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**DOCKET NO. 137-SE-1203**

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<b>Student</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>B/N/F Parent</b>	§	
	§	
<b>VS.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>HARLANDALE INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**DECISION OF THE HEARING OFFICER**

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**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 (“the Agency”) on 12/16/03, assigned to the undersigned Impartial Hearing Officer, and set for hearing on 1/12/04, with a decision deadline of 1/30/04. A telephone pre-hearing conference pursuant to 19 T.A.C. §89.1180 was scheduled for 12/29/03, but was postponed. Parent telephonically advised that she needed additional time to seek legal representation. The hearing date was continued to 2/26/04, for good cause shown, with an extended decision deadline of 3/17/04. On 2/10/04, Respondent requested a continuance from the 2/26/04, setting due to unavoidable substitution of counsel. A further continuance was granted to 3/29/04, for good cause shown, with an extended decision deadline of 4/30/04. Parent by letter received 3/2/04, requested to keep the present hearing dates or “get person to take your place.” This request was interpreted as a motion for recusal, which was denied and the matter referred to Texas Education Agency for further proceedings. By letter dated 3/10/04, the Agency upheld the denial of Parent’s recusal request.

Subsequently Parent advised in correspondence of 3/2/04 that she had been unable to obtain representation and would be proceeding without counsel. She also wrote that unnamed persons were making phone calls claiming to be on her behalf, and therefore all phone calls should be reported. Parent also wrote that a neighbor had been forging her signature and therefore requested that all correspondence be sent via some type of certified mail, which request was granted. No telephone pre-hearing conference took place. The evidentiary due process hearing convened as scheduled. Respondent was represented by Wesley Johnson, Attorney at Law. Petitioner was represented by Parent, pro se. Evidence was received and the record closed on 3/29/04.

At the evidentiary hearing Parent requested a further continuance in order to subpoena various staff members from Edgewood I.S.D., Student’s school district prior to her October 2002 enrollment in Harlandale I.S.D., in order to show that Edgewood had a better program than Harlandale. The request

was taken under advisement during the hearing, and is hereby denied pursuant to 19 T.A.C. §§89.1180(f) and 89.1185(o). The record establishes that Student has not been enrolled in Edgewood since before October 2002, more than a year, at least, before this action was filed. Testimony of Edgewood personnel would not reflect Student's present performance and educational needs. Furthermore, the comparison of Student's performance in Edgewood, as against her performance in Harlandale, is as a matter of law not material to the issues raised herein, namely whether Harlandale implemented Student's IEP and behavior plan, provided special education services, or afforded Student a free, appropriate public education in the LRE. Compelling testimony as Parent requested is not good cause for extending the decision deadline.

### **Petitioner's Complaint and Relief Request**

Petitioner's correspondence initially complained, in reference to Student, that Parent and/or Student were being sexually harassed by school employees, and that Student was being excluded from school for the reason that perverts at the school did not want her there. Petitioner was advised that the Hearing Officer has no jurisdiction of sexual harassment complaints or school personnel matters, except and to the extent such matters involve the denial of Student's special education rights. Petitioner subsequently wrote complaining of the following special education issues concerning Student:

1. Failure to provide appropriate behavioral consequences (e.g. using name-calling)
2. Inappropriate removal from class
3. Failure to provide special education services.

Petitioner requested as relief compensatory educational services, and reimbursement of the costs of home-schooling. Petitioner raised additional issues in the due process hearing, which are addressed herein.

### **FINDINGS OF FACT**

1. Student enrolled in \*\*\* grade at Harlandale I.S.D.'s \*\*\* School on 10/7/02. She withdrew from attendance on 12/18/02. Respondent's Exhibit ("R") 19.
2. Before enrolling at \*\*\*, Student attended school in Edgewood I.S.D. where, as of 9/4/02, she was considered eligible for special education as a student with emotional disturbance and learning disability, and received instruction in general education for Reading, Language, and Math, with special education support. She attended modified general education classes for Science, Social Studies, and other classes. She received counseling on a consultative basis. R-1.
3. Harlandale I.S.D. convened an ARD Committee on 10/14/02 to initiate a temporary placement for Student. \*\*\* representatives reported that Student was experiencing difficulty in all academic areas. The Committee also noted that an Edgewood representative had described Student to \*\*\* personnel as experiencing difficulty in her Edgewood placement. The Harlandale I.S.D. ARD Committee scheduled Student in resource special education class for Reading, Language Arts, and Math, and general education with itinerant special education support in Social Studies and/or Science. Parent did not attend this meeting. R-2.
4. Harlandale I.S.D. convened an ARD Committee meeting on 10/23/02 to review assessment, schedule further assessment, and develop IEPs for special education classes. Parent did not attend this meeting. A functional behavior assessment was undertaken, and a behavior management plan developed to address problem behaviors of not following teacher directives, talking out, and verbal and physical aggression. R-3.
5. On or about 9/9/03 Parent filed a complaint with the Agency alleging in pertinent part that Harlandale was not carrying out Student's IEP. The Agency investigated, and determined that certain modifications scheduled in Student's IEP were not implemented. Specifically, Harlandale I.S.D. did

not document either the delivery of Student's modified grading system, or her modified grades and assignments. By letter dated 11/4/03, the Agency instructed Harlandale to convene an ARD Committee to determine educational services needed to compensate Student. R-25, R-26.

6. Harlandale I.S.D. convened an ARD Committee on 12/3/03 to schedule Student's 3-year re-evaluation and develop additional services as required by the Agency. The Committee reviewed and accepted a September 2003 psychological assessment report of Dr. \*\*\* submitted by the parent documenting Student's anxiety, distractibility, and cognitive deficits manifested in developmental delays in language and other areas, and general difficulty with information processing. R-4, R-8.
7. At Student's 12/3/03 ARD Committee meeting Parent refused consent for further testing of Student by Harlandale, and stated her preference that the District not be involved further in Student's education. Parent requested compensation from the District for the cost of books for home-schooling. School representatives presented a proposed updated IEP for Student, to which Parent made no specific contemporaneous objection of record. R-4.
8. In the 12/3/03 ARD Committee meeting, Harlandale I.S.D. offered to provide Student with six weeks of after-school tutoring, delivered one hour twice weekly, with a special education teacher in a small-group setting, as a compensatory service to address the Agency's directive. Parent refused the services, insisting instead on designating an outside person herself to provide the services. The District offered a 10-day recess because of Parent's disagreement. R-4.
9. Harlandale I.S.D. convened an ARD Committee meeting on 1/9/04 to take up matters unresolved from the prior meeting. Parent did not attend this meeting. The District representatives at this meeting modified the proposal for compensatory services by increasing the amount of services, and giving Parent some say in choosing the provider and the location for the services. The ARD Committee reviewed and approved the proposed IEP developed at the previous meeting. The documentation of this meeting, which set out the offer of compensatory services in the minutes of deliberations, was mailed to Parent. R-23.
10. The classrooms in which Student received instruction at \*\*\* do not have telephones in the classroom. Tr. 37-38.
11. Test results from Dr. \*\*\* tend to show that Student as of the most recent evaluation was functioning in academic areas somewhat above what would be expected from her cognitive functioning level. R-6.
12. While Student was enrolled in Harlandale I.S.D., the district implemented her IEP behavior plan. Student participated in all general education classroom instruction and activities, and was not excluded from activities or removed for disciplinary reasons. Student made meaningful educational progress during her attendance at \*\*\*. Tr. 16, 29-31, 74-77.

## DISCUSSION

The IDEA entitles every student with a disability to be offered a free, appropriate public education ("FAPE") in the least restrictive environment ("LRE"). Board of Education v. Rowley, 458 U.S. 176 (1982). This means the student is entitled to an individualized education plan ("IEP") that is developed according to specified procedures, designed specifically for the student's unique needs, individualized based on assessment and performance, and supported by services that will permit the student to benefit meaningfully from instruction. The IEP also must be formulated in such a way that the student receives instruction alongside non-disabled peers to the maximum extent appropriate. If implemented, the IEP must be delivered in a collaborative and coordinated manner by the key "stakeholders," and ultimately must produce positive academic and non-academic benefits. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997). A public school district's proposed IEP is presumed to be appropriate. A parent who challenges the IEP bears the burden to prove

by a preponderance of evidence that the IEP was not developed according to IDEA procedures, or that the IEP would fail or did fail to provide the student with FAPE in the LRE. Tatro v. State of Texas, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). A public school district's failure to satisfy IDEA's substantive or procedural requirements may merit such prospective or compensatory relief as is necessary to provide the student with a free, appropriate public education. Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985); Parents of Student W. v. Puyallup Sch. Dist. No. 3, 21 IDELR 723 (9<sup>th</sup> Cir. 1994).

Petitioner's complaints herein are addressed in the following discussion as they were presented in correspondence filed by Petitioner, and additionally as raised during the course of the due process evidentiary hearing.

#### **A. Failure to provide appropriate behavioral consequences, and inappropriate removal from class**

According to 34 C.F.R. §300.342 and the decision in Michael F., *supra*, one question to be addressed in determining whether a school district has provided an eligible student with a free and appropriate education is whether the school district delivered the student's IEP in a collaborative and coordinated manner. Notably, in regard to this issue in Student's case, the evidence tends to show that Petitioner never challenged the content of Student's IEP behavior plan developed by Harlandale I.S.D. in an ARD Committee or Agency complaint, before requesting this due process hearing. Additionally, Petitioner raised no complaint in this hearing about the content of the behavior plan. Consequently the only issue concerning behavior management is whether the plan for Student was implemented as required by law.

Parent alleges that Student's teacher violated the behavior plan by making Student participate in "Don't Do Drugs," and wear an anti-drug pin, as a punishment, while the other kids got to work on an Indian project and were not required to wear pins. Parent also alleges that she received a phone call during which she heard Student screaming uncontrollably while kids were laughing in the background, implying the behavior plan was not being followed. Parent also alleges that some of her own relatives from Colorado showed up at Student's school and this resulted in some things being done against Student in violation of her plan.

In regard to the Indian assignment, Student's teacher testified credibly that Student did participate in the Indian project with her peers up to the time she was withdrawn from school, and did not participate in anti-drug instruction because no such instruction is included as part of the \*\*\*-grade curriculum. Additionally the teacher testified that all children, not just Student, were given anti-drug pins to wear as part of a campus-wide program. Furthermore, the teacher's credible testimony refuted Petitioner's contention that the teacher engaged in any punitive name-calling against Student, removed Student from class for disciplinary reasons, or otherwise treated Student inconsistent with her behavior plan and IEP requirements. Furthermore, credible testimony of the school \*\*\* refuted Petitioner's contention regarding the telephone screaming incident, establishing that the classrooms at Student's school do not have telephones. Alternatively if such a phone call indeed took place in some other manner, Petitioner brought no evidence tending to show that the incident did deny, or would have denied, appropriate services for Student in such a manner or extent as to interfere with her receiving meaningful educational benefit as required by IDEA.

## **B. Failure to provide special education services**

Petitioner's complaints against the District herein reference and incorporate matters raised in Parent's administrative complaint to the Agency. Following investigation of that complaint, the Agency determined that pursuant to 34 C.F.R. §300.342, certain modifications were not implemented, and ordered Student's ARD Committee to provide appropriate compensatory services. Harlandale I.S.D. convened an ARD Committee meeting on 12/3/03 and offered compensatory services. Parent objected, but according to her testimony at hearing, the only reason she did so was that she did not like the person whom the District designated to provide the services.

Concerning the alleged service denial arising from the omitted modifications, Respondent offered general rebuttal testimony at hearing. Respondent argued, in the alternative, that the District already offered appropriate compensatory services to address the alleged omissions, and consequently there was no live issue for hearing. The District's argument is well-grounded. It appears from review of all the evidence that the offer of compensatory services by Student's ARD Committee on 12/3/03 was sufficient to afford Student a free, appropriate public education. This is the purpose of compensatory services. Petitioner brought no substantial evidence to support a finding or conclusion that this 12/3/03 offer of services was not appropriate. A parent's personal dislike for the District's designated service provider, without more, raises, if anything, a personnel or governance issue that lies beyond the jurisdiction of a special education hearing officer. It is not necessary to take up the District's rebuttal to the Agency's findings, because the appropriateness of the District's offer of compensatory services has not been challenged by Petitioner in any manner cognizable under IDEA. Consequently, any issue arising from Petitioner's various complaints implicating Agency findings is moot for purposes of this hearing.

Additionally Petitioner complained in the due process evidentiary hearing that Harlandale I.S.D. violated IDEA by failing to include an auditory amplification device as a supplementary service or related service in Student's IEP to help Student focus her attention in the classroom. However, testimony of Student's teacher established that Student was making good progress without such a device. Petitioner failed to offer sufficient contrary evidence to establish that such a device is necessary in order for Student to receive an appropriate education.

## **C. Other issues**

At the evidentiary hearing Parent raised a barrage of other complaints against the District, including the complaint that the coach "almost" stepped on Student's foot; that one of the teachers is a pervert; that someone told Parent not to bring Student to school early; that someone at school gave Student a mark on her arm that looked like an injection; that the school \*\*\* failed to give Student her allergy medication; that school officials allowed Parent's relatives from Colorado to wander around Student's school campus and spy on Student; that other kids shoved and mistreated Student in class at unspecified times; that a teacher abused Student in an unspecified manner; and that a staff member had another staff member listen in by walkie-talkie during a confrontation with Parent. Given the content of these complaints and the supporting testimony Petitioner offered in the due process hearing, these do not appear to state cognizable claims under IDEA. Even if they did, none of these complaints is supported by a preponderance of credible evidence tending to establish an IDEA violation that denied Student a free, appropriate public education.

Additionally, Parent complained at hearing that Harlandale I.S.D. does not have inclusion. Parent, however, never disputed previously Student's placement proposed or scheduled by Harlandale I.S.D.'s ARD Committee, whether during the course of, or as a result of, any Committee meeting. In any

event, Petitioner's evidence fails to establish that the placement scheduled for Student by Harlandale I.S.D.'s ARD Committee was inappropriate or failed to deliver services in the LRE.

Additionally Parent complained that she rejected Harlandale's 12/3/03 offer of compensatory services as inappropriate, for the reason she did not like the person designated by the District to deliver those services. However as previously noted, and in the absence of any contention, much less evidence, that the District's designated service provider was unable or unqualified to deliver the services, Petitioner states no lawful basis to challenge the District's personnel decision under IDEA. Consequently, this forum lacks jurisdiction of the issue.

#### **CONCLUSIONS OF LAW**

1. Harlandale 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 is an IDEA-eligible student to whom Harlandale I.S.D. must offer a free, appropriate public education in the least restrictive environment.
3. Petitioner failed to sustain her burden of proof to establish that any IEP services offered or provided to Student by Harlandale I.S.D. were not reasonably calculated to provide Student with a free, appropriate public education in the least restrictive environment.
4. Petitioner did not sustain her burden of proof to establish that Harlandale I.S.D. failed to implement Student's behavior plan in a coordinated and collaborative manner.
5. Petitioner's complaint regarding Student's entitlement to compensatory services as a result of the District's failure to deliver modifications during the time of Student's enrollment in Harlandale I.S.D. is moot.
6. Petitioner is not entitled to relief.

#### **ORDERS**

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

**IT IS ORDERED** that any and all relief requested by Petitioner herein is **DENIED**.

**SIGNED** this 14<sup>th</sup> day of April 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).

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

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**DOCKET NO. 137-SE-1203**

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<b>B/N/F Parent</b>	§	
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<b>VS.</b>	§	<b>HEARING OFFICER</b>
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<b>HARLANDALE INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**SYNOPSIS OF DECISION**

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**ISSUE:** Whether Harlandale I.S.D. failed to implement Student’s behavior plan.

**CITATION:** 34 C.F.R. §300.342

**HELD:** For the District.

**ISSUE:** Whether Harlandale I.S.D. failed to provide or to offer appropriate services to address Student’s special education needs.

**CITATION:** 34 C.F.R. §§300.342

**HELD:** For the District.