requiring the district to pay for tuition and transportation to a mutually agreed upon summer camp in 2007, either to be vocationally based or behaviorally based;
6. An order requiring the district to create an appropriate transition assessment related to career interests or post secondary education; and

7. An order requiring the district to organize a “Person Centered Plan Team” to address the child’s individual transition needs.

The hearing began on February 13, 2007 and concluded on the same date. After hearing the testimony of the witnesses presented, reviewing the exhibits from both parties which were admitted into evidence, and weighing such evidence in light of current law, the relief requested from the petitioners is hereby DENIED.

HELD, for the respondent.

Findings of Fact

1. The parties each agree that the child is an *** grade student eligible for special education services under IDEA04 based upon his Learning Disabilities in the areas of Math Reasoning and Math Calculations. (See, Trial Transcript, pp. 16, 59 – 60, Respondent’s Exhibit #1, p. 7, Respondent’s Exhibit #9, p. 7).
2. The child began receiving special education services as it relates to this case in his *** grade year of school after transferring in from Garland ISD. (See, Respondent’s Exhibit #2; Trial transcript, p. 60).
3. While at Garland ISD during his *** grade year, the child had failed World Geography, English I, and Biology I. (See, Respondent’s Exhibit #15, p. 1, Trial transcript, pp. 61-62). He did not have sufficient credits to be on track with his class. (See, Trial transcript, pp. 62-63).
4. Upon transferring in to Commerce ISD from Garland ISD, the district held a transfer ARD on August 17, 2005 in which the petitioner was a participant. (See, Respondent’s Exhibit #2).

5. The child's IEP was developed by the ARD Committee and the Accommodations and Modifications for the child were taken and duplicated from Garland ISD. (See, Trial transcript, pp. 63-64). The child's BIP was also developed by the ARD Committee. (See, Trial transcript, pp. 66-68). The petitioner was in agreement with the ARD Committee's decisions. (See, Trial transcript, p. 75; Respondent's Exhibit #3, p. 27).
6. During the 2005-2006 school year, the child's *** grade year, the child took general education classes, including English I and English II, and two Resource Math classes. (See, Respondent's Exhibit #15, p.2).
7. The district gave a copy of the child's BIP to all teachers (See, Trial transcript, p. 68), but failed to provide a copy of the Accommodations and Modifications to the Resource math teacher, Mr. ***. (See, Trial transcript, pp. 75).
8. The child did not do particularly well with his grades when the year began, but as the year progressed, the child's grades improved steadily where he passed all his subjects, thus earning sufficient credits to be back on pace with his classmates. (See, Respondent's Exhibit #15, p. 2).
9. The child also met or exceeded ARD expectations in his standardized state testing for the year. (See, Respondent's Exhibit #16, pp. 12-13).
10. During the year, the child was "written-up" numerous times for inappropriate behavior. (See, Trial transcript, pp.16, 21, 32, 248).
11. In the Spring 2006, the petitioner filed a complaint with the Texas Education Agency ("TEA") alleging that the district was not following the child's IEP. The TEA conducted its investigation and found that the "allegation is

substantiated”. (See, Petitioner’s First Amended Complaint with TEA Special Education Complaint Investigative Report, p. 5).

12. The TEA required some training for the district’s staff on how to implement an IEP and required some compensatory services for the child. The district complied with the training requirement.
13. The district attempted to comply with the compensatory services requirement by scheduling time for the child to come in for tutoring. The child failed to attend most of the tutoring. (See, Respondent’s Exhibit #8, p. 6). Ultimately, the child and the parent did not desire to finish the compensatory services as ordered by the TEA and an ARD Committee formally discontinued that process at the request of the parent and child, and altered the compensatory services to continue with basic skills objectives. (See, Respondent’s Exhibit #10, p. 51; Trial transcript, pp. 106, 116).
14. The child got into a physical altercation with another student while in Mr. ***’s Resource Math class in the Spring 2006. (See, Trial transcript, pp. 237-240, 244-245).
15. The petitioner filed her Due Process Complaint on November 15, 2006, raising the issues and requesting the relief as outlined above.

DISCUSSION - APPLICATION OF FACTS AND LAW

Petitioner’s Issue No. 1 – The district denied the child FAPE and violated his rights by failing to follow the accommodations and modifications as outlined in the child’s IEP.

The petitioner complains that the district denied the child FAPE and violated his rights by failing to follow the accommodations and modifications as outlined in the child's IEP. The basis for this complaint stems from the following evidence: a) the child was written up many times by his teachers; b) the child was involved in a physical altercation with another child that ultimately resulted in the child being arrested; and c) a statement signed by *** (See, Petitioner's Exhibit #2), the Commerce High School Principal, which implied that the IEP Accommodations and Modifications do not apply outside of the General Education classroom setting.

The child's IEP Accommodations and Modifications indicate the child is to have preferential seating near the teacher. (See, Respondent's Exhibit #3, p. 21; Respondent's Exhibit #7, p. 23). The petitioner states that these were not being followed and offers as proof the fact that the child was written up about 40 times during his *** grade school year and the current school year. (See, Trial transcript, p. 21). Mr. ***, the child's Resource Math teacher, alone wrote the child up 16 times. (See, Trial transcript, p. 248). The petitioner contends that all these write-ups stem from the fact that the district was not giving the child preferential seating. Her contention is that if the preferential seating was given the child in his classes, these write-ups would not have occurred. However, the fact that the child was written-up so many times does not, in and of itself, prove that the child's IEP was not being followed. If a child continues to display inappropriate behavior, even with all the Accommodations and Modification in place, then what is a teacher left to do? In this case, the ARD Committee had developed a Behavior Intervention Plan ("BIP") to deal with inappropriate conduct by the student. (See, Respondent's Exhibit #3, pp. 5-6; Respondent's Exhibit #7, pp. 6-7). Testimony was

presented by ***, the child's case manager, that the consequences outlined in the BIP plan were followed in sequence, beginning with the lowest consequence and then moving up to the highest consequence. (See, Trial transcript, pp. 166-168). All teachers who testified indicated they followed the BIP in all dealings with the child in their classroom. (See, Trial transcript, pp.175, 209-215, 230). These teachers also testified that they followed the Accommodations and Modifications as listed in the child's IEP. (See, Trial transcript, pp.178, 199-206, 235-237). No testimony was presented and no evidence was received that the teachers were not following the child's BIP, or the child's IEP. Thus, based upon the fact the child was written-up repeatedly, it cannot be demonstrated by a preponderance of the evidence that the district failed to follow the child's IEP.

The petitioner also argues that the child would never have been involved in the physical altercation with the other student if the Resource Math teacher, Mr. ***, would have had the child seated near the teacher as required by the child's IEP Accommodations and Modifications. (See, Respondent's Exhibit #3, p. 21; Respondent's Exhibit #7, p. 23). It is undisputed that the incident occurred at the back of Mr. ***'s classroom. (See, Trial transcript, pp. 247). The district responded by relying on Mr. ***'s testimony that the child's assigned seat was in close proximity to the teacher, but that the child got up without permission and simply walked to the back of the classroom to the computer area. (See, Trial transcript, pp. 244-245). Mr. *** testified that he was in the process of trying to get the child back to his proper seat when the altercation occurred. (See, Trial transcript p. 245). Whether or not this is true, *** drafted a statement which appears to be in response to this incident where she states: "Mr. ***, Ms. *** and I have reviewed Frankie's Behavior Intervention Plan, his Individual Education

Plans and the Positive Behavior Strategies and found that they are being followed in the classroom. The general education modification sheet does state that *** should be seated near the teacher, but his incident happened in a special education class where that modification is not specified". (See, Petitioner's Exhibit #2). The implication from this statement is wholly in line with the testimony of *** and ***; namely, that IEP Accommodations and Modifications do not apply outside of the general education setting, and they were not given to the Resource Math teacher. (See, Trial transcript, pp. 73, 261-262). Mr. *** admitted that he did not have a copy of the Accommodations and Modifications. (See, Trial transcript, p. 234).

Federal law mandates that a child falling under IDEA04 must have his education program individually tailored to the specific needs of that child. **20 U.S.C. §1414(d)**. The law saw fit to create IEP teams to review the data on a child and to develop an IEP based on that particular child's needs. What group would know better the child's needs than they? It is this lawfully organized group that developed this child's IEP, along with his particular Accommodations and Modifications. Yet, the district does not feel these IEP Accommodations and Modifications apply outside of the general education classroom setting. The district contends that the Resource classroom is a special education classroom which already accommodates children with disabilities. (See, Trial transcript, pp. 71-73, 234-235). It argues that imposing the IEP Accommodations and Modifications in this setting would be redundant since they are already done on a regular, normal basis. (See, Trial transcript, pp. 71-73, pp. 234-235). This argument is hardly convincing. If, for example, the child had a hearing disability whose IEP required the child be provided with preferential seating and a personal hearing aid, it would be

unreasonable to assume that these Accommodations and Modifications would not apply in a Resource classroom. It is also unbelievable that the normal and regular instruction in that classroom would already provide all students with preferential seating and personal hearing aids. Not every child can have preferential seating, by definition, since some children will be required to sit in the back of the classroom or in a location away from the teacher. To state that all students in a Resource classroom already are given preferential seating cannot be accurate, absent an extremely small class. The position that a Resource classroom teacher can and does regularly and generically satisfy all IDEA04 students' specific and individual needs is silly.

In this case, the Texas Education Agency found the allegation made by the parent that the child's IEP was not being followed was substantiated. (See, Petitioner's First Amended Complaint with TEA Special Education Complaint Investigative Report, p. 5). This hearing officer also finds that Commerce ISD failed to follow the IEP Accommodations and Modifications in the child's Resource Math classes during the *** grade and through this current *** grade school year. No such finding is made in regards to the child's general education classes, as all general education teachers testified they followed the child's IEP Accommodations and Modifications in their classes, and no evidence was presented to the contrary.

Federal law states that "a decision by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." **20 U.S.C. §1415(f)(3)(E)(i)**. "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies – (I) impeded the child's

right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." **20 U.S.C. §1415(f)(3)(E)(ii)**. In this case, Mr. *** testified that his Math classes only had 12 to 15 students (See, Trial transcript, p. 236) and that this child's regular seat was in close proximity to the teacher's desk. (See, Trial transcript, pp. 237-238). He further testified that he regularly followed all of the specific Accommodations and Modifications listed in the child's IEP as part of his normal and usual teaching in that classroom. The fact that he was not given a copy of the child's IEP Accommodations and Modifications, nor was he familiar with those specific accommodations amounts to a procedural violation. The question remains whether the failure (1) impeded the child's right to FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE for the child, or (3) caused a deprivation of educational benefits to the child. **20 U.S.C. §1415(f)(3)(E)(ii)**.

Child not deprived of FAPE

In order for a child to have received FAPE, the district must comply with the procedural requirements of IDEA04 and it must design and implement an IEP based on the specific needs of the child to enable the child to receive an educational benefit.

Hendrick Hudson Central School District v. Rowley, 458 U.S. 175 (1982). There has been no evidence presented in this hearing that the district did not comply with the procedural requirements of IDEA04, or that the district failed to design and implement an IEP developed specifically for the individual needs of the child. As will be shown below,

the child also received an educational benefit. In this case, the child was not deprived of FAPE.

Parents not impeded from meaningful participation in process

Regarding the parent's participation in the decision making process concerning the child, this hearing officer did hear any evidence that the parent was denied the ability and opportunity to meaningfully participate in the process. To the contrary, the evidence presented established that the parent was involved in the process. For example, the parent attended all the ARD Committee meetings which had been scheduled for the child, and signed on all documents, whether or not in agreement with the consensus of the ARD Committee. (See, Respondent's Exhibit #2, 3 and 7).

Procedural violations did not result in deprivation of education benefits to child

The child transferred into Commerce ISD in the Fall 2005, the beginning of his *** grade school year. The child had spent his *** grade school year in Garland ISD and had failed *** courses. (See, Respondent's Exhibit #15, p. 1). When the child enrolled in Commerce High School, the child was behind his classmates in academic credits needed to graduate. (See, Respondent's Exhibit #15, p. 4). After going through his *** grade year at Commerce High School, the child had passed all his courses and had caught up on the credits he had failed to attain in Garland ISD. (See, Respondent's Exhibit #15, p. 4). He was now caught up with his classmates in terms of academic credits needed to graduate.

Furthermore, the state assessment testing also demonstrated the child had progressed academically and had received an educational benefit while at Commerce High School. While at Garland ISD in the *** grade, the child scored a *** on his SDAA Math test. (See, Respondent's Exhibit #16, p. 11). In his *** grade year at Commerce High School, the child scored a *** on his SDAA Math test, thus showing a full year of increase in his math knowledge and skills. (See, Respondent's Exhibit #16, p. 13). Academic progress is clear and an educational benefit to the child was demonstrated.

Because the procedural violation referenced above did not deny the child FAPE, did not deprive the parent of the opportunity to be involved in the decision making process, and because it did not deprive the child of an education benefit, this hearing officer may not find, as a matter of law, that the child did not receive a free appropriate public education as outlined in IDEA04. The petitioner failed to meet her burden.

Petitioner's Issue No. 2 - The district denied the child FAPE and violated his rights by failing to follow the child's BIP.

The petitioner alleges the child was denied FAPE and had his rights violated by the district's failure to follow the child's BIP. This allegation is without merit based upon the evidence presented. Each teacher that testified indicated that they followed the child's BIP when that child was in their class. (See, Trial transcript, pp. pp.175, 209-215, 230). The petitioner offered no evidence to the contrary, other than her testimony that she believed the BIP was not being followed by all the child's teachers. (See, Trial transcript, pp. 32, 36-38). She relied upon the fact that the child was written-up so many times, in the hopes of demonstrating the BIP was not being followed. However, as

shown above, the fact that the child was written-up so many times does not prove the district failed to follow the child's BIP. The petitioner failed to meet her burden.

Petitioner's Issue No. 3 - The district gave the child grades he did not earn.

The petitioner alleges the district gave the child grades which he did not earn. Such an allegation, if true, would have serious consequences for the district. The petitioner's main reason for making such an allegation is the fact that the child's progress as shown in school cannot be duplicated or demonstrated while the petitioner is working with the child at home. (See, Trial transcript, pp. 49-50). There was no evidence presented to substantiate this allegation. To the contrary, a comparison of the child's grades and state assessment testing scores, seems to validate the child's grades. The petitioner failed to meet her burden.

Conclusions of Law

1. The child is a student eligible for special education and related services under the provisions of IDEA04, and its related statutes and regulations.
2. Commerce ISD is the local education agency responsible for the providing the child with the free appropriate public education pursuant to IDEA04, and is a legally constituted independent school district operating as a political subdivision of the State of Texas.
3. This hearing officer has jurisdiction over this matter.
4. The district failed to comply with the child's IEP Accommodations and Modifications in the child's Resource Math classes, since it was the district's position that IEP Accommodations and Modifications do not apply outside the

general education classroom setting.

5. The failure to provide the Resource Math teacher with the IEP Accommodations and Modifications was a procedural violation, since the teacher testified he regularly and routinely complies with the accommodations and modifications as his regular manner of teaching in his class.
6. The procedural violation did not result in a denial of FAPE to the child.
7. The petitioner failed to meet her burden of proof that the IEP was not being followed in the child's general education classes.
8. The petitioner failed to meet her burden of proof that the child's BIP was not being followed in the child's classes.
9. The petitioner failed to meet her burden of proof that the child's grades were being given to him by the district.

ORDER

Based upon a preponderance of the evidence and the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the relief requested by the petitioner is DENIED.

SIGNED this 28th day of February, 2007.

Tomas Ramirez III,
Special Education Hearing Officer

Cases Cited

Hendrick Hudson Central School District v. Rowley, 458 U.S. 175 (1982)

Statutes and Regulations Cited

20 U.S.C. §1400 et.seq.

*** b/n/f ***, PETITIONER	§	SPECIAL EDUCATION
	§	
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	§	
COMMERCE ISD, RESPONDENT	§	STATE OF TEXAS

SYNOPSIS

ISSUES: Whether district failed to provide the child with FAPE and violated his rights by failing to follow the child's IEP, BIP and by giving the child grades which he had not earned.

HELD: For Respondent.