
DOCKET NO. 279-SE-0404

STUDENT	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENT	§	
	§	
VS.	§	HEARING OFFICER
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

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 April 20, 2004, assigned to the undersigned Impartial Hearing Officer, and set for hearing on May 12, 2004, with a decision deadline of June 4, 2004. A telephone pre-hearing conference convened on May 11, 2004, in which the parties clarified the nature of Petitioner’s complaints and relief request. Counsel in the pre-hearing conference identified scheduling difficulties that merited a continuance of the trial setting and an extension for good cause of the decision due date. The matter was set for hearing on June 3, 2004, with a decision deadline of June 28, 2004. Thereafter Respondent notified the undersigned and opposing counsel of the non-availability of certain prospective witnesses on June 3, 2004, and Petitioner’s counsel also requested a continuance, due to illness. Counsel agreed to re-schedule the hearing, which then was re-set for September 9, 2004, with a decision due date of September 26, 2004. The hearing convened as scheduled. All evidence was received on September 9, 2004, and the record was closed on that date except for final argument, which was scheduled by agreement for written submission on September 30, 2004. The decision deadline was extended to October 21, 2004. The record closed upon the submission of final argument on September 30, 2004. The Decision of the Hearing Officer was filed in the record and mailed to the parties on October 21, 2004. Throughout the proceedings Petitioner Student was represented by Christopher Jonas, Attorney at Law, and Respondent Houston I.S.D. by Hans Graff, Attorney at Law.

STATEMENT OF THE CASE

On its face, Petitioner’s complaint is straightforward insofar as it involves only one issue. As disclosed in the Request for Hearing and clarified in the Pre-hearing Conference, Petitioner alleged that Houston ISD (“HISD”) violated Petitioner’s right to a free, appropriate public education in the following manner:

1. Failure to draft an IEP for Student (“Student”) to address her educational needs in the area of Orchestra;
2. Failure to complete Student’s IEP commenced on March 12, 2004.

Petitioner requested as relief an order for HISD to complete the IEP commenced on March 12, 2004, and draft an IEP for Student for Orchestra.

FINDINGS OF FACT

1. Student is an IDEA-eligible student residing within and enrolled in HISD. Parent is Student's parent. Stipulation
2. Student's IDEA eligibility classifications are Other Health Impaired due to attention-deficit hyperactivity disorder, and Speech Impaired. Student has a mixed receptive-expressive language disorder. She also has weaknesses in reading that are addressed by special education. Transcript Page(s) ("Tr.") 18-20; Petitioner's Exhibit ("P")-2, Respondent's Exhibit ("R")-3
3. In the 2003-04 school year at issue, Student attended *** grade at *** School in HISD, where her course schedule included Science, Social Studies, Reading, Math, and Orchestra. Orchestra is a general education class in the *** School fine-arts magnet program. Although Orchestra is an elective course at ***, students at the school are required to take some type of music class. R-10; Tr. 18, 23
4. Music reading is important in Orchestra. Students can be successful at beginning and intermediate level Orchestra without good music reading skill, but it is not possible to advance beyond an intermediate level without proficiency in reading music. Tr. 127-129
5. Orchestra at *** is not organized strictly by grade level. Students progress at their own rate regardless of grade placement, and become eligible for various activities based on their progress independent of grade placement. While there is not a grade-level curriculum as such for Orchestra, skills are taught and assessed in three principal areas: technical command of the musical instrument, skill in discriminating musical sounds and playing in tune, and music reading. Proficiency in music reading is not necessary to earn a passing grade in Orchestra and participate at the beginning and intermediate levels. However, it is necessary to participate along with advanced level students playing the most difficult and demanding music. Tr. 158-159
6. Student began Orchestra in *** grade at *** and continued Orchestra into *** grade. Student's Orchestra teacher voiced some concern to Parent during Student's *** grade year, about difficulty he believed Student experienced when attempting to read music. Student demonstrated good auditory discrimination and recall, and made progress on her playing technique, but did not show more than minimal improvement in music reading. Student's Orchestra teacher suggested to Parent considering a different class for Student's *** grade year, a class like Choir that places more emphasis on Student's strengths and less emphasis on reading. Tr. 125-130
7. Student had IEP modifications for Orchestra. Her Orchestra teacher was familiar specifically with Student's modifications, and generally with the idea of implementing modifications for students with disabilities in Orchestra. Tr. 145-146, 155-158
8. Parent initially disagreed with the Orchestra teacher's recommendation for changing Student's music class in *** grade, believing that it would be worthwhile to give Student more time to see if she could make additional progress in Orchestra. Tr. 21-22
9. In spring 2004 Student's Orchestra teacher felt that Student had developed sufficient technical skill that it was appropriate to begin working more with her music reading skills. Tr. 135-144
10. Student continued having difficulty reading music in ***-grade Orchestra, showing minimal improvement in this area. As the spring 2004 semester went on, Student's difficulty in Orchestra became a source of stress and frustration for Student. This was apparent to her Orchestra teacher and was a concern for Parent. Tr. 21-29, 34, 125, 165; P-2
11. Student's Orchestra teacher also noted that Student seemed worried in late spring 2004 that she might go on to be the only ***-grade student in intermediate level Orchestra. As it turned out,

there would have been several ***-grade students alongside Student at the intermediate level had she remained in Orchestra. Tr. 167

12. Parent asked the staff at ***, and later on asked Student's ARD Committee,¹ to have Student removed from Orchestra and placed in Choir instead. For a variety of practical as well as administrative reasons, it was not possible to change Student's music class in mid-semester. Therefore Parent asked Student's teacher to have HISD develop an IEP for Orchestra to help Student with music reading. Student's ARDC convened on 3/12/04 and considered options for Orchestra, including Parent's request for an IEP to help her with music reading. P-2, R-10; Tr. 21-29, 52, 126, 169-171
13. Student's Orchestra teacher brought to Student's 3/12/04 ARD meeting, and offered for consideration, a written list of interventions for helping Student progress further in Orchestra by improving her music reading. These interventions generally resembled the informal modifications that the Orchestra teacher was using already to help Student, whose strengths lay in auditory learning rather than in reading. The interventions included mini-tutorials in class, close proximity to teacher, extended time, combining auditory learning with note reading, modified seating, and large print music where possible to address Student's complaint about not being able to see the sheet music. Student's Orchestra teacher submitted these and additional suggestions to the ARD Committee in the form of a written music reading improvement plan that was attached to the 3/12/04 ARD Committee documentation but not made part of Student's IEP at the 3/12/04 meeting. P-2
14. Parent did not believe that Student could benefit from the suggestions offered by Student's Orchestra teacher, at least not in the form that these were presented. Among other things, she wanted music reading skills broken down into shorter segments to accommodate Student's disability, and included in the IEP as goals and benchmarks for measuring Student's progress. The members of Student's ARD Committee all agreed to recess the 3/12/04 so that Student's special education teacher could work with the Orchestra teacher to adapt strategies for Student's IEP. Tr. 23-25, 57-64; P-2, R-3
15. Student's ARD Committee agreed unanimously at the meeting on 3/12/04 to develop an IEP for Student in Orchestra, including strategies to monitor and measure her progress in music reading. Tr. 32-33; P-2
16. Student's 3/12/04 ARD Committee re-convened on 3/29/04, at which time Student's special education teacher explained that based on research and consultation with HISD administration, it was not necessary to develop IEPs for Student for extracurricular activities, beyond addressing her ability to participate in such activities. Student's special education teacher also informed the Committee that Student was "learning the same skills as all of the Orchestra students are learning" but at different levels. Student's Orchestra teacher informed the Committee that Student was showing improvement in music reading as well as in technique, and was qualified to play in the spring concert. P-2; Tr. 38
17. Parent did not agree with HISD's position, that Student did not need an IEP for Orchestra. The ARD Committee agreed to recess again in order to give further consideration to Parent's request for an Orchestra IEP. P-2
18. Student's ARD Committee re-convened on 4/7/04. HISD maintained that no IEP could be written for Orchestra because that is a content area for which no assessment is available, as would be the case for reading, writing, or math. Consequently even though Student's ARD Committee had promised to develop an IEP for Orchestra, HISD's subsequent discovery that no assessment is available for Orchestra made it impossible to proceed further because without assessment, it is impossible to establish a need for special education. HISD additionally expressed that because

¹ "ARD" refers to the Admission, Review, and Dismissal Committee, the group of persons designated under Texas law to fulfill the responsibilities of the IEP Team as set out in 34 C.F.R. 300.344-300.346. 19 T.A.C. §89.1050.

Student's Orchestra teacher had goals in place for Student and was implementing modifications in an attempt to address her music reading difficulties already, an IEP would not have any practical effect. R-10

19. Parent disagreed with HISD's position at the 4/7/04 ARD Committee meeting, because she did not believe HISD's report about Student's progress in Orchestra was credible, and because she wanted the Orchestra teacher's reading improvement modifications to be enforceable IEP requirements, and not just discretionary with the teacher. R-10
20. In the fall 2003 semester *** staff had reason to suspect that Student needed glasses for reading. Student subsequently got a prescription for eyeglasses, and began wearing eyeglasses in school some time during April 2004. Tr. 51, 94-95
21. Student passed ***-grade Orchestra, despite her difficulties reading music and despite the lack of an IEP. Parent believed that HISD discriminated against Student because of her disability when it refused to write an IEP for her in Orchestra, because the district was indifferent to whether she made progress or not. R-11; Tr. 33-36
22. Student currently is in Choir as her music elective for *** grade. Tr. 24

DISCUSSION

IDEA requires among other things that an eligible student's IEP be developed in accordance with prescribed procedures, be delivered in a collaborative and coordinated manner, and produce meaningful academic and non-academic benefits. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997). A school district's proposed IEP is presumed appropriate, and the petitioner in a case such as this has the burden to prove by a preponderance of evidence that the student's IEP was not developed according to IDEA procedures, or that the IEP did not provide the student with a free appropriate public education ("FAPE") in the least restrictive environment. Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983). A school district's substantial failure to satisfy IDEA's substantive or procedural requirements may, if proven, merit prospective or compensatory relief as necessary to provide FAPE. 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 (9th Cir. 1994).

In brief, the sequence of relevant events concerning Student's issues with Orchestra is as follows. Student's parents, despite concern expressed by Student's Orchestra teacher, elected to continue Student in Orchestra in *** grade. Student showed progress during *** grade, particularly in regard to technique. However, she encountered increasing stress and frustration in the spring 2004 semester, after the Orchestra teacher began to put more emphasis on music reading so as to advance Student beyond the intermediate level. There is no dispute about the appropriateness of trying to advance Student in Orchestra in this manner, even though advanced-level performance was not necessary for Student to receive a passing grade in Orchestra, and indeed there were a number of ***-grade students in intermediate-level Orchestra at the time of the hearing. But Student made barely minimal progress in music reading, essentially no progress, and both the Orchestra teacher and Student's parents noticed with concern the child's increasing stress in spring 2004. Parent then sought to have Student moved from Orchestra to Choir, as the Orchestra teacher had suggested before, but the *** administration balked because of several practical problems with a mid-semester transfer, not the least of which was that Student had already qualified to perform in the spring concert in Orchestra.

Parent asked Student's ARD Committee to effect Student's transfer out of Orchestra, but the Committee did not believe it could do that. Parent consequently requested an IEP in Orchestra so that music reading could be broken down in smaller units of instruction to accommodate Student's disability, and so that Student would have measurable objectives or benchmarks to track her

progress. Parent also wanted the additional modifications that her Orchestra teacher had been using re-stated in Student's IEP because she did not agree with some of them, and also wanted them to be enforceable through IDEA procedural safeguards. Both the special education teacher and the Orchestra teacher found this to be a reasonable request that could be fulfilled after further collaboration between the Orchestra teacher and Student's special education teacher, and an IEP proposed in a later meeting. Indeed, the Orchestra teacher came to the meeting prepared to offer a new set of modifications, and it is reasonable to infer that the Orchestra IEP issue was expected to come up at this meeting.

Two ARD Committee meetings convened thereafter, but HISD never proposed an IEP for Student in Orchestra. School officials offered a series of different reasons why. Initially, HISD took the position that Student was not entitled to an IEP in Orchestra because Orchestra is an extracurricular activity for which the District's only obligation is to provide equal opportunity of participation. This might be a correct analysis, had Orchestra been an extracurricular activity. HISD next told Parent that the District was not obligated to write an IEP in an area of instruction where no assessment was available, since without a curriculum-based assessment it is impossible to establish an educational need for special education support. But highly credible testimony of the Orchestra teacher did not bear out the assertion that progress in Orchestra is impossible to assess. While Orchestra does not fit the grade-level curriculum structure of core content courses, the teacher's testimony established that Orchestra is indeed a highly organized content area with identifiable domains and levels of progression. HISD also told Parent that no IEP was needed for Student's modifications because the Orchestra teacher was already modifying for her, and so an IEP would add nothing. This plainly is not true, because IEPs are written precisely to afford assurance that supplementary aids and services are individualized based on student needs as determined by the IEP team with parent input. IEP modifications also involve procedural safeguards and assurances that are not present when general education classroom strategies are left solely to teacher discretion. Finally, HISD told Parent that Student was showing improvement in Orchestra just like the other students and so no educational need existed. HISD apparently had discovered at this juncture that it was indeed possible to assess Student's progress in orchestra. But as it turned out, Student made no meaningful progress in music reading skills.

The documentation of Student's ARD Committee and the testimony at hearing tends to establish more likely than not that HISD's refusal to follow up on writing an IEP for Student in Orchestra was based on administrative considerations and not on an individualized determination of Student's needs by the ARD Committee including due consideration of input from Parent. The determination of the 3/12/04 ARD Committee to write an IEP for Student to include measurable goals and objectives for Orchestra was binding on HISD and could not be overruled by District administration. See Letter to Anonymous, 20 IDELR 1222, 20 LRP 2389 (OSEP 1993) (interpreting 34 C.F.R. §300.346). Thus, HISD violated the cited regulation.

This is not, as HISD argues, a situation where the ARD Committee modified its position based on evaluation of the child's changing needs and circumstances between 3/12/04, and 3/29/04 or 4/7/04. The 3/12/04 ARD Committee was properly constituted, and the key HISD stakeholders already were quite familiar with Student, having worked with her directly. As far as the record discloses, nothing about Student changed after 3/12/04. HISD's refusals were based on specious or conclusory predicates, and facially not based on assessment of any changing needs or circumstances of the child. Furthermore, HISD was not surprised by Parent's request when the Committee convened on 3/12/04. Her Orchestra teacher came prepared to present and discuss a written list of additional modifications. Had the Committee needed to plan further evaluation in order to determine educational need, that, and not an IEP, could have been promised.

Regarding Petitioner's relief requests, the District correctly argues that Fifth Circuit has somewhat curtailed a petitioner's entitlement to relief for school district procedural violations. The Court explained in Adam J. v. Keller I.S.D., 328 F.3d 804 (5th Cir. 2003), that IEP procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of educational opportunity or infringe the parent's opportunity to participate in the IEP process. The evidence in Student's case is persuasive that Parent's right of participation was infringed. However it is not evident that Student was deprived of educational opportunity, that is to say, meaningful educational benefit, during her ***-grade year in Orchestra. Student had an excellent teacher in Orchestra who was sensitive to Student's needs, and so it comes as no surprise that Student and Parent wanted to continue with this teacher. Student was performing at an intermediate level in Orchestra, made progress in technical skills during the 2003-2004 school year, and made sufficient progress to pass Orchestra and to participate in concert. She did begin to exhibit behavioral manifestations, and she may well have needed further special education interventions to be successful in ***-grade Orchestra. But as the record shows, she progressed enough in *** grade to receive meaningful benefit in all of her classes at *** including Orchestra. Adam J., supra, notwithstanding, IDEA does not require school districts to maximize educational benefit for eligible students. Board of Educ. v. Rowley, 458 U.S. 176 (1982).

Petitioner has requested as relief that HISD be ordered to convene an ARD Committee and complete the IEP commenced on 3/12/04 including drafting an IEP for Student in Orchestra. Petitioner in her closing argument also requested compensatory educational services. With respect to the latter, it is significant that such relief was not included in Petitioner's hearing request or statement of relief at the pre-hearing conference, and therefore is denied for that reason. Additionally, and in the alternative, given the evidence regarding Student's educational history during *** grade, no award of compensatory relief is appropriate.

Petitioner's claim for relief in the form of an order to write an IEP for Orchestra, as promised by the ARD Committee, has been mooted by Student's change from Orchestra to Choir for *** grade. This is the change Parent originally asked for, the refusal of which in part led to this hearing, and it was recommended by her Orchestra teacher. This Hearing Officer declines to order Student back into Orchestra with an IEP for that subject. It is, however, necessary for the ARD Committee to fulfill its obligation to Student by reconvening to examine Student's present performance and educational needs, if any, in her music class.

CONCLUSIONS OF LAW

1. Houston I.S.D., is a local education agency and a political subdivision of the State of Texas, and 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 Houston I.S.D. must offer a free, appropriate public education in the least restrictive environment. 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982).
3. Petitioner sustained her burden of proof to establish that Houston I.S.D. violated 34 C.F.R. §345 by failing to provide a service that was scheduled by Student's ARD Committee.
4. Petitioner failed to sustain her burden of proof to establish that Houston I.S.D. failed to confer positive educational benefits for Student during her ***-grade year.

ORDERS

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

IT IS ORDERED that Houston I.S.D. convene an ARD Committee within 15 school days of this Order and consider Student's present performance and educational needs in Choir.

IT IS FURTHER ORDERED that Houston I.S.D. shall timely implement this decision within 10 school days (except as otherwise specifically provided herein) 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.

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

SIGNED this 21st day of October 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

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VS.	§	HEARING OFFICER
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE: Whether Houston I.S.D. failed to implement the decision of Petitioner's ARD Committee.

CITATION: 34 C.F.R. §300.346.

HELD: For the Petitioner.