

DOCKET NO. 196-SE-0204

TOMBALL INDEPENDENT SCHOOL DISTRICT, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	HEARING OFFICER
	§	
Student, b/n/f Parent, Respondent	§	
	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Tomball Independent School District (hereafter TISD or Petitioner) requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, as amended, to obtain an order from the Hearing Officer overriding lack of parental consent for re-evaluation of Student (hereafter Student or Respondent), by next friend Parent.

The sole issue for hearing was whether the district is entitled to re-evaluate Student to obtain a new psychological evaluation and more information concerning his other health impairment (OHI) eligibility, despite lack of consent from his mother.

Held, for Petitioner TISD.

PROCEDURAL HISTORY

Petitioner TISD's request for hearing was received by the Texas Commissioner of Education on February 4, 2004, and was received by the Hearing Officer on February 9, 2004. ***, Special Education Director, appeared on behalf of the school district. Parent, Student's mother, participated in two prehearing conferences on Student's behalf, and exchanged e-mail correspondence with the Hearing Officer, but did not attend the hearing.

The hearing was scheduled for March 12, 2004. A telephone prehearing conference was held on February 26, 2004, and was transcribed by a court reporter. The parties jointly requested a continuance to allow time for mediation. The continuance was granted, and the hearing was reset to April 14, 2004. Subsequently, the district requested a continuance to allow time to pursue further settlement negotiations. The continuance was granted, and the hearing was reset to May 19, 2004. The district requested another continuance to allow time to pursue further settlement negotiations. The continuance was granted, and the hearing was reset to June 2, 2004.

Parent did not disclose documents or a witness list before or after the deadline of May 25, 2004. At 10:30 p.m. on May 24, 2004, Parent requested a continuance by e-mail correspondence, stating that her son was seeing a doctor and that she wanted to obtain private testing of him on her own prior to the hearing. The district stated that it wanted to pursue its own testing, notwithstanding any outside testing, and objected to any further continuances. The

continuance was denied. A prehearing conference was held on May 28, 2004, at Parent's request, to attempt to resolve the issues for hearing. Resolution was not reached because Parent continued to refuse to consent to evaluation.

Parent did not attend the due process hearing on June 2, 2004, which was scheduled to begin at 9:00 a.m. See Finding of Fact 13.

The Decision due date was extended by agreement to June 15, 2004, and the Decision was issued on that date.

FINDINGS OF FACT

1. Student is *** years old and recently completed *** in TISD. He has been diagnosed with attention deficit hyperactivity disorder (ADHD). He is highly distractible and has difficulty staying on task. He took Ritalin for a trial period several years ago, but it was discontinued, and he currently does not take medication for ADHD.
2. Mr. *** was Student's adaptive behavior classroom teacher for the 2003-2004 school year. Student attended regular PE and band classes, and was mainstreamed for part of the year in Ms. ***'s regular science and social studies classes. Student is bright and can learn readily when he is on task. Mr. *** and Ms. *** observed behaviors that interfered with Student's education, including inattentiveness, extreme distractibility, angry outbursts, work refusal, profanity, defiance, aggressive acting out, poor social skills, inappropriate sexual remarks, withdrawal and refusing to speak to teachers, throwing things, and shoving things off his desk. He sometimes refused to engage in schoolwork for an entire day. Student was very reluctant to leave the adaptive behavior classroom to go to his mainstream classes. He also refused at times to do things he normally enjoyed, such as attend band, and he refused to go on an end-of-year field trip to a science museum. His grades went up and down, and were declining at the end of the school year, especially in his mainstream classes. He performed better academically in the adaptive behavior classroom, and was able to pass science and social studies based on the grades he received from Mr. *** in those subjects. He passed *** grade and was promoted to *** grade.
3. Mr. *** [the adaptive behavior classroom teacher] is concerned that Student will have extreme difficulty coping with the distractions of *** in Fall 2004, and fears that he will be considered a discipline problem in that environment. Ms. *** [the regular science and social studies teacher] believes Student is not ready to handle the responsibility of multiple teachers and classrooms.
4. Ms. *** is a licensed specialist in school psychology (L.S.S.P.) for TISD. She had 13 counseling sessions with Student during the 2003-2004 school year, focusing on relaxation strategies, problem-solving, and identifying potential triggers for his outbursts of anger at school. Student may be suffering from anxiety and/or depression in addition to ADHD, and needs psychological testing to rule this out.

5. Ms. *** is a diagnostician who performed Student's IQ and achievement testing in March 2004. Student was cooperative and seemed to enjoy most of the testing, but he became very frustrated with portions of the testing requiring the use of short-term memory. The testing indicates he does not have learning disabilities. He needs further testing to ascertain the reasons for his behavioral problems.
6. Student previously attended Alvin ISD. Following a psychological evaluation performed in October 2000, the Alvin ISD admission, review, and dismissal committee (ARDC) determined that he was eligible as a student with OHI based on ADHD. In September 2002, the Alvin ISD ARDC placed him in a self-contained adaptive behavior class for all content areas, with counseling provided as a related service.
7. On November 26, 2002, Student was enrolled in *** School in TISD. The district scheduled the transfer ARDC meeting for Student several times due to the parent's nonattendance. It was scheduled for December 11, 2002, then for December 18, 2002, and finally for January 14, 2003. The parent was given notice by telephone and in writing, but did not attend any of the meetings. The first two meetings were cancelled due to her nonattendance. The ARDC meeting went forward on January 14, 2003, without Parent. The ARDC adopted the adaptive behavior placement and IEPs based on records from the previous district.
8. TISD made several attempts to obtain parental attendance at Student's annual ARDC meeting and pre-assessment review in Fall 2003. It was scheduled for September 23, 2003, October 1, 2003, and October 21, 2003. Parent failed to attend any of the meetings, and the first two were cancelled due to her nonattendance. The ARDC meeting went forward on October 21, 2003, at 8:30 a.m., which was the time requested by the parent, but the parent did not attend. The committee reviewed eligibility and requested new evaluation data. A functional behavioral assessment was developed, and the behavior intervention plan was reviewed. The committee determined that Student would receive twelve 30-minute sessions of counseling per year. Due to his declining performance in general education science and social studies classes, the ARDC placed him full-time in Mr. ***'s adaptive behavior class.
9. An ARDC meeting was held on December 3, 2003, in which Parent participated by telephone. Student's [alternative behavior classroom] teacher, Mr. ***, reported behaviors of shutting down, withdrawing, verbal defiance, and tantrums, also noted were 29 tardies. The ARDC requested parental consent for achievement testing, IQ testing, psychological consult, and OHI eligibility. Parent requested that Student be dismissed from special education and returned to all regular education classes, but the other committee members disagreed with this request due to his behaviors. It was explained to Parent that he could not be dismissed from special education without further testing, but Parent refused consent for any evaluations by TISD.
10. The ARDC attempted to meet again on January 15, 2004, but when Parent finally was

reached after several attempts by telephone, she requested that the meeting be rescheduled. It was rescheduled and took place on January 27, 2004, with Parent participating by telephone. She again refused to consent to any evaluations. In March 2004, after meeting with Ms. ***, Parent consented to updated IQ and achievement testing, but continued to refuse consent to any type of psychological testing.

11. TISD filed a request for due process that was received by the Texas Education Agency on February 4, 2004, seeking an order to override lack of parental consent for evaluation. In a prehearing conference held on February 26, 2004, the parties agreed to postpone the hearing to allow Parent and Ms. *** to meet and attempt to reach resolution. Parent met with Ms. *** and/or other staff approximately five times during March, April, and May, 2004, to work out a trial mainstreaming arrangement in science and social studies. The trial mainstreaming in those classes began in April 2004 and continued till approximately the end of the school year.
12. Parent agreed to attend, but did not attend, a meeting on May 13, 2004, with Ms. *** and staff from the *** where Student will attend next year. She agreed to attend, but did not attend, a meeting on May 14, 2004, with the school psychologist; and she continued to refuse to consent to a psychological evaluation.
13. Parent did not attend the due process hearing on June 2, 2004, which was scheduled to begin at 9:00 a.m. She telephoned the special education director prior to 9:00 a.m. and stated that she was ill and would not attend the hearing. She did not request a continuance from the Hearing Officer on the basis of illness. The hearing was delayed for 1.5 hours because Parent told the special education director that she would provide signed consent for evaluation that morning. She agreed to sign and fax the consent for evaluation forms to the district by 10:00 a.m., and was informed by the special education director that the hearing would proceed if consent was not received by 10:00 a.m. At 10:30 a.m., no consent or other communication had been received from Parent, and she could not be reached by telephone. The special education director e-mailed Parent that the hearing would go forward. The hearing commenced at 10:30 a.m.

DISCUSSION

Student's last full individual evaluation was performed by Alvin ISD in October 2000. TISD has attempted to gain consent from his mother since Fall 2003 to perform an updated full individual evaluation, including a psychological evaluation. Parent did consent to IQ and achievement testing in March 2004, but she continued to refuse to allow a new psychological evaluation. In addition, as of the date of the hearing, she still had not provided updated medical information for OHI eligibility.

TISD has demonstrated good reason to perform a psychological evaluation of Student. His teachers have noted behaviors that interfere with his education, including inattentiveness, extreme distractibility, impulsiveness, angry outbursts, work refusal, profanity, defiance, aggressive acting

out, poor social skills, inappropriate sexual remarks, and withdrawal and refusing to speak to teachers. The TISD LSSP who provided counseling to Student testified that ADHD may not be his only disability, and stated that an evaluation should be done to rule out problems with anxiety and/or depression. Both his adaptive behavior teacher and his mainstream teacher from last year expressed grave doubts about his ability to cope with mainstreamed *** classes this fall due to his behavioral problems. Student needs further evaluation so that his behavior problems can be appropriately addressed.

TISD is required to evaluate Student in all areas of suspected disability. 34 C.F.R. §300.532 (g). A school district is required to re-evaluate a child at least once every three years, and more often if warranted. 34 C.F.R. §300.536. Student's ARDC reviewed existing evaluation data and determined that updated evaluation data is necessary. Although the district now has current IQ and achievement test scores, the existing data is not adequate to assess the effect of Student's ADHD on his education and whether he has disabilities other than ADHD; to determine whether he continues to need special education and related services; and to determine whether his special education program needs to be modified to address his individual needs, meet his IEP goals, and participate, as appropriate, in the general curriculum. See 34 C.F.R. §300.533 (a).

Parent requested that the ARDC dismiss Student from special education. This request also triggers a need for further evaluation. The decision to dismiss a child from special education cannot be made prior to obtaining current evaluation data. 34 C.F.R. §300.534 (c) (1).

TISD is entitled to pursue a new psychological evaluation and information concerning Student's OHI eligibility, despite lack of parental consent. Parent has indicated to the district that Student is seeing a private psychologist. The ARDC must consider any outside evaluation provided by the parent in the future. However, the district is entitled to perform its own evaluation using its own evaluators. *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995).

CONCLUSIONS OF LAW

1. Student resides in TISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, as amended.
2. TISD has a legal obligation to maintain current evaluation data for Student in all areas of suspected disability. The district must re-evaluate Student whenever necessary, and at least once every three years. 34 C.F.R. §300.532(g); 34 C.F.R. §300.536.
3. TISD has demonstrated a need for further evaluation. Student's behavioral problems have a severe impact on his ability to benefit from his education, and raise a question as to whether he may have a disability in addition to ADHD. Student's last psychological evaluation is more than three years old. The existing evaluation data is not adequate to determine the nature of his current disability or disabilities; to determine whether he continues to need special education and related services; and to determine whether his

special education program needs to be modified to enable him to meet the IEP goals and participate, as appropriate, in the general curriculum. 34 C.F.R. §300.533; §300.534 (c)(1).

4. TISD made strenuous efforts to obtain parental consent for evaluation through numerous ARDC meetings and staff meetings with the parent. When a parent refuses consent for evaluation, the district is entitled to pursue the evaluation by using due process procedures to obtain an order overriding lack of parental consent. 34 C.F.R. §300.505 (b).
5. TISD is entitled to proceed with a full individual evaluation of Student, including a psychological evaluation, despite the lack of parental consent. 34 C.F.R. §300.505 (b); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995); *Palestine ISD v. Student*, TEA No. 278-SE-0501 (2001); *Alief ISD v. Student*, TEA No. 287-SE-0503 (2003); *Student v. Texas Youth Commission*, TEA No. 360-SE-0801 (2001).

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 **GRANTED**.

It is **ORDERED** that TISD may proceed to evaluate Student in all areas of suspected disability, including a psychological evaluation, despite his parent's refusal to provide consent.

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

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

SIGNED this 15th day of June, 2004.

/s/Janis Herd _____
Janis Herd
Special Education Hearing Officer

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SYNOPSIS

Issue 1: Whether TISD is entitled to evaluate a student in all areas of suspected disability, including a psychological evaluation, despite his parent’s refusal to consent to such evaluation.

Held: For Petitioner TISD. Districts are required to re-evaluate students at least once every three years. When a parent refuses consent for evaluation, the district is entitled to pursue the evaluation by using due process procedures to obtain an order overriding lack of parental consent. The district demonstrated a need for further evaluation. The student’s behavioral problems have a severe impact on his ability to benefit from his education, and raise a question as to whether he may have a disability in addition to ADHD. His last psychological evaluation is more than three years old, and the existing evaluation data is not adequate to determine the nature of his current disability or disabilities; to determine whether he continues to need special education and related services; and to determine whether his special education program needs to be modified to enable him to meet the IEP goals and participate, as appropriate, in the general curriculum.

Citations: 34 C.F.R. §300.505 (b); §300.532(g); §300.533; §300.534 (c) (1); §300.536.