

DOCKET NO. 188-SE-0104

Student § **BEFORE A SPECIAL EDUCATION**
B/N/F Parent & Parent §
§
VS. § **HEARING OFFICER FOR THE**
§
FORT BEND INDEPENDENT §
SCHOOL DISTRICT § **STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Student (Petitioner) through his next friends, Parent and 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 Fort Bend Independent School District.

Petitioner alleged 65 separate complaints in her Amended Pleadings prior to the commencement of the hearing, many of which were outside the jurisdiction of the Hearing Officer. Petitioner's cognizable complaints can be categorized into three areas:

1. Whether Student's current placement at the Structured Learning Center is appropriate and the least restrictive environment for Student.
2. Whether Student's IEP as developed at the January 8, 2004 ARD Committee (ARDC) meeting is appropriate and addresses Student's specific disabilities.
3. Whether or not FBISD has implemented Student's IEP and followed recommendations based on current assessment data.

Petitioner also complained that FBISD violated the stay-put provisions of IDEA by not returning Student to his regular education classes at *** School, his home campus and complained of issues raised in a prior request for due process hearing which was dismissed with prejudice.

As relief, Petitioner requested an Order requiring an ARDC to reconvene and develop an appropriate IEP for Student, with placement in the least restrictive environment, which Petitioner argues is regular education classes at *** School.

HELD, for the Respondent.

PROCEDURAL HISTORY

Petitioner's request for hearing was received by Texas Education Agency on January 29, 2004 and assigned to Special Education Hearing Officer Sharon M. Ramage. Petitioner was represented by his parent, Parent, Pro Se. Jeff Rogers, Attorney at Law, represented Fort Bend Independent School District.

The hearing was initially scheduled for February 26, 2004, with a decision due date of March 13, 2004. A telephone prehearing conference was held on February 3, 2004 and was transcribed by a court reporter. Petitioner

requested an expedited hearing and the parties agreed on a hearing date of February 17, 2004, with no change in the decision due date. On February 12, 2004, Petitioner requested a continuance of the disclosure deadline, and Respondent objected to said request for continuance. I found that good cause existed to continue the hearing in this matter for one week due to a medical emergency with Parent's child. The hearing was continued to February 24, 2004, and the decision due date was extended to March 20, 2004.

This is the fourteenth request for hearing filed by Petitioner and the second hearing request assigned to the undersigned hearing officer. On October 29, 2003, Petitioner filed a request for hearing in Docket No. 074-SE-1003, raising issues that were identical to the issues in the instant case. Petitioner's request for hearing in that case was dismissed with prejudice on December 3, 2003, due to Petitioner's failure to comply with the disclosure deadline in 89 Tex. Admin. Code §1180(g). I hereby take official notice of all prior proceedings in Docket No. 074-SE-1003.

On January 28, 2004, Petitioner filed a request for hearing in the above docket number, complaining of the same issues complained of in Docket No. 074-SE-1003. Respondent filed a Motion for Partial Dismissal based on the doctrine of *res judicata*. The Motion for Partial Dismissal was granted, barring relitigation of all claims based on events occurring prior to December 3, 2003. Petitioner subsequently amended her pleadings, alleging that FBISD violated Student's right to a Free Appropriate Public Education from December 3, 2003 to date of hearing, generally complaining about the appropriateness of Student's placement at the SLC and the implementation and appropriateness of his IEP.

The hearing was held on February 24, 2004, and parties were allowed to submit written arguments which were considered by the hearing officer.

Based upon the evidence and argument of the parties, 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 ***-year old *** grade student who resides within the boundaries of the Fort Bend Independent School District. He is eligible for special education as a student with other health impairment and a learning disability. (R1).
2. Student's current placement is in the Structured Learning Center at ***. His home campus is *** School. (R1)
3. Beginning in 2001, Student began exhibiting disruptive and non-compliant behaviors which were interfering with his success in the regular education classroom. (R6; R7). In October and December, 2001, FBISD consulted with a Developmental Pediatrician, Dr. ***, and a Licensed Specialist in School Psychology, ***. Both professionals recognized that Student exhibited disruptive classroom behaviors in the form of truancy, tardiness, fighting, non-compliance, and failure to comply with teachers' directives. (R6; R7). Dr. *** recommended that the District consider alternative placement with more specialized behavior intervention in the event Student's disruptive behaviors continued. (R6). Both professionals recommended the use of behavior contracts. (R6, R7). During this time period, Petitioner filed multiple hearing requests, invoking his rights under the stay-put provisions of IDEA. As a result, the District continued to attempt to serve Student in his regular education classes. (Tr. 283). The behaviors continued to escalate, with Student receiving 64 disciplinary referrals from August 2002 through

November 2002. (P10). The behaviors included tardiness, insubordination, bullying, extortion, profanity, inappropriate physical contact with others, threats against a teacher, and generally disruptive behavior. (R3, P10, Tr. 139). Additionally, Student experienced academic difficulties in his regular education classes. (Tr. 283-84). FBISD attempted to implement behavior contracts with Student in the Fall of 2002, with interference by Parent. (R3, p. 33). An ARDC convened in December, 2002 to address Student's behavior and placement in December 2002. (R3, p. 33).

4. Following continued disruptive, non-compliant and threatening behaviors by Student, further disagreements arose between FBISD and Parent. Petitioner filed another request for due process hearing in Docket No. 407-SE-0802 in late 2002. The Hearing Officer in that case ordered that Student remain in the SLC during the pendency of the case. (See Pre-Hearing Conference Transcript in Docket No. 074-SE-1003 and Pre-Hearing Conference Transcript in instant case). The complaint in Docket No. 407-SE-0802 was dismissed in January 2003. Student withdrew from FBISD and attended Lamar Consolidated ISD in the Spring of 2003. (R3, P18). When Student re-enrolled in FBISD in August, 2003, a transfer ARD was held, at which time a decision was made to return Student to his most recent placement within the District, the Structured Learning Center. The IEP developed by the ARDC included special education instruction in all areas, instructional modifications and accommodations, a behavior intervention plan, and psychological services. (R3, P18). The IEP and placement were implemented, and Petitioner did not complain of that placement until October 29, 2003 in Docket No. 074-SE-1003. That case was dismissed with prejudice on December 3, 2003. (See Dismissal Order in Docket No. 074-SE-1003).
5. The Structured Learning Center is a placement which utilizes a point system by which students earn points to transition back to a regular education setting, in order to bring behaviors under control and enable the student to achieve success in the classroom. (Tr. 207-08, 253-54) In the SLC, Student earns points for academic work as well as behavioral success. (Tr. 207) The program is designed such that a Student can begin transitioning back to a less restrictive environment in as little as 21 days. (Tr. 208). It is not a permanent placement and not designed to isolate Student from non-disabled peers. Transition from the SLC, if approved by the ARDC, is gradual, in that the student initially attends the SLC for part of the day and classes on the home campus (or the campus approved by the ARDC) for a short period of time. Gradually, the student's time at the SLC is decreased and his time on his home campus is increased while his behavior and academic success are monitored. (Tr. 207). FBISD personnel expect that Student would transition from the SLC to his home campus upon meeting the transition requirements, but that he would need special education support in all academic areas. (Tr. 285-288).
6. The ARDC convened on October 1, 2003, to review Student's progress in the SLC. The ARDC determined that Student was being successful in the SLC and that he was on track to begin a transition back to *** School. (R2, Tr. 195, 283, 286). Parent left the ARDC meeting when the ARDC began to discuss transition options for Student. (R2). On October 29, 2003, Petitioner filed a request for hearing in Docket No. 074-SE-1003, complaining of the SLC placement and Student's IEP. On December 3, 2003, that case was dismissed with prejudice because of Petitioner's failure to comply with the disclosure requirements in 89 T.A.C. § 89.1180(g). (See Dismissal Order in Docket No. 074-SE-1003).
7. At the time of the October 1, 2003 ARDC meeting, Student's behavior was appropriate, his attendance was good, and he was turning in his assignments. (Tr. 195, R2). He was successful academically and behaviorally, although he had struggled in both areas in his regular education placement at ***. (Tr. 282—88)
8. After the October 1, 2003 ARDC meeting, Student's attendance and completion of assignments began to decline and he stopped earning points through the point system which would have enabled a transfer back

to the *** School. (Tr. 203-05, 209-10, 265-67). In essence, Student stopped attending class and turning in his assignments, with the encouragement of Parent. (Tr. 205, P1)

9. Student's non-compliance with the requirements of the SLC program (i.e., completion of assignments) and his decline in attendance also coincided with his release from juvenile probation. (Tr. 165) Student has not attended class at FBISD since December 8, 2003. (R9, Tr. 209)
10. The ARDC convened at the request of Parent on January 8, 2004. FBISD continued to recommend that Student remain in the SLC as recommended during the October 1, 2003 ARDC meeting and made no changes to his IEP. The ARDC discussed Student's attendance and refusal to turn in his assignments. Parent admitted to the other members of the ARDC that she instructed her son not to complete the assignments. (R1) Parent stated that she would refuse to return her son to school as long as the ARDC recommended placement in the SLC. (R1). The IEP developed for Student was individualized and addressed his academic and behavioral needs. (Tr. 286). Student continued to require special education instruction and support in all academic areas (R1, Tr. 286) and the SLC continued to be the least restrictive environment for Student. Parent disagreed with the ARDC recommendation and refused a 10-day recess. (R1). She filed the current request for hearing on January 29, 2004.
11. Petitioner produced no evidence that that Student's failure to attend school was directly related to his disability or that the SLC program was not the least restrictive environment for Student. Student's failure to achieve continued success in the SLC program was due to his refusal to attend school and turn in assignments. (Tr. 208, 265).
12. Petitioner produced no evidence that Student's IEP was inappropriate. In fact, the testimony established the current IEP is individualized and reasonably calculated to confer meaningful academic and behavioral benefit, and in fact Student has benefited from the IEP. (Tr. 286).
13. Student's evaluation is current, and a reevaluation is not required until October 1, 2004. (R1, 2, 3). Petitioner failed to produce any evidence that conditions warrant a reevaluation prior to that time, or that the data from those assessments is no longer accurate.

DISCUSSION

Res Judicata

Parent complained of the SLC placement in Docket No. 074-SE-1003, which was dismissed with prejudice. Petitioner's complaint in this request for hearing is identical to her complaint in Docket No. 074-SE-1003 in that she complained of the same placement, evaluation and IEP. The doctrine of *res judicata* requires that judgment in a first suit preclude relitigation on matters actually litigated, as well as causes of action which arise out of the same subject matter and which with due diligence, might have been litigated in the first suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992). This doctrine is applicable when the judgment in a first suit results from a dismissal with prejudice as such a dismissal is a final judgment on the merits. *Mossler v. Shields*, 818 S.W.2d 752 (Tex. 1991). This doctrine is also applicable to special education due process hearings. *Alexander G. v. San Angelo ISD*, TEA Dkt. No. 220-SE-0302 (April 4, 2002). The appropriateness of the SLC placement and Student's IEP were adjudicated on December 3, 2003, when Petitioner's complaint was dismissed with prejudice. Therefore, Petitioner's complaints with regard to his placement and IEP prior to December 3, 2003, were dismissed pursuant to the doctrine of *res judicata*.

Stay Put

Petitioner argued that FBISD violated the stay-put provision of IDEA by failing to return him to *** School during the pendency of this proceeding. Petitioner claims that *** School is the last placement agreed upon by the parties. The “stay put” provision of IDEA requires that during the pendency of any proceeding, unless the school and the parent agree otherwise, the child shall remain in the then-current educational placement. 20 U.S.C. 1415(j); 34 C.F.R. §300.514. Petitioner failed to prove that she had not at some point since January, 2003 agreed to placement in the SLC. In fact, the minutes from the August ARDC meeting reflect that Parent attended by phone and that the ARDC reached an agreement on September 19, 2003. It was not until October 1, 2003, that Parent withdrew her agreement. (R2 p. 37, 53-54). By letter dated October 10, 2003, Parent acknowledged that she had acquiesced in Student’s placement in the SLC. (R2, p. 52). The District had already implemented the SLC placement for two months when Parent filed her request for hearing in Docket No. 074-SE-1003. The SLC placement then became an adjudicated placement by virtue of the doctrine of *res judicata* when Petitioner’s complaint was dismissed with prejudice on December 3, 2003. Therefore, at the time Petitioner filed the current complaint, the SLC was the “then current placement” under 20 U.S.C. 1415(j).

Student’s IEP and Placement are Presumptively Appropriate

Petitioner asserts that the placement in the SLC is not the least restrictive environment for him and that his current IEP is not appropriate. Petitioner has failed to demonstrate by a preponderance of the evidence that the proposed placement and IEP are not appropriate. Petitioner has also failed to produce any evidence that his IEP has not been implemented. Petitioner has wholly failed to meet her burden of proof and overcome the presumption of appropriateness. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d* 468 U.S. 883 (1984).

Student’s Attendance

At best, Petitioner has proven that Student does not want to attend school; not that the program is inappropriate. In fact, this issue was best stated by Student when asked if he had been absent because of sickness. His response was “Yes, I have. Basically, I’ve been sick of going.” (Tr. 35). The evidence also established that Parent played an active role in her son’s lack of attendance and failure to turn in assignments.

To the extent Student’s absences from school since December 8, 2003, currently prevent him from benefiting meaningfully from the instructional services being offered at the SLC, this failure cannot be attributed to FBISD. The District’s obligation under IDEA is to provide opportunity, not to guarantee educational progress to a student who fails to attend class and produce the necessary assignments. *Student v. Southwest Independent School District*, TEA Dkt. No. 169-SE-0203 (May 30, 2003). The IEP’s developed at the August 19, 2003 and January 8, 2004 ARDC meetings and the SLC placement provide such an opportunity. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); 34 CFR §300.552; and 19 T.A.C. §89.1055.

Least Restrictive Environment

Student is in the *** grade and has exhibited behaviors which interfere with his success in the regular education classroom. Additionally, as Student has stopped attending classes altogether, with his mother’s cooperation and consent, he is unable to be successful because of his own behavior, not because the placement is inappropriate. Student needs a highly structured educational program which focuses on the retraining and coaching of replacement behaviors, with a gradual return to the regular education classroom, with supports. The proposed SLC placement is appropriate to meet Student’s needs.

Student is entitled to be educated with nondisabled peers to the maximum extent appropriate. *Daniel R.R.*

v. State Board of Educ., 874 F.2d 1036 (5th Cir. 1989). In evaluating whether Respondent is educating Student with nondisabled peers to the maximum extent appropriate, there are two inquiries which must be made. The first question is whether education in the regular education classroom, with supplementary aids and services, can be achieved satisfactorily for Student. If not, then we must evaluate whether FBISD has mainstreamed Student to the maximum extent appropriate, taking into consideration Student's particular disability and its manifestations.

In *Daniel R.R.*, the Fifth Circuit discussed several factors in determining whether placement in the regular education classroom is appropriate. These factors include academic benefit, benefit from association with nondisabled students, detrimental effects on the disabled child, and detrimental effects on classmates, taking into consideration the nature and severity of the child's disability. No one factor is dispositive. *Daniel R.R.* If it is determined that education in the regular education classroom cannot be achieved satisfactorily, we must next determine whether the child has been mainstreamed to the maximum extent appropriate by reviewing whether the school has taken steps to accommodate him in regular education. Mere token gestures are not sufficient. However, the school is not required to provide every conceivable supplementary aid and service to assist the child, or to modify the curriculum beyond recognition. *Daniel R.R.*

In applying the above factors to this case, it is clear that Student's disruptive behaviors significantly hindered his ability to remain in the regular education classroom and receive instruction. For example, Student received 64 disciplinary referrals over a period of 2 months. Additionally, Student was not successful academically in the regular education classroom. He only began achieving success when placed at the Structured Learning Center.

Immediate return to a regular education placement would not be in Student's best interest. Student was showing success in his placement until he stopped attending FBISD altogether, with his mother's cooperation and encouragement. Prior evaluations of Student indicated that Student needed a structured environment in the event disruptive behavior continued. Student's behaviors must be brought under control in order for him to be successful in the school setting. Truancy, tardiness, insubordination and willful refusal to turn in assignments continue to be behavioral issues for Student, although the other disruptive behaviors seem to be somewhat under control at the SLC. The SLC provides an environment for Student where he can achieve success, both academically and behaviorally, and eventually transition back into a regular education placement, with special education supports.

FBISD has exhausted all efforts to educate Student in the regular education setting. FBISD began consulting with outside professionals regarding Student's behavior and its classroom implications in October, 2001. These professionals recommended that the District consider an alternative placement with appropriate supports and related services in the event Student's behavior continued to disrupt his education. FBISD attempted to maintain Student's placement in regular education classes, in part due to numerous due process hearing requests filed by Parent and the attendant stay-put requirements under IDEA. In January 2003, a hearing officer ordered SLC placement during the pendency of one of those due process hearing requests. Petitioner's response was to withdraw and enroll in another District. When Student returned to the SLC in August 2003, he finally began to achieve academic and behavioral success. Given Student's history of behavioral issues, lack of success in the regular education setting, and almost immediate positive response to placement in the SLC, it is obvious that Student has a particularized need for an environment which is more structured than the regular education classroom.

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 Fort Bend 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 are presumed to be appropriate. Petitioner bears the burden of proof. Petitioner has failed to demonstrate by a preponderance of the evidence that the proposed placement and IEP are not appropriate. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984). Additionally, Petitioner has failed to demonstrate by a preponderance of the evidence that FBISD has failed to implement his IEP.
4. The IEP developed at the August 19, 2003 and January 8, 2004 ARDC meetings is reasonably calculated to confer a meaningful educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); 34 CFR §§300.346-347 and 19 T.A.C. §89.1055.
5. The individual education plans and related services developed by the district for Student offered him an opportunity to make progress under the standard of *Cypress-Fairbanks ISD v. Student.*, 118 F.3d 245 (5th Cir. 1997).
6. Placement at the Structured Learning Center enables Student to receive a free appropriate public education in the least restrictive environment. 34 C.F.R. §§ 300.550; 300.552; *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) (5th Cir. 1995); *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

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 20th day of March, 2004.

/s/Sharon M. Ramage

Sharon M. Ramage

Special Education Hearing Officer

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SYNOPSIS

Issue 1: Is placement in a behavioral intervention class (the Structured Learning Center) away from his home campus in all academic subjects the least restrictive environment appropriate for a *** school student with persistent, disruptive behaviors?

Held: For the District. The SLC placement is appropriate at this time due to ongoing, serious behavior problems that interfere with Petitioner’s educational success in the regular education classroom.

Citation: 34 C.F.R. §§300.550; 300.552; *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).

Issue 2: Did FBISD fail to develop and provide an IEP with appropriate individualized goals and objectives for Student?

Held: For the District. The IEP developed by FBISD is reasonably calculated to confer an educational benefit.

Citation: 34 CFR §§300.346-347 and 19 T.A.C. §89.1055; *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

Issue 3: Did FBISD violate the Stay Put provisions of IDEA by refusing to return Student to his regular education classes at his home campus during the pendency of this proceeding?

Held: For the District. The SLC placement was the subject of a request for due process hearing which was dismissed with prejudice approximately 6 weeks prior to the filing of the instant case. Under the doctrine of *res judicata*, the SLC placement was adjudicated when Petitioner’s prior complaint was dismissed with prejudice on December 3, 2003. Therefore, at the time Petitioner filed the current complaint, the SLC was the “then current placement”.

Citation: 20 U.S.C. 1415(j); 34 C.F.R. §300.514.