DOCKET NO. 143-SE-0207

STUDENT *b/n/f*	§	BEFORE A SPECIAL EDUCATION
PARENT,	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
PORT ARTHUR INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I.
STATEMENT OF THE CASE

Petitioner, Student *b/n/f* Parent ("Student"), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1400 *et. seq.,* contending that Respondent, Port Arthur Independent School District ("PAISD"), denied Student a free, appropriate, public education ("FAPE"). In the initial filing, Student alleged multiple claims against PAISD. However, the parties settled all of their claims but for one, which concerns PAISD's removal of Student from Athletics (football) to a health class without the approval of his Admissions, Review, and Dismissal Committee ("ARD Committee") or his parent's written agreement. Student seeks a ruling by the Hearing Officer that his unilateral removal from Athletics (football) class and the team in January 2007 1) denied his mother her right to participate in the decision as a member of Student's ARD Committee; and 2) constituted procedural violations of federal and state statutes resulting in a denial of FAPE. Student requests that 1) PAISD reinstate him in the Athletics (football) class for school year 2007-2008; and 2) PAISD provide training to its athletic director, his coaching staff, and special education staff and diagnosticians regarding IDEIA compliance.

II.
PROCEDURAL HISTORY

On February 6, 2007, the Texas Education Agency ("TEA") received Student's Request for Due Process Hearing and assigned the case Docket No. 143-SE-0207. On February 8, 2007, the undersigned Hearing Officer issued the Initial Scheduling Order, setting forth all relevant deadlines pursuant to IDEIA. The undersigned scheduled the prehearing telephone conference for February 26, 2007, the Due Process Hearing for March 22, 2007, and reminded the parties of the April 22, 2007, Decision deadline.

On February 26, 2007, the parties convened for the prehearing telephone conference. In attendance were the following: 1) Ms. Yvonnilda Muniz, counsel for Student; 2) Ms. Melody Chappell, counsel for PAISD; 3) the court reporter, who made a

record of the telephone conference; and 4) the undersigned Hearing Officer. The parties re-scheduled the Due Process Hearing to April 4-5, 2007, with Disclosures due March 28, 2007, and the Decision deadline extended to May 6, 2007.

On March 8, 2007, PAISD informed the undersigned Hearing Officer that the parties had reached an agreement on all but one issue at the resolution session held on February 28, 2007. The parties requested a second telephone conference to re-schedule the hearing and accommodate briefing on the remaining issue.

The second prehearing telephone conference convened on March 28, 2007. In attendance were the following: 1) Ms. Muniz, counsel for Student; 2) Ms. Chappell, counsel for PAISD; 3) the court reporter, who made a record of the telephone conference; and 4) the undersigned Hearing Officer. During this telephone conference the parties discussed the remaining issue and agreed to re-schedule the Due Process Hearing to May 22, 2007, with Disclosures due May 15, 2007, and the Decision deadline extended to June 22, 2007. The parties also agreed upon a briefing schedule related to the remaining issue.

On April 13, 2007, PAISD filed its Motion to Dismiss the remaining issue in this case, alleging that its removal of Student from athletics to health without ARD consideration was not a violation of IDEIA because it was not a change in placement. On April 20, 2007, Student filed his response, arguing that because Student's IEP included Athletics (football), any removal from that course required ARD Committee authorization or prior parental agreement. On April 27, 2007, the undersigned issued an order denying PAISD's Motion to Dismiss.

The Due Process Hearing convened on May 22, 2007. Student introduced four (4) exhibits; PAISD introduced one (1). Student called ten (10) witnesses, who were cross-examined by PAISD. PAISD called no additional witnesses. Both sides rested and the hearing concluded on May 22, 2007. At the conclusion of the hearing, the parties and Hearing Officer agreed to a post-hearing schedule. The parties' closing arguments would be due June 22, 2007, and the Decision would be due June 27, 2007. Subsequently, the parties and Hearing Officer agreed to extend the Decision deadline to July 5, 2007.

III.
FINDINGS OF FACT

1. Student is a male who resides with his parents within the jurisdictional limits of PAISD. Student just completed his **of High School.

2. Student currently receives special education services from PAISD under the classifications of 1) Other Health Impairment ("OHI") due to severe Attention Deficit Hyperactivity Disorder ("ADHD") and 2) Emotional Disturbance ("ED").

3. PAISD is a political subdivision of the State of Texas and a duly incorporated independent school district.

4. Student started playing football in the ** grade. In his ** year, 2005-2006, Student was in regular education Physical Education (Athletics), not football.

5. On February 26, 2006, Student's ARD Committee held its annual meeting to review Student's educational program and progress and to develop his Individual Education Plan ("IEP") for the 2006-2007 school year, which included a Behavior Intervention Plan ("BIP") addressing compliant behaviors and compliance with school rules. Student's placement would be in both special education and regular education classes. Included in his IEP was placement in regular education Athletics (football) for the upcoming school year. Accommodations and modifications were agreed upon for use in Student's regular education classes.

6. Student's February 26, 2006, ARD Report noted that his placement in the delineated regular and special education classes was in the least restrictive environment and was based upon his needs.

7. Participation in the football program encompasses several responsibilities, such as 1) attending class during fourth (4th) period, 2) participating in required practices, 3) attending games when authorized by the coaching staff, and 4) generally demonstrating compliant behaviors and maintaining required grade point averages. Football players who comply with these requirements routinely receive a grade of "A."

8. During school year 2006-2007, Student manifested numerous behavioral problems associated with the football program. He was often late for practice or missed it completely; he left campus in his uniform without permission; he failed to demonstrate compliant behaviors with peers, coaches, and teachers. Because of his continued noncompliance, PAISD's athletic director removed him from the football team and instructed the counselor to remove him from fourth (4th) period Athletics (football).

9. On January 27, 2007, the ** grade counselor unilaterally moved Student from fourth (4th) period Athletics (football) to fourth (4th) period Health. Student learned of his removal from the football team and class when he received his schedule two (2) days later. Student's mother learned of his removal when he showed her his new schedule.

10. Neither the athletic director nor any coach or counselor requested an ARD Committee meeting to discuss Student's behavior problems in the football program and his removal from that program.

11. Neither the athletic director nor any coach or counselor contacted Student's parent to obtain written consent to remove him from the football program prior to such action.

12. Student's ARD Committee placed him in the football program as part of his educational program.

13. Student's removal from the football team and class is a decision to be made by his ARD Committee or by agreement with his parent.

14. Student's unilateral removal from the football team and class was a change in placement.

15. Student's removal from the football team and class without ARD Committee approval or by agreement with his parent denied his parent the right to participate in a decision effecting a change in placement.

16. The evidence established that PAISD personnel are in need of training in federal and state procedures related to the provision of special education services.

IV.
DISCUSSION

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits."

The student's Individualized Education Program ("IEP") is designed by his or her ARD Committee. It must include a variety of written statements regarding the student's current levels of academic achievement and functional performance levels, measurable annual goals, progress toward meeting those goals, supplementary aids and services, program modifications and supports, the extent of the student's participation with nondisabled children, alternative state assessments, and dates of delivery of services. 34 C.F.R. 300.320. Additionally, the IEP must address the student's inclusion in extracurricular and other nonacademic activities. 34 C.F.R. 300.320(a)(4)(ii). Once the ARD Committee develops an IEP pursuant to Section 300.320, the school district must provide the services set forth on the IEP.

Any change to the student's IEP may be effected by 1) a convened ARD Committee or 2) written agreement between the parent and the school district. 34 C.F.R. 300.324(a)(6). Either mechanism requires prior notice to the parents that the school

district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child. 34 C.F.R. 300.503.

In the instant case, the sole issue relates to the unilateral removal of Student from the football class and team, and placement in a health class, without either ARD Committee approval or prior written agreement with the parent. Student contends that such action constitutes a change of placement that was done in violation of the procedural rights afforded by IDEIA. PAISD contends that the ARD Committee did not place Student on the football team or in the football class. Rather, Student made the team on his own and his placement in the fourth (4th) period Athletics (football) class was merely a ministerial action and not a determination by the ARD Committee that this extracurricular activity was a part of his educational program. In other words, the ARD Committee simply "rubber-stamped" the athletic department's acceptance of Student on the team. As such, changing Student from fourth (4th) period Athletics (football) to fourth (4th) period health was merely a change in schedule, not a "change in placement."

A. Was Student's Placement In Athletics (Football) A Part Of His Educational Program?

If an extracurricular activity is included in a student's IEP, it must be considered a part of the student's present educational placement. *Letter to Fisher,* 21 IDELR 992 (OSEP 1994). If modifications are needed for the student to participate in the extracurricular activity, those modifications will be included in the student's IEP. If participation in the extracurricular activity is necessary to meet the least restrictive environment requirements, the activity will be included in the IEP as part of the extent to which the child will participate in regular education. *Id*.

In this case, Student's 2006-2007 IEP clearly shows his placement in the regular education Athletics (football) class. Student's ARD Committee modified this placement in accordance with the other regular education modifications in place: short-answer tests; modified tests/texts; note-taking assistance; extended time; preferential seating; cooling-off period; positive reinforcers; checking for understanding; content mastery monitor; and no failure due to mid term or final exam. This extracurricular activity was included in the "Determination Of Services To Be Provided" section of the Report, affirming that "[j]ustification indicates that the identified placement is in the least restrictive environment and is based on the needs of the student." The Report's Deliberation page states that "[c]lasses, modifications and IEP for 2006-2007 were agreed upon."

In adopting the athletic department's "invitation" to participate in the football program, Student's ARD Committee made the determination that Student would benefit from inclusion in the football program and that such placement was part of his educational program. The ARD Committee went the extra step to assign modifications and accommodations to the football program. It likewise included the placement in the regular education setting, finding that such placement was in the least restrictive environment. All

in all, the ARD Committee clearly made Student's Athletics (football) an extracurricular component of his educational program.

B. Was Student's Unilateral Removal From Football And Placement In A Health Class A "Change In Placement"?

Determining whether a change to the IEP constitutes a "change in placement" is done on a case-by-case basis. In making this determination, one must analyze whether the proposed change would substantially or materially alter the student's educational program. This analysis involves examination of several factors: whether the student's educational program has been revised; whether the student will be educated with nondisabled students to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the student's new placement is the same on the continuum of alternative placements. If this inquiry leads to the conclusion that a substantial or material change in the child's educational program has occurred, the school district must provide prior written notice that meets the content requirements of 34 C.F.R. 300.503. *Letter to Heldman*, 20 IDELR 621 (OSEP 1993).

In the instant case, Student's unilateral removal from football and placement in health was a substantial and material change to his educational program. Student lost the opportunity to participate in football class and team activities, such as practice, association with other team members, traveling to, and participating in, football games. The evidence established that although Student did not comply with all attendant rules and requirements for the football program, he loved the sport and membership on the team helped motivate him to perform academically. As an integral part of his educational program, multiple factors should have been considered carefully before such an important aspect of his daily education was removed and replaced with a class that bears no resemblance to the football program. Clearly, the removal constituted a change in Student's educational placement.

Under the applicable federal statues and regulations, the ARD Committee is charged with the responsibility of determining the need for a disabled student's participation in extracurricular activities. In this regard, Student's ARD Committee must make the determination of whether Student's continued participation in the football program is an appropriate component of his educational program. The ARD Committee should not simply "rubberstamp" the athletic director's *sua sponte* decision to kick Student off the team and out of the class. The ARD Committee must review the appropriate modifications, accommodations, and behavioral interventions available for helping Student to be successful in the football program before taking such a critical step. After such examination, and if it is determined that Student does not benefit from his involvement in the football program, then his ARD Committee can make the appropriate changes to his IEP.

V.
CONCLUSIONS OF LAW

1. Student is eligible for special education services based upon his classifications of OHI and ED, as mandated under the provisions of IDEA and its implementing regulations. 20 U.S.C. §1400 *et seq*.

2. Student's unilateral removal from football and placement in health on January 27, 2007, without ARD Committee approval or written parental agreement, was a change in placement, which constitutes a procedural violation of IDEIA. 34 C.F.R. 300.324(a)(6).

3. The change in placement on January 27, 2007, required prior written notification to Student's mother. The failure to provide such notice is a procedural violation of IDEIA. 34 C.F.R. 300.503.

4. The change in placement on January 27, 2007, without parental consent or ARD Committee approval denied Student's parent from meaningful participation in making educational decisions for Student. 34 C.F.R. 300.327.

VI.
ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is GRANTED IN PART. Within ten (10) school days, or on a date agreed upon by the parties, Student's ARD Committee shall convene to thoroughly analyze Student's continued participation in Athletics (football) for the 2007-2008 school year. Such analysis shall consist of reviewing the appropriateness of Student's modifications and accommodations in the regular education football class and during team practice and other activities; his BIP and its implementation and viability in the football program; and any other factors that could make participation in the football program for school year 2007-2008 educationally beneficial to Student. The decision to preclude Student's participation in the football program for school year 2007-2008 shall be made only if the ARD Committee determines that this extracurricular activity is not educationally beneficial to student and is not based simply upon requests from the athletic director or coaches to remove Student from football. It is further

ORDERED that within ten (10) school days, PAISD shall implement a training program for its athletic director, his coaching staff, the special education department, and any other teacher or aide working with Student, regarding basic procedural and substantive rights under IDEIA, particularly as these rights apply to extracurricular activities. It is further

ORDERED that PAISD shall timely implement this Decision within ten (10) school days. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency, and copied to Student within fifteen (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 ten (10) school days, PAISD's plan for implementing the Decision within the prescribed timeline and a signed assurance from the superintendent that the Decision will be implemented. It is further

ORDERED that all other relief not granted is hereby DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately. This Decision is final and is appealable to state or federal district court.

SIGNED this 5th day of July 2007.

Deborah Heaton McElvaney
Special Education Hearing Officer

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SYNOPSIS

ISSUE: *Whether Student's unilateral removal from the football program and placement in a health course was a change in placement requiring ARD Committee approval or written agreement between Student's parent and PAISD*

C.F.R. CITATION: 34 C.F.R. 300.324(a)(6).

HELD: For Student. Once the ARD Committee makes a determination that extracurricular activities are part of a disabled student's IEP, any removal of Student from that activity constitutes a change in placement and may be effected only with ARD Committee approval or written agreement between the Student's parent and the school district.

ISSUE: *Whether Student's unilateral removal from the football program and placement in a health course violated the parent's procedural rights to prior written notice of such change in placement.*

C.F.R. CITATION: 34 C.F.R. 300.503

HELD: For Student. The Student's change in placement required prior written notice to Student's parent.

ISSUE: *Whether Student's unilateral removal from the football program and placement in a health course without prior written notice to the parent prevented the parent from meaningful participation in a decision affecting the Student's educational program.*

C.F.R. CITATION: 34 C.F.R. 300.327

HELD: For Student. The unilateral removal of Student from football to health prevented Student's mother from any participation in that decision.

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