

DOCKET NO. 124-SE-1203

Student, b/n/f § **BEFORE A SPECIAL EDUCATION**
Parent §
§
VS. § **HEARING OFFICER FOR**
§
BROWNSVILLE I.S.D § **THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

Student (Petitioner) through his next friend, Parent, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et. seq.*, as amended. The Respondent is the Brownsville Independent School District.

During the Pre-Hearing Conference, Petitioner alleged that Respondent denied his rights under the Individuals With Disabilities Education Act (hereinafter IDEA) in the following particulars:

1. Failure to provide FAPE during a four-week period of the 2003-2004 school year by failing to provide a teacher for Petitioner. The four-week period complained of encompassed the dates September 30 through October 22, 2004.
2. Failure to provide an appropriate individualized remedial reading program to address his dyslexia.
3. Failure to provide appropriate support services and supplementary aids.
4. Failure to provide appropriate evaluation and testing with regard to his learning disability and his dyslexia.

At the time of hearing, Petitioner withdrew his complaint with regard to Issue No. 4. For relief, Petitioner requests compensatory education services for a period of one year in all subject areas.

HELD, for the Respondent.

PROCEDURAL HISTORY

Petitioner's request for hearing was received by Texas Education Agency on December 8, 2003 and received by Special Education Hearing Officer Sharon M. Ramage on the same date. Christopher Jonas, of Corpus Christi, Texas, represented Petitioner. J. Erik Nichols, of Henslee, Fowler, Hepworth & Schwartz, represented the Brownsville Independent School District.

The hearing was scheduled for January 7, 2004, with a decision due date of January 23, 2004. A telephone prehearing conference was held on December 17, 2003 and was transcribed by a court reporter. Both parties requested a continuance of the due process hearing due to scheduling conflicts. As hearing officer, I found good cause to continue the matter and scheduled the hearing for March 3, 2003. The Decision due date was initially extended to March 20, 2004. Following the hearing, the parties agreed to an extension of the decision due date to March 22, 2004, in order to submit written arguments.

The hearing was held on March 3, 2004. Based upon the evidence and argument of counsel, I find that Petitioner has failed to meet his burden of proof on all issues and make the following findings of fact and conclusions of law. (All references to the transcript will be designated as "Tr.", followed by the page number; all references to Petitioner's and Respondent's exhibits will be designated as "R" or "P", followed by the exhibit number.)

FINDINGS OF FACT

1. Student is a student who is eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The Brownsville Independent School District is the local education agency responsible for the provision of Student's free appropriate public education.
3. Student receives special education services under the classifications of Learning Disabled and Emotionally Disturbed. (P1, R33, Tr. 8). Student's learning disability is in reading comprehension. (Tr. 8, R31). Student is in the *** grade. (Tr. 8)
4. It is undisputed that Student made meaningful educational progress for the 2002-2003 school year. (Tr. 30, 75).
5. Student began the 2003-2004 school at ***, his home campus. (Tr. 9). Student's placement was in the Behavior Unit at ***, a self-contained, special education placement. (Tr. 9, R28, R32). Student's teacher at *** was Ms. ***. (Tr. 34). Ms. *** was certified in special education. (Tr. 34).
6. Ms. *** resigned on October 13, 2003. (Tr. 45, R38). However, Ms. *** was absent from her classroom from September 30, 2003, until the date she resigned. (R38)
7. During Ms. *** absences, Student was provided with numerous substitute teachers from September 30 through October 16, 2003, a period of 9 school days. (Tr. 49, 50, 64, R38). The lesson plans utilized by the substitute teachers were prepared by Ms. ***. (Tr. 49).

8. Ms. *** resigned on October 13, 2003. (R38). ***, the behavioral specialist for the District was assigned to Student's classroom on October 16, 2003. (Tr. 47). Prior to being assigned specifically to that classroom, Ms. *** was the behavior specialist assigned to the campus and would have been a resource to the teachers in the Behavior Unit. (Tr. 66). Once Ms. *** was assigned to the classroom, substitute teachers would also be assigned to the classroom to assist her. (Tr. 50). Petitioner did not challenge Ms. ***'s certification or credentials. Additionally, a permanent substitute was assigned to Student's classroom on October 20, 2003, who was a certified special education teacher. (Tr. 53, R38).
9. Petitioner's attorney asked Special Education Director *** if each of the teachers assigned to the Behavior Unit had the proper certification to teach Student, and he stated that the practice of the District was to hire certified teachers as substitutes and match the certification with their assignment. (Tr. 54, 64). Petitioner failed to produce any affirmative evidence that any of the substitutes assigned to Student's classroom lacked the requisite certification.¹
10. The ARDC met on October 22, 2003, and agreed to place Student in the Behavior Unit at *** on October 23, 2003. (Tr. 69). *** was the campus Student attended during the 2002-2003 school year. (Tr. 9, 69). This change was requested by the parent and agreed to by the ARDC. (Tr. 61; P1, R33).² The parent requested the change in campus even though Mr. *** requested that she give the District's behavior specialist an opportunity to work with Student and the classroom teacher. (Tr. 47, 61). Student's mother visited with Mr. *** around the same time Mrs. *** resigned and Ms. *** was assigned to the classroom, and approximately one week before requesting that Student be transferred to a different campus. (Tr. 22).
11. *** testified. Ms. *** was the student's teacher during the 2002-2003 school year. (Tr. 69). Student's mother appeared to have a good relationship with Ms. ***. (Tr. 24).
12. Ms. *** has been the student's teacher since October 23, 2003, when Student returned to ***, to present. (Tr. 69).
13. As of the date of hearing, Student has made meaningful educational progress for the 2003-2004 school year. (Tr. 75). In fact, Student's mother testified, that Student has made "great" progress since returning to ***. (Tr. 24).
14. Petitioner produced no evidence that he failed to obtain an educational benefit during the 2003-2004 school year as of the date of the hearing. In fact, the evidence as a whole

1 Although Mr. *** testified that the practice of the District was to employ substitutes who were certified, he was unable to testify with any degree of certainty that each teacher assigned to Student's classroom on each of the days in question possessed the proper certification in the area of their assignment. *See* Tex. Admin. Code §89.1131.

Although I found Mr. ***'s testimony to be troublesome and somewhat evasive, I cannot find that BISD failed to provide properly certified teachers without engaging in speculation.

² Petitioner does not complain about the *** placement and does not request an order that his IEP be implemented in the Behavior Unit on his home campus pursuant to 34 C.F.R. 300.552.

establishes that Petitioner made passing grades in all subject areas for each of the reporting periods during the 2003-2004 school through the date of hearing. (Tr. 32, 33, R37). Student showed improvement over each of the three grading periods from the beginning of the school year to the date of hearing. (Tr. 33). Although there was some evidence that there were behavioral issues while Student was enrolled at ***, his report card reflects overall satisfactory or improving behavior. (R37). The behavior specialist did not report that there were behavioral issues with Student, and the behavior reported by Student's mother was not consistent with the information Mr. *** obtained from Mrs. ***. (Tr. 60).

15. Upon return to ***, Student exhibited no behavioral difficulties. (Tr. 71). In fact, he earned all of his points on his first day back at ***. (Tr. 73, R34). As of the date of hearing, Student was making adequate progress in reading and passing grades in all areas. (Tr. 70). Overall, Student has shown improvement in academics (Tr. 70, 75), and there has been no change in his behavior from the prior school year. (Tr. 71).
16. The undisputed evidence was that Student did made progress in reading during the Fall 2003 semester. (Tr. 32-33, 70, R37).
17. *** testified that the student has made meaningful educational progress since the time the student left her class in the Spring of 2003. (Tr. 74-75). This testimony was undisputed.
18. Petitioner failed to prove his contention that support or supplementary aids were withheld or not delivered to Petitioner.
19. Petitioner failed to prove his contention that FBISD failed to provide an individualized reading program to address his dyslexia
20. Petitioner failed to produce any evidence that Respondent's failure to perform a Functional Behavior Assessment in the Fall of 2003 prior to transferring Studednt to *** resulted in any educational loss. In fact, Petitioner does not complain of the current placement and does not request an order that Student be returned to an appropriate placement at his home campus.

DISCUSSION

The sole issue in this case centers around Petitioner's complaint that BISD failed to provide Student with a certified special education teacher during a four-week time period in the Fall of 2003. Under the IDEA, each state must have a comprehensive system of personnel development to "ensure that all personnel who work with children with disabilities . . . have the skill and knowledge necessary to meet the needs of children with disabilities . . ." 20 U.S.C. §1412(a)(14). "Qualified personnel" are defined as those persons who meet state educational agency (SEA) approved or SEA recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services. 34 C.F.R. §300.23 The Texas Education Agency regulations require that all special education and related service personnel shall be certified, endorsed, or licensed in the area or areas of assignment in accordance

with 34 C.F.R. §300.23 and §300.126, the Texas Education Code (TEC), §§21.002, 21.003, and 29.304; or appropriate state agency credentials. *See* 19 Tex. Admin. Code §89.1131(a). A teacher who holds a special education certificate or an endorsement may be assigned to any level of a basic special education instructional program serving eligible students 3-21 years of age, in accordance with the limitation of their certification with certain exceptions. 19 Tex. Admin. Code §89.1131(b).

Petitioner alleges that BISD failed to provide an appropriately certified teacher in the Behavior Unit during the four-week time period in question, and that such failure caused a deterioration in Student's academic and behavioral performance and a denial of a Free Appropriate Public Education. Student was assigned to a Behavior Unit, a self-contained, special education classroom. Under the applicable state regulations, any teacher assigned to provide instructional services in the Behavior Unit must therefore be certified, endorsed or licensed as appropriate for their area of assignment. 19 Tex. Admin. Code §89.1131. Petitioner failed to produce sufficient evidence that the teachers assigned to the Behavior Unit in Ms. *** absence were not appropriately certified. Additionally, Petitioner failed to prove that the program and services provided to Student at *** were not reasonably calculated to confer a meaningful educational benefit under the standard set forth in Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982). In fact, the evidence established that Student did in fact receive a meaningful educational benefit during the 2002-2003 school year to the date of hearing.

CONCLUSIONS OF LAW

1. Student is a student eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The Brownsville Independent School District is the local education agency responsible for the provisions of Student's free appropriate public education.
3. The educational program and placement proposed by the school district is presumed to be appropriate. Petitioner bears the burden of proof. Petitioner has failed to demonstrate by a preponderance of the evidence that the educational program and placement provided by BISD were not appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984).
4. The district's efforts in developing an educational program and related services for Student resulted in an individual education plans and related services in the least restrictive environment reasonably calculated to confer an educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); 34 CFR §§300.121 and 300.300; 34 CFR §300.552; and 19 T.A.C. §89.1055.

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 Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED and ENTERED this 22nd day of March, 2004.

/s/Sharon M. Ramage

Sharon M. Ramage

Special Education Hearing Officer

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SYNOPSIS

Issue: Whether Respondent denied Student a free appropriate public education during the Fall of 2003 school year by failing to provide him with an appropriately certified teacher.

Held: For Respondent. Respondent provided Student with an appropriate educational program and placement during the Fall of 2003 that reasonably calculated to confer, and did confer, educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). Even if one or more of the substitute teachers assigned to Student’s classroom during the teacher’s absence was not properly certified, the number of days involved was minimal, and resulted in a de minimus denial of a Free Appropriate Public Education.

Cite: 34 CFR §§300.121 and 300.300; 34 C.F.R. §§ 300.23, 300.136; 19 Tex. Admin. Code §89.1131