
DOCKET NO. 116-SE-1203

Student	§	BEFORE A SPECIAL EDUCATION
B/N/F Parent	§	
	§	
VS.	§	HEARING OFFICER
	§	
EL PASO INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

AMENDED DECISION OF THE HEARING OFFICER

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Procedural History

The above-captioned Request for Impartial Due Process Hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (“IDEA”), was received by Texas Education Agency on December 4, 2003, assigned to Impartial Hearing Officer Janis Herd, and set for hearing on January 6, 2004, with a decision deadline of January 19, 2004. A telephone pre-hearing conference of record took place on December 4, 2003. The hearing was rescheduled for January 8, 2004. The case was re-assigned to the undersigned Impartial Hearing Officer on December 30, 2003, and Pre-hearing Orders were entered on December 31, 2003. Petitioner was represented by Mark Berry, Attorney at Law; Respondent was represented by Rose George, Attorney at Law. The hearing convened as scheduled and all evidence was received on January 8, 2004, and the record closed subject to the parties filing written closing argument. The decision deadline was extended to January 30, 2004, to accommodate the filing of written argument. The parties filed their closing arguments, and the record was closed on January 22, 2004.

Petitioner's Complaint and Relief Request

The issues in this matter were stated in Petitioner’s hearing request, clarified in the Pre-hearing Conference and set out in the Pre-hearing Orders. Petitioner alleges the following IDEA violations alleged against Respondent El Paso I.S.D (“EPISD” or “the District”).

1. Failure to provide notice to the parent, Parent, as required by 34 C.F.R. §300.503, when EPISD refused the parent’s request for a special education eligibility evaluation for Student.
2. Failure to provide notice to the parent, Parent, as required by 34 C.F.R. §300.504, when the parent requested special education eligibility evaluation of Student.
3. Failure to involve the parent, Parent, in EPISD’s determination of needed evaluation data as required by 34 C.F.R. §300.533, 34 C.F.R. §300.344, and 19 T.A.C. §89.1045.

4. Failure to make a non-eligibility determination regarding Student that complied with procedural requirements of 34 C.F.R. §300.534 and 19 T.A.C. §89.1050.
5. Failure to provide a timely evaluation of Student, a child suspected of having a disability, as required by 34 C.F.R. §§300.124 and 300.320.

As relief for the aforementioned violations, if proven, Petitioner requests the following orders from the Hearing Officer:

1. An order requiring EPISD to provide a full and individual evaluation of Student.
2. An order requiring EPISD to include Parent as a member of all committees that determine evaluation or eligibility for Student.
3. An order requiring EPISD to provide proper written notice to Parent including notice of procedural safeguards when it proposes or refuses to initiate or change the identification, evaluation, or educational placement of Student.

FINDINGS OF FACT

1. Student resides within EPISD. Student's parent and Next Friend in this matter is Parent (Stipulation).
2. EPISD at all times relevant to this proceeding has known of Parent's belief, and has maintained certain records tending to establish, that Student has respiratory problems. P-5; Tr. 66-67, 72-73, 205-206.
3. Student lives within the attendance area of *** School ("***"). Student received permission to transfer to *** School ("***") for the 2003-04 school year. The transfer was approved after Parent expressed concern about what she believed to be air quality problems at *** that could affect Student, though EPISD granted the transfer request for a variety of reasons. The transfer was revoked in October 2003, and the revocation upheld on appeal on 11/11/03. The transfer revocation resulted from a disagreement between *** campus officials and the parent, that was not related to any special education issue. P-6; Tr. 80-83, 99.
4. After 11/11/03, Student's home campus was ***. Parent has not presented Student for enrollment at ***, nor has Student attended school at ***, following the 11/11/03 denial of Parent's appeal of the transfer revocation. Tr. 156-158.
5. Parent wrote a letter to the principal at ***, dated 11/16/03 and marked received on 11/17/03, referring Student for special education. The letter also stated that Student suffered from Chronic Rhinitis Sinusitis, and represented that Student had been transferred from *** because of air quality problems at that school, on account of her disability. Parent requested that Student be returned to *** pending the referral. P-1; R-1.
6. EPISD sent Parent a letter dated 11/18/03. The letter advised Parent that in order to refer Student to special education "it will be necessary to follow the pre-referral procedures at ***." Accompanying this letter were a copy of "standard handout ... to begin this process" including the student-teacher assistance team ("STAT") referral packet "containing information regarding our special education program." The letter directed Parent to work with the *** on the referral. P-1
7. EPISD's 11/18/03 correspondence also included a copy of one page of IDEA federal regulations with a portion of the regulation governing initial evaluations, as well as a copy of the compulsory attendance policy and a copy of a memorandum concerning air quality at *** and at ***. R-2
8. The STAT, according to documents transmitted to Parent, is a school-based pre-referral committee that reviews student information and explores strategies to meet the student's needs. The STAT handout states that a "referral for evaluation for consideration of special education should be a last resort." R-2.

9. The STAT process expressly addresses teacher referrals, and by its terms is initiated by a teacher referral. The STAT team considers a variety of information about the student, and makes a decision regarding the necessary intervention, which may or may not include referral for special education evaluation, that being the last resort. The STAT team considers a variety of accommodations to help the student, short of referral for IDEA special education, such as tutoring, Title I services, Section 504 accommodations, and the like. The referring teacher is always a member of the STAT team, which also includes other required or optional participants. The parent is not a member of the STAT team. However, a STAT team member must contact the parent to explain the reason for the referral and the nature of the STAT process. R-2; Tr. 139.
10. EPISD's policy at the time Parent referred Student to special education directed that, for students like Student, the STAT process was a required pre-referral process that had to be followed before the student could receive an evaluation from special education, but could be waived in case of a written request for referral from a parent. Tr. 36-37, 88, 139-140.
11. EPISD's policy at the time Parent referred Student to special education directed that, in the case of parent referrals to special education, the child's campus would obtain parent consent for evaluation and give the parent notice of procedural safeguards on the same day the referral was made, thus marking the beginning the referral timeline. P-4; Tr. 45-46.
12. EPISD through counsel sent Parent a letter dated 12/17/03 stating EPISD's position that it had not denied Parent referral of Student to special education, and enclosed with the letter a copy of the IDEA procedural safeguards. The letter explained that it is customary for the parent to meet with a diagnostician or school psychologist to review certain information in connection with a referral. R-3.
13. EPISD did not send Parent a consent form for special education evaluation. Parent has not given consent for special education eligibility evaluation. Tr. 48-50.
14. EPISD did not send Parent a notice that it was denying her request for special education referral. Tr. 146.
15. EPISD begins the special education referral process by going over the parent's rights with the parent and making sure they understand them, and obtaining informed consent for evaluation. Ordinarily this takes place at the student's campus but there is no policy requiring this. Using the STAT process following a parent-initiated referral is an option, but it is not required if the parent prefers to proceed directly with a special education testing. P-4; Tr. 115-116, 133-134, 185-190.
16. Parent did not receive or initiate communication with any EPISD officials after 11/18/03. She believed the District's 11/18/03 letter was a refusal of her request for referral. Tr. 123, 206-208.
17. Parent had previously requested special education referral from EPISD, and the district on that earlier occasion commenced the evaluation process right away without first requiring the student to go through the STAT process. Tr. 144-145.

DISCUSSION

In general, IDEA entitles every student with a disability to receive free, appropriate public education ("FAPE") in the least restrictive environment according to appropriate procedural safeguards. Board of Education v. Rowley, 458 U.S. 176 (1982). This case concerns the District's compliance with procedural safeguards. A parent who challenges the district's actions has the burden to prove by a preponderance of evidence that the IDEA procedures were not followed. Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983), and hearing officers strictly scrutinize IEPs for procedural defects that caused a loss of educational opportunity for the student, or that infringed the parents' opportunity to participate in the IEP process. Adam J. v. Keller I.S.D., 328 F.3d 804, 39 IDELR 1, 103 LRP 18199, (5th Cir. 2003); Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990). My discussion follows the outline of Petitioner's specific allegations.

I. Failure to provide notice to the parent as required by 34 C.F.R. §300.503

The section upon which Petitioner relies requires that the District provide written notice to the parent when the district refuses to initiate, inter alia, the identification or evaluation of the child. Petitioner alleges that EPISD refused Parent's request for a special education eligibility evaluation for Student, and that refusal triggered the requirement for the district to provide a §300.503 notice that undisputedly was not given to Parent I have difficulty with Petitioner's argument for applying these regulations to the facts.

Petitioner's thorough cross-examination of the District's witnesses failed to elicit any statement that the District is or was refusing to refer and evaluate Student for special education. That said, there is little doubt but that EPISD's written response to Parent's request letter was in fact confusing to Parent, partly by virtue of the attachment of STAT referral procedures along with a single page taken from extensive IDEA regulations. Parent testified that she believed the communication from EPISD was a refusal of her request for referral. It is understandable from her perspective why she thought that. For example, the letter states that Parent has to complete the pre-referral process, and makes reference to the attached STAT documents as the standard handout to begin that process. However, on their face, the STAT forms appear to be designed mainly for teacher-initiated referrals, and do not contemplate a necessary parent role in the STAT process as would be the case for an IDEA referral and subsequent eligibility evaluation.

At the same time, Petitioner's examination of the responsible District special education administrator elicited acknowledgement that the content of EPISD's letter, insofar as it stated or implied that the STAT process was a necessary prerequisite for a parent referral to special education, reflected a mistake on the District's part. This testimony was credible and appears consistent with the applicable law. See Pasatiempo et al. v. Aizawa, 25 IDELR 64, 103 F.3d 796 (9th Cir. 1996). The STAT documents may have been the wrong documents to send, insofar STAT was not, under District policy, a necessary pre-referral process to commence an IDEA referral. Some administrators including the principal at *** believed the STAT process for teacher referrals was meant to apply inflexibly to parent referrals, but the administrator in charge of special education knew this was not the case. If Parent and school officials had worked collaboratively, as IDEA intends in regard to the referral and assessment process, the mistake could have been corrected sooner than it was.

II. Failure to provide notice to the parent as required by 34 C.F.R. §300.504

This section of the regulations requires that the parent be provided with notice of procedural safeguards "upon initial referral for evaluation." While there is no deadline referenced in federal or state IDEA regulations, District policy interpreted this phrase to mean on the same day as the referral. The District ultimately provided the notice of procedural safeguards to the parent approximately one month after the parent requested the referral. Without opining what specific time frame might constitute provision of the notice "upon referral," I believe providing the notice one month after the referral is not consistent with §300.504 and therefore the notice delay violated this section. There is not a preponderance of evidence to establish that this violation denied Student a free appropriate public education.

III. Failure to involve the parent in the determination of needed evaluation data as required by 34 C.F.R. §§300.533(a) and 300.344, and 19 T.A.C. §89.1045.

The cited sections of the federal regulations require that, as part of an initial evaluation, individuals who would ordinarily be part of the student's IEP Team (ARD Committee), including the parent, review existing evaluation data on the child and, based on input from the parent, decide what if any additional data is necessary to determine whether the child has a qualifying disability, and has a need for special education services or modifications. State regulations at §89.1045 require that parents be invited to participate meetings of ARD Committees as Committee members.

In Student's case, she had not been determined eligible for special education services and did not have an ARD Committee to convene. Parent would be entitled to participate in any decision in regard to the evaluation data that might be necessary to determine Student's special education eligibility. However, the parties did not reach this stage of the eligibility determination process, where data are evaluated and assessment planned, because Parent did not contact EPISD to clarify the meaning of the 12/18/03 letter, and EPISD officials did not follow up to ascertain why the request for referral was not proceeding. EPISD's conduct was somewhat understandable considering that Parent did not attempt to enroll Student in *** following the transfer revocation. But, even for children not attending school, the District still has an affirmative child-find duty. So a confluence of errors and omissions pretermitted the normal referral process. It is my finding that EPISD did not violate the sections cited by Petitioner in this portion of her complaint because the referral process never reached the point of determining needed evaluation data. The record contains no evidence that EPISD had any policy, or any history with Parent, to support an inference that EPISD would have refused her participation under these sections.

IV. Failure to make a non-eligibility determination that complied with 34 C.F.R. §300.534 and 19 T.A.C. §89.1050.

The sections Petitioner relies on require that a group of knowledgeable professionals and the parent must determine whether a child who has been referred is eligible for special education based on tests and other evaluation materials considered and/or produced according to the procedures of §300.533 and related provisions. In this case, no tests or other evaluation materials were collected or created for review because of previously-cited problems in the referral process. I find there was no violation of the provisions Petitioner relies on in regard to this portion of her complaint.

V. Failure to provide timely evaluation as required by 34 C.F.R. §§300.124 and 300.320.

IDEA federal and state regulations governing the referral process require that all children referred for eligibility evaluation receive certain procedural safeguards. The regulations do not distinguish between children enrolled in public school and those not enrolled in public school. See Robertson County School System v. King, et. al., 24 IDELR 1036, 24 LRP 3776 (6th Cir 1996). While IDEA does not set out time limits for the completion of an initial eligibility evaluation, states are required to implement standards ensuring that initial evaluations are conducted within a reasonable time. Letter to Barnett, 18 IDELR 1235, 18 LRP 1729 (OSEP 1992). Texas Educ. Code §29.004 establishes the 60-day timeline for completion of the referral following parent consent for evaluation, and that section applies to Student's referral, and the district's child-find duty is an affirmative one, not dependent on parent initiative. See Robertson County, supra.

The District received Student's request for referral on 11/17/03, and sent a written response on 11/18/03 containing certain mistaken information. No other communication took place between Parent

and EPISD between 11/11/03 and 12/4/03, when Parent filed her request for this due process hearing. It was not until 12/17/03 that EPISD advised Student that it was not refusing her request for referral.

At least as of 12/4/03, Parent was represented by competent counsel in this matter, and the evidence at hearing indicates she has not given consent for EPISD to evaluate Student. It is not clear to me why consent was not forthcoming after Petitioner received EPISD's 12/17/03 letter. At the same time, it concerns me that EPISD failed to take the initiative in obtaining consent after sending Parent the 11/18/03 letter, indeed did nothing for more than two weeks thereafter, and did not advise Parent of correct referral procedures until 12/17/03. In this context it appears that the delay in moving ahead with the referral process was unreasonable. Both parties share some responsibility for this delay, but ultimately IDEA imposes the child-find responsibility on the District, not on the parent. Since no evaluation has taken place, however, there is not a preponderance of evidence to establish that this delay denied Student a free, appropriate public education.

VI. Stay-put

Petitioner argued at hearing that *** should be Student's educational "placement" during the pendency of these proceedings because it was the last campus Student attended that Parent agreed to. It clearly was the last campus that Parent agreed to. ***, not ***, is Student's home campus. Parent was granted a request to transfer Student to *** under general education policies and it was under those policies that the transfer request was subsequently revoked and the revocation upheld on appeal. The District's final determination in regard to the transfer revocation took place prior to the initiation of due process proceedings. The *** transfer request was not granted as part of any IDEA placement. 34 C.F.R. §300.514 requires the maintenance of the current educational placement during the pendency of administrative proceedings, and the evidence establishes that *** is the current educational placement.

VII. Relief

Petitioner requests orders requiring the District to provide Parent with her notice of procedural safeguards and notice of refusal. The District has provided her, albeit somewhat belatedly, with her notice of procedural safeguards. Since the evidence does not establish that the District refused her request for assessment, no notice of refusal is appropriate.

Petitioner also requested an order requiring the District to provide a full and individual evaluation of Student. However, the evidence establishes that Parent has not given written informed consent for assessment of Student, and this matter does not entail any request for orders compelling assessment of Student to override lack of parent consent. While I am concerned about confusion and delay that has troubled this referral, I see that EPISD has recognized that a meeting needs to take place to review procedural safeguards and go over other matters necessary for the obtaining of informed consent so the District can proceed with Student's referral irrespective of her enrollment status in EPISD. Under the facts of Student's case, this is a legal obligation of the district that requires no order from me.

CONCLUSIONS OF LAW

1. El Paso I.S.D., as a local education agency and political subdivision of the State of Texas, is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student has resided within El Paso I.S.D. at times relevant to the claims in this due process hearing and is entitled to a free, appropriate public education from El Paso I.S.D.

3. El Paso I.S.D. did not refuse the request of Student's parent for referral to special education.
4. El Paso I.S.D. failed to provide timely notice of procedural safeguards to Student's parent following the parent's request for special education referral.
5. El Paso I.S.D. failed to take timely steps to initiate assessment of Student following receipt of the parent's referral of Student to special education.

ORDERS

In consideration of the foregoing, the following Orders are appropriate.

IT IS ORDERED that the specific relief requested by the Petitioner herein is hereby **DENIED**.

IT IS FURTHER ORDERED that any findings of fact that are more appropriately construed as conclusions of law, and any conclusions of law that are more appropriately construed as findings of fact, shall be considered and treated as if appropriately construed.

IT IS FURTHER ORDERED that El Paso I.S.D. shall timely implement this decision within 10 school days in accordance with 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 this 6th day of February 2004.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).

JAMES N. HOLLIS
SPECIAL EDUCATION HEARING OFFICER
FOR THE STATE OF TEXAS

DOCKET NO. 116-SE-1203

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B/N/F Parent	§	
	§	
VS.	§	HEARING OFFICER
	§	
EL PASO INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE 1: Whether El Paso I.S.D. failed to provide notice to the parent as required by 34 C.F.R. §300.503.

CITATION: 34 C.F.R. §300.503

HELD: For the Respondent.

ISSUE 2: Whether El Paso I.S.D. failed to provide notice to the parent as required by 34 C.F.R. §300.504.

CITATION: 34 C.F.R. §300.504.

HELD: For the Petitioner.

ISSUE 3: Whether El Paso I.S.D. failed to involve the parent in the determination of needed evaluation data as required by 34 C.F.R. §§300.533(a) and 300.344, and 19 T.A.C. §89.1045.

CITATION: 34 C.F.R. §§300.533(a) and 300.344; 19 T.A.C. §89.1045

HELD: For the Respondent.

ISSUE 4: Whether El Paso I.S.D. failed to make a non-eligibility determination that complied with 34 C.F.R. §300.534 and 19 T.A.C. §89.1050.

CITATION: 34 C.F.R. §300.534 and 19 T.A.C. §89.1050

HELD: For the Respondent.

ISSUE 5: Whether El Paso I.S.D failed to provide timely evaluation as required by 34 C.F.R. §§300.124 and 300.320.

CITATION: 34 C.F.R. §§300.124 and 300.320

HELD: For the Petitioner.

ISSUE 6: Whether El Paso I.S.D. violated Petitioner's rights under IDEA's stay-put clause.

CITATION: 34 C.F.R. §300.514

HELD: For the Respondent.