

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

Student, bnf

**Parent,
Petitioner,**

v.

**NORTHSIDE INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

§
§
§
§
§
§
§
§

DOCKET NO. 071-SE-1003

DECISION OF THE HEARING OFFICER

Procedural History

Petitioner Student bnf Parent (“Student” or “Petitioner”) brings this action against the Respondent Northside Independent School District (“the school district”, “NISD”, or “Respondent”) under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 et. seq as amended, and its implementing state and federal regulations.

Petitioner has been represented in this case by his legal counsel, Christopher L. Jonas, The Center for Special Education Law. Respondent has been represented in this case by its legal counsel, Craig Wood of Langley & Banack.

The request for hearing was filed on October 29, 2003. The prehearing conference could not be conducted until December 3, 2003 due to scheduling conflicts for Petitioner’s counsel. A continuance of the initial hearing date was granted to allow the parties an opportunity to exchange documents to facilitate an agreed upon communications assessment and the provision of homebound services. The parties also agreed to attempt an informal settlement.

Unfortunately, the parties were unable to reach a settlement and the due process hearing was conducted on February 9, 2004. Both parties were represented by their legal counsel. Mr. Jonas’ personal assistant, Manual Sanchez, appeared at the hearing as well as Student’s mother, Parent and his godmother, ***. Dr. ***, appeared at the hearing as the party representative for NISD. The parties agreed to submit written closing arguments and to extend the deadline for the Decision of the Hearing Officer until March 11, 2004.

Issues

The issues in this case are:

1. Whether the school district should have conducted a communications assessment (specifically, an assessment for sign language) for Student during the 2002-2003 school year and if not, whether that constitutes a violation of the Individuals with Disabilities Education Act (“IDEA”);
2. Whether the school district provided Student with an appropriate speech program in order to receive a free, appropriate public education (“FAPE”) within the meaning of IDEA; specifically, whether the speech program should have included an alternative means of communication beginning in the 2002-2003 school year; and,
3. Whether the school district should have provided Student with homebound services beginning in the fall semester of the 2003-2004 school year in order to receive FAPE within the meaning of IDEA.

Requested Relief

Petitioner requests the following items of relief:

1. One year of additional sign language instruction as compensatory relief for the failure to conduct a sign language assessment in a timely manner and for the failure to provide sign language or an alternative means of communication as a component of Student’s speech program; and,
2. One semester’s worth of additional homebound services as compensatory relief for the failure to provide homebound services during the fall semester of the 2003-2004 school year.

Findings of Fact

1. Student is *** years old and has received special education services from NISD since his initial enrollment at age three. Student is eligible for special education as a student with mental retardation (“MR”), other health impairment (“OHI”), and, speech impairment (“SI”). There is no dispute about Student’s eligibility for special education services except to the extent that there is a dispute over whether Student was properly enrolled for the current school year (2003-2004).
2. Student has been diagnosed with Down’s syndrome, a form of mental retardation. In addition, he suffers from a number of chronic medical conditions including: chronic diarrhea, rickets, incontinence, morbid obesity, vision impairment, lower back problems, obstructive sleep apnea, chronic parotitis with bilateral sialolithiasis, and, chronic otitis media with perforated ear drum. He also contends with a skin condition that results in boil-like lesions on various parts of his body.
3. Student attends the Applied Learning Environment (“ALE”) class at *** School when he is able. However, Student has rarely attended school in the past two years due to his

chronic illnesses. He can only tolerate school for a 2-3 hour period when he does attend. Last year Student attended school for four afternoons in August, seven afternoons in September, two afternoons in November and two afternoons in April. He did not attend school at any other time during the 2002-2003 school year. This year, Student only attended school for two afternoons in August. He has not returned to *** School since then.

4. Student is largely non-verbal. His primary method of communication is through sign language and some verbalization with family members and his homebound teacher. Student currently uses about 40 sign language symbols to communicate. NISD has provided Student with instruction in sign language as well as other communication methods. At a February 2003 Admission, Review & Dismissal Committee (“ARD”) meeting the parties agreed that Student needed 750 minutes of speech and language services per year provided in the home setting. A speech/language Individual Education Plan (“IEP”) was revised with goals and objectives that addressed Student’s communications needs. The IEP was to be in effect for one year – from February 2003 through February 2004. Student’s mother disagreed with the speech/language goals.
5. NISD began to teach Student the Picture Exchange Communication System (“PECS”). However, Student’s mother isn’t supportive of the PECS because she has not observed Student using it. Last spring, Student’s mother requested a communications assessment to determine whether the exclusive use of sign language would be appropriate for Student. NISD recommends the use of a total communication approach with Student including sign language, PECS and continued oral verbalization.
6. Student’s mother thought that the communications assessment would be conducted over the summer. Student’s mother did not submit her written consent for the communications assessment until January 2004 after prodding from her counsel in order to comply with a deadline imposed by the hearing officer in this litigation. A communications assessment was scheduled by agreement for February 16, 2004.
7. The February 2003 ARD also approved 75 minutes per year of Assistive Technology (“AT”) support. NISD previously provided Student with a small, assistive technology communications device but his mother didn’t really understand it or know how to use it with Student. Student doesn’t really use the device to communicate but only as a plaything.
8. Last year, Student received 4.5 hours of homebound educational services per week due to his complicated and chronic medical conditions. Student also received extended school year services (“ESY”) at home during the summer of 2003. The provision of homebound services is not automatic upon parental request. Instead, NISD needs to verify and confirm the need for homebound services from the student’s treating physician. The need for homebound services is reviewed at least annually (depending upon the student’s medical needs and the physician’s opinion) because so much can change with a particular student’s medical condition.

9. In the past, Student's need for homebound services has been reviewed at an ARD meeting usually held at the beginning of each year. It has been the past practice for Student's mother to bring a completed homebound services form (signed by Student's physician) to the ARD meeting where it is reviewed and the homebound service approved for the year.
10. There has been a history of difficulty and some resistance securing updated medical information from Student's mother. For example, last year Student's mother would only grant limited consent for NISD to confer with Student's physician about Student's medical needs and his ability to attend school. She insisted that communications with the physician occur by speakerphone during an ARD meeting. She refused consent for NISD to confer directly with the physician without her involvement.
11. There has also been some discussion and disagreement in the past over Student's need for homebound services. Last year, Student's mother was charged with failure to comply with state compulsory attendance laws. The charges were ultimately dismissed when Student's physician appeared at the hearing. However, there continues to be friction between the parties about Student's continued need for homebound services. Student loves school when he does attend. He seems to enjoy being there and participating in class activities. He seems happy at school despite some mobility and physical challenges.
12. This year, the school district spoke with Student's mother about setting up the homebound services ARD when she brought Student to school on August 21, 2003. The classroom teacher gave Student's mother a packet of information including a new enrollment form, a form to update Student's shot records, and, an emergency form. Student's mother promised she would call back with a date for the ARD. At the same time, NISD mailed Student's mother a homebound services form and a consent form for the communications assessment.
13. By late August, Dr. *** became aware that Student had not attended school after August 21st. He instructed his staff to contact Student's mother and secure the necessary medical information to update the need for homebound services. Student's mother was called four times in September 2003 and the parties discussed dates for the homebound services ARD. Finally, an ARD was set for October 20, 2003. The proper notices were sent and received.
14. However, Student's mother cancelled the ARD at the last minute because her attorney was not available. She told NISD that the lawyers would need to schedule the ARD and then let the school and the parent know the date selected. This never happened. Homebound services have not been provided to Student this year because NISD did not receive the necessary paperwork, including updated medical and enrollment information, updated shot records and other essential information.
15. Student's mother had a completed and signed homebound services form from one of Student's physicians as early as August 2003 and a second form completed and signed by another physician in October. However, she made no attempt to transmit either or both of these forms to NISD. Instead, she relied on the past practice of submitting the form at an

ARD meeting. NISD finally received one of the completed homebound services forms on January 8, 2004 in compliance with a deadline established by the hearing officer in this litigation.

Discussion

Communications Assessment and IEP

Petitioner failed to meet his burden of proof that NISD should have conducted a communications assessment or provide Student with sign language instruction during the 2002-2003 school year. *Tatro v. Texas*, 703 F. 2d 823 (5th Cir. 1983)(*Tatro II*), *aff'd on other grounds sub nom Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ.*, 790 F. 2d 1153 (5th Cir. 1986); *Christopher M. v. Corpus Christi Ind. Sch. Dist.*, 933 F. 2d 1285 (5th Cir. 1991).

Methodology Dispute is the Hidden Issue

The evidence showed that there was a speech/language IEP in place for Student for the 2002-2003 school year that addressed his communications needs. The real dispute here is one of methodology – Student’s mother disagreed with the total communication approach recommended and implemented by NISD. Student’s mother did not support the use of the assistive technology device, the use of the PECS, or continued efforts at encouraging verbalization. Her resistance to those methods, coupled with Student’s prolonged absences from school, contributed to his lack of mastery in using the device, the PECS, and further development of oral language. Although the IDEA encourages and indeed mandates parental participation in educational planning for their children, it does not provide parents with “veto” power - including the choice of educational methodology. *Lachman v. Illinois State Bd. of Educ.*, 852 F. 2d 290, 297 (7th Cir. 1988).

Parental Failure to Provide Consent for Assessment

Furthermore, the evidence also showed that a communications assessment could not be conducted until Student’s mother executed and returned the necessary consent form to the school district. NISD did not receive the signed consent until January 2004. This only occurred because Petitioner’s counsel prodded Student’s mother to comply with the deadline to do so imposed by order of the hearing officer as part of this litigation. The assessment has presumably since been completed. Therefore, any relief that could have been awarded for failure to conduct the assessment in a timely manner has already been provided. Therefore, this issue is moot under the circumstances. *See, Bingham v. Oregon Sch. Activities Assoc.*, 35 IDELR 216 (9th Cir. 2001) (*request for injunctive relief moot where school association complied with parent’s requests*); *Bd. of Educ. Harrison Cent. Sch. Dist.*, 25 IDELR 363 (SEA NY 1996); *Highland Park Ind. Sch. Dist.*, 22 IDELR 389 (SEA TX 1994).

Need for Updated Assistive Technology Assessment

The evidence also showed that Student does not appear to be using the Assistive Technology device provided by NISD. Thus, there is a need for an updated assessment as to whether Student and his mother would benefit from additional training and monitoring on the use of the device. Student may also need a different device or an additional form of AT depending upon the communication needs identified in the new communication assessment. **34 C.F.R. §300.308**

Homebound Services for 2003-2004 School Year

The issue of whether the school district should have provided Student with homebound services for the current school year is more problematic. There is evidence that both parties failed to initiate the actions that would have easily addressed this issue. The credible evidence showed that NISD provided Student's mother with the necessary homebound services forms and made genuine attempts to schedule an ARD meeting to discuss and confirm the need for the service. However neither party followed up when the lawyers failed to communicate effectively and schedule the ARD.

The credible evidence also showed that NISD knew Student's medical history and condition as recently as the summer of 2003. NISD knew or should have known that Student was likely to require homebound services again when he only attended school for two days in August. NISD could have convened an ARD for the purpose of continuing homebound services pending the receipt of the updated medical information (even if Student's mother and attorney chose not to attend and so long as the proper efforts to ensure parental participation were made). **34 C.F.R. §300.345(d)**

The homebound teacher could have easily requested the form from Student's mother during an initial visit and a completed homebound services form was in fact available as early as August 2003. However, NISD would have been entitled to withdraw the service if Student's mother failed to provide the school district with the updated medical information.

Likewise, Student's mother made virtually no attempts to transmit the homebound services form to NISD (as the form clearly directs the parent to do). Instead, she waited for NISD to act. She could have simply faxed or mailed the completed form as early as August 2003. Doing so would have placed the responsibility squarely on NISD for convening the ARD and then implementing the service, whether Student's mother or her lawyer chose to attend the ARD or not.

The credible evidence also showed that there was a growing disagreement between the parties about Student's continued need for homebound services as well as a methodological dispute over his communication needs. These issues contributed to the lack of cooperation between the parties. While NISD could have and should have convened an ARD to at least tentatively begin providing homebound services, Student's mother could have and should have made greater efforts to update Student's medical information and communicate with NISD instead of waiting passively for NISD to act. IDEA places great emphasis on the procedures by which both parents and school districts are to work together to reach solutions to this type of problem. The burden of compliance with these procedures falls equally on parents as well as school districts. **Garland Ind. Sch. Dist. v. Docket No. 071-SE-1003**

Decision of the Hearing Officer

Wilks, 657 F. Supp. 1163, 1167 (N.D. Tex. 1987)

Conclusions of Law

1. Petitioner failed to meet his burden of proving that the school district should have conducted a communications assessment during the 2002-2003 school year or that his speech and language program did not meet the requirements of the Individuals with Disabilities Education Act (“IDEA”). *Tatro v. State of Texas*, 703 F. 2d 823 (5th Cir. 1983) *aff’d on other grounds sub nom Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ.*, 790 F. 2d 1153 (5th Cir. 1986); *Christopher M. v. Corpus Christi Ind. Sch. Dist.*, 933 F. 2d 1285 (5th Cir. 1991).
2. Petitioner’s request for compensatory sign language instruction is not appropriate since the delay in scheduling the communications assessment was due to parental failure to submit the necessary written consent in a timely manner. Furthermore, the need for a communications assessment grew out of a methodological dispute between the parent and the school district. Parental preferences do not govern methodological choices that are the sole responsibility of the school district. *Lachman v. Illinois State Bd. of Educ.*, 852 F. 2d 290, 297 (7th Cir. 1988).
3. Respondent should have provided Petitioner with homebound services for the current 2003-2004 school year in order to receive a free, appropriate public education within the meaning of IDEA. 34 C.F.R. §§300.13, 300.345(d); 300.501.
4. Petitioner is not entitled to compensatory services for the delay in providing homebound services since Petitioner failed to provide the school district with the necessary updated medical information to which it was entitled and failed to make a genuine effort to communicate with the school district about the need for those services. *Garland Ind. Sch. Dist. v. Wilks*, 657 F. Supp. 1163, 1167 (N.D. Tex. 1987)

ORDERS

Based upon the foregoing findings of fact and conclusions of law I hereby **ORDER** the following:

1. The parties shall convene an Admission, Review & Dismissal Committee (“ARD”) meeting no later than ten (10) school days from the date of this Decision, with or without the participation of legal counsel, for the purpose of confirming Student’s need for continued homebound services in the amount of four hours per week through the remainder of the current school year. The school district shall ensure that homebound services are scheduled and initiated no later than ten (10) school days following the date of the ARD meeting ordered herein;
2. The ARD Committee shall also review and discuss the results of the communications assessment conducted on February 14, 2004 and revise and update Student’s speech/language IEP to include any and all recommendations contained in that assessment as well as any revisions needed to update any of Student’s other IEP’s;

Docket No. 071-SE-1003

Decision of the Hearing Officer

Page 7 of 10

3. The school district shall arrange for a home visit no later than ten (10) school days from the date of this Decision for the purpose of updating Student's assistive technology ("AT") needs, (including the need for additional training for both Student and his mother on the use of his current AT device), and, to determine whether Student would benefit from additional forms of AT. The AT assessment shall consider the needs and recommendations identified in the new communications assessment; and,
4. The school district shall ensure that additional training and monitoring sessions as determined by the updated AT assessment are scheduled through the remainder of the current school year. The AT assessment and training/monitoring schedule shall be attached to Student's IEP as an Addendum once it has been completed by the AT staff responsible for the provision of AT services.

All other relief not specified herein is **DENIED**.

The district shall timely implement this decision within ten (10) school days as required in 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner 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 the 25th day of February, 2004.

/s/Ann V. Lockwood

Ann Vevier Lockwood

Special Education Hearing Officer

Notice to the Parties

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185 (p); Tex. Gov't Code, §2001.144(a)(b)

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT., bnf
PARENT,
Petitioner,**

§
§
§
§
§
§
§

v.

DOCKET NO. 071-SE-1003

**NORTHSIDE INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

SYNOPSIS

Issue: Whether school district should have conducted a communications assessment (for sign language) of *** year old non-verbal student with Down’s syndrome (“MR”), speech impairment (“SI”) and, chronic medical and health issues (“OHI”) in the previous school year.

Held: **For the school district.** Petitioner failed to meet his burden of proof on this issue and delay in conducting assessment was due to parental failure to provide school district with written consent. Need for sign language assessment arose from methodological dispute where parent preferred sign language and school district advocated use of total communication approach for student.

Citation: **34 C.F.R. §300.505**

Issue: Whether school district should have provided sign language as alternative means of communication for *** year old non-verbal student with Down’s syndrome, speech impairment, and, chronic medical and health issues in previous school year.

Held: **For the school district.** Petitioner failed to meet his burden of proof on this issue. School utilized total communication over parent’s preference for exclusive use of sign language. Law does not allow parental preference to govern methodological choices that are left to school district.

Citation: **34 C.F.R. §300.13**

Issue: Whether school district should have provided *** year old non-verbal student with Down’s Syndrome, speech impairment, and, chronic medical and health issues with homebound services for the current school year where school district provided those services to student in the past and as recently as the summer before the current school year began.

Held: **For the student in part and the school district in part.** Communication breakdown in convening ARD meeting for purpose of reviewing student's continued need for homebound services was mutual fault of both parties. School district knew or should have known that student would continue to need homebound services based on its knowledge of student's medical history and condition as recently as summer prior to beginning of current school year.

School district could have convened ARD without parent's participation (so long as proper efforts made to ensure parental participation) for purpose of tentatively providing homebound service pending receipt of updated medical information from parent. School district could have withdrawn the service if parent continued to fail to provide the information.

Parent failed to provide school district with necessary updated medical information from student's physician that would have confirmed student's continued need for homebound services. Parent waited to present the information at ARD meeting that never took place. Parent had other avenues she could have used to transmit the information to the school district but simply chose not to and waited passively for school district to act.

Citation: **34 C.F.R. §§300.345(d); 300.501(c)(4)**