

DOCKET NO. 218-SE-0319

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by next friend and grandparent (hereinafter “Petitioner” or “the student”), filed a request for hearing on March 19, 2019. Respondent filed a counterclaim on June 11, 2019. Petitioner alleges that the Ysleta Independent School District (hereinafter “the district”) failed to provide the student with a free, appropriate public education (“FAPE”) as required by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*, and related statutes and regulations. Petitioner sought as relief an order requiring the district to provide an appropriate private placement for the student at the district’s expense, compensatory educational services (including Applied Behavioral Analysis [“ABA”] and tutoring) for the student, extended school year services, and an award of attorney’s fees.

Respondent in its counterclaim alleged that the current homebound placement provided in the student’s individual education plan (“IEP”) which had been requested by Petitioner was inappropriate. The district maintained that homebound placement was not the least restrictive environment (“LRE”) for the student and that an appropriate placement to meet the educational needs of the student was available on a school campus within the district. The district sought an order removing the student from the homebound placement and providing for direct educational services on a school campus.

Counsel for the parties stipulated at the hearing that the one-year statute of limitations for their claims applied. 19 T.A.C. 89.1151(c). [Transcript Pages 8, 25-26]

The case was set and reset for good cause on a number of occasions as the parties attempted mediation unsuccessfully and prepared for hearing. On July 22, 2019, counsel for Petitioner filed a pleading entitled, "Petitioner's Stipulation of Nonsuit and Dismissal." In a prehearing conference on August 7, 2019, counsel for the parties discussed the proposed nonsuit of Petitioner's claims and the remaining counterclaim of the district. The district insisted that the matter should proceed to hearing on its counterclaim alone. Counsel for Petitioner advised the Hearing Officer that the motion for nonsuit was withdrawn. Petitioner filed a motion withdrawing the nonsuit the day of the prehearing conference. On July 9, 2019, the Hearing Officer issued an order calling for a hearing on the merits on both parties' claims to proceed on August 21 and 22, 2019.

Petitioner was represented by Terry P. Gorman of the Gorman Law Firm in Austiustiyespond

Findings of Fact

1. The student attended *** within Ysleta Independent School District and began *** at the age of *** in the 2017-18 school year. [Respondent's Exhibits ("R.") 2; Transcript Pages ("T.") 12, 13]

2. The student lives with the student's grandparent in El Paso within the Ysleta Independent School District. At times, the student's ***. [R. 2; T. 11]

3. The student is qualified for special education and related services under the eligibility criteria of autism and speech impairment. The district conducted a full individual evaluation ("FIE") for the student in August 2017 and made an addendum to the evaluation in December 2017. The evaluation included a number of objective assessments which are scientifically based and appropriate for proper evaluation of the student. The evaluation was properly administered by knowledgeable professionals. [R. 2-8; T. 12, 88, 89]

4. The student functions in a below average range in intelligence assessments but performs in the average range in nonverbal measures. The student's grandparent believes that the school's assessments of the student reflect a lower level of cognitive abilities than the student actually possesses. [R. 2; T. 12-14, 94, 109]

5. An admission, review, and dismissal ("ARD") committee for the student was convened on September ***, 2017, which developed an IEP and determined the educational placement for the student. The student was placed in a *** class in ***. The student received speech therapy, autism support services, occupational therapy, a behavior intervention plan ("BIP"), and in-home training services. At the end of the school year, *** was added as a related service for the student. [R. 4, 7; T. 13, 59, 107]

6. The student's grandparent complained to school officials during the fall of 2017 about the student's classroom teacher. The grandparent believed that the student was bullied by

classmates and mistreated by school personnel. The grandparent thought discipline for the student was improperly administered and believed the student suffered ***. The grandparent's complaints were investigated by campus personnel. They were not substantiated. The grandparent's complaints and concerns were addressed at three ARD committee meetings for the student in January, April, and May 2018. [R. 5, 6, 7; T. 14, 16, 21-29, 96, 97, 147]

7. The student's grandparent asked at an ARD meeting on January ***, 2018, for a change in the student's placement to the "****" classroom on the same campus. The *** class is a regular education class with several special education students taught by a regular education

the student in the *** class. The committee also discussed the student's number of absences during

writing, math, ***, adaptive behavior and social skills, and speech/language. The committee members explained to the student's grandparent that the student is required to work on approved curriculum adopted by the State in any placement which is facilitated for the student – including homebound. [R. 7; T. 147-151, 261-262, 269, 277]

14. The district accommodated concerns expressed by the student's grandparent during the 2017-18 school year on many occasions and in various ways. The school assigned a different autism specialist when the grandparent complained; the ARD committee provided a *** evaluation and ***; the district provided an additional aide in the classroom, and to please the grandparent the district adjusted the student's educational setting to a placement which did not serve the student well. [R. 5-8; T. 99-100, 158-160, 170-171]

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18. The student's grandparent refused consent for district personnel to contact the physician or the physician to contact the district. District personnel did not confer with the physician at any time. [R. 10; T. 193]

19. The grandparent requested homebound services for the student at the ARD on October ***, 2018. Members of the ARD committee expressed concerns about the propriety of homebound placement because it is highly restrictive and could prevent the student with opportunities to make progress academically and with social skills. The grandparent insisted on homebound services based upon the form submitted by the physician and the ARD committee developed an IEP providing eight (8) hours of homebound services each week. [R. 11; T. 152-156]

20. Based upon the IEP, the district sent two providers (teachers or service providers) to the student's home each week. Related services including speech therapy were also provided to the student. [R. 21, 23, 28; T. 156-158]

21. Experienced personnel from the district provided the services but the student's grandparent insisted upon *** in the methods, timing, content, and scoring of the student's work. The grandparent consistently ***. The school personnel, familiar with best homebound practices, were frequently met with refusal, criticism, and obstruction ***. [R. 21-26; T. 164, 207-209, 226-229, 240-242 & 255-257]

22. The homebound services program afforded the student provided an opportunity for the student to make academic progress – despite the interference by the student's grandparent. At the ARD meeting for the student on June ***, 2019, the committee moved the student from *** level IEP goals and objectives to *** goals and objectives for the 2019-20 school year. [R. 3, 14; T. 110-111, 166-169, 223, 298, 300, 308]

23. The ARD committee on June ***, 2019, offered an extended school year (“ESY”) program for the student to allow the student to make continued educational progress and prevent

problems with regression over the summer. The student, however, spent most of the summer *** in San Antonio and did not take part in the ESY program (including related services) which was available within the district. [R. 8, 16, 17]

24. The actions of the student and grandparent during the 2018-19 school year show that the student was not confined at home for serious medical reasons. The student and grandparent frequently left the home for outings in the community and travel outside of El Paso. [R. 17; T. 179]

25. The school records presented by the district are credible documentation of the district's efforts to provide FAPE for the student. The district's efforts are supported by the reasoned and credible testimony of school personnel in all stages of educational services provided – or offered – to the student and grandparent. [R. 1-9, 11-29, 31-32; T. 87-142, 145-198, 202-250, 252-273, 287-301, 310-322, 330-337]

26. District personnel who provided homebound direct instruction and related services for the student found their efforts for the student unreasonably controlled or obstructed ***. District professionals including homebound teachers, autism specialists, and speech providers documented their problems in providing educational services ***. [R. 21-25, 28; T. 206-230, 310-324, 330-337]

27. School personnel providing services for the student in the homebound program unanimously agreed that the student showed no signs of physical, emotional, or medical concerns which prevented the student from accessing services in a far less restrictive environment. [R. 14; T. 117-118, 192-195, 225, 260, 323]

28. The student's grandparent on many occasions cancelled services on agreed dates for instruction and the student missed instruction and related services because the student was

“absent” – for educational purposes – from school during homebound services. [R. 19, 22-24; T. 331-332]

29. Based on the record of homebound services and the professional opinions of professionals with direct knowledge of the student’s needs, the proposed placement *** – in the absence of a compelling change in the student’s circumstances since the hearing – would provide appropriate educational services for the student in the least restrictive environment. [R. 7, 13, 14; T. 103-106, 321]

Discussion

Students in public school in Texas who qualify for special education are entitled to a free appropriate public education under the provisions of IDEA, 20 U.S.C. § 1400, et seq., and related statutes and regulations. The U.S. Supreme Court has defined the standards for FAPE in Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) and Endrew F. v. Douglas County School District, 137 S.Ct. 988 (2017).

The Fifth Circuit has developed the elements for FAPE in Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), as required by 34 C.F.R. § 300.300, and 19 T.A.C. § 89.1055. The Court determined that there are four factors to determine whether a school district’s program provides a student with the requisite meaningful, educational benefit intended under the law. The factors are:

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The district's program for the student in this case has been properly individualized, is provided in a collaborative manner to the extent possible ***, and positive academic and non-academic benefits are demonstrated.

The program, however, has not been administered in the least restrictive environment in the 2018-19 school year because of the unilateral action of the student's grandparent. The evidence adduced at the hearing does not support the provision of homebound instruction for the student.

In unusual situations like this one, courts have concluded that districts are "not obligated to accede to the parents' demand for homebound instruction simply because they presented a physician's statement authorizing this type of educational setting." Alcoa City Schs., 117 LRP 47632 (SEA TN 2017). The student's grandparent has refused consent for the district to confer with the student's physician and for the physician to communicate with the district. The district has been prevented from working with the key stakeholders because the student's grandparent will not cooperate. Further, the homebound form from the physician calls for homebound services to extend only through September ***, 2019. That is, the period for homebound has expired. And the medical concerns for placement have been mooted.

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. Schaffer v. Weast, 126 S.Ct. 528 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F.2d 127 (5th Cir. 1993).

Petitioner failed to meet its burden of proof in challenging the student's placement for the 2017-18 and 2018-19 school years. Petitioner proved nothing about a need for private placement. The student was offered ESY but did not attend it. The district, however, met its burden of proof in challenging the propriety of the homebound placement insisted upon by the student's grandparent. The program afforded the student failed to meet requirements for LRE under IDEA and to meet the factor in Michael F. requiring placement in the least restrictive environment.

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this case is a final and appealable order. Any party