

STUDENT *b/n/f*
PARENTS,

Petitioner,

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BEFORE A SPECIAL EDUCATION

II.
DUE PROCESS HEARING ISSUES AND REQUESTED RELIEF

Based upon discussions and clarifications during the prehearing telephone conference, the Hearing Officer deemed the following issues relevant to this proceeding:

Petitioner's Issues

Petitioner bears the burden of proof and persuasion on the following issues:

- 1) whether Respondent failed to devise appropriate Individual Education Program[s] (hereafter "IEPs") for Student to meet his unique needs;
 - a. Respondent failed to provide Student with supplemental aids and related services (i.e.,

- l. Respondent failed to provide progress reports to the parents on Student's IEP goals and objectives at least as frequently as regular education students received mid-terms and grade reports;
- m. Respondent failed to use scientifically based, peer-reviewed methods of instruction with Student; and
- n. Parents were not made equal partners when the school failed to provide all records at the request of the advocate and the family prior to the ARD to adequately prepare for the ARD.

Petitioner seeks an order from the Hearing Officer requiring:

- 1) Respondent be ordered to provide to Student an appropriate IEP in the least restrictive environment that complies with all the procedural and substantive requirements of the IDEA and Texas special education laws to meet Student's unique needs;
 - a) Respondent will conduct a training session for teachers and staff member who work with Student for the fall and spring semesters of this school year, once each semester, for teachers and staff regarding the issues raised in this case;
 - b) Respondent will provide an independent, AT, OT, Speech and FIE at District's expense;
 - c) Respondent will conduct one half-day training session on the IDEA and state law during the fall semester and in the spring semester for parents in the school district who have special needs children. The meeting shall be open to the public and shall be advertised in the local newspaper and fliers shall be mailed to the homes of all students who have been found eligible for special education and related services in the school district;
 - d) Respondent shall provide the family with sign language classes for the remainder of the 2009-2010 school year, and through the summer of 2010 and then as deemed necessary by ARD;
 - e) Respondent will contract with a private services provider to perform a functional behavioral assessment and devise a behavioral intervention plan that the District agrees to implement;
 - f) Respondent will provide to Student a communication notebook that will travel between home and school and will include entries from the school about significant problems that occurred during the school day and any other information that the school and/or parents believe to be relevant to convey to the other to include what therapy Student had that day and what was discussed;
 - g) Respondent agrees to provide to the parent's written progress reports on Student's IEP goals and objectives every week;
 - h) Respondent agrees to provide the following accommodations and modification to Student: 1:1 aid and/or inclusion and a liaison;

- i) Respondent's staff who works with Student directly shall receive specialized in-service training that continues each semester for the next two years in sign language and whole language communication;
- j) Respondent shall provide extended year services to Student for the summer of 2010 and 2011 and otherwise as agreed to by the ARD committee;
- k) Respondent shall provide compensatory speech therapy with whole language to determine primary mode of communication;
- l) District shall design a program to address the disability of Down Syndrome as allowed by 20 U.S.C. 1401; and
- m) District will provide compensatory educational services due to the school's denial of FAPE.

Respondent's Issue

Respondent bears the burden of proof and persuasion on the following issue:

Because Petitioner has requested independent evaluations in the areas of assistive technology, occupational therapy, speech therapy, and full and individual evaluation, Respondent filed a counterclaim to defend its assessments. Respondent contends it prepared appropriate evaluations in each area where independent evaluations have been requested.

As relief, Respondent requests that Petitioner's request for the independent evaluations be denied.

III. THE DUE PROCESS HEARING

On June 1, 2010, the Hearing Officer convened the Due Process Hearing in the special education administrative offices of Keller Independent School District. Mr. Finch represented Petitioner; also appearing on Petitioner's behalf, were Student's mother, and Ms. Liva, a parent advocate. Ms. Bigbee represented Respondent, and ***, Director of Special Education, appeared as the District representative. The hearing lasted two days.

The parties called eight witnesses and presented documentary evidence consisting of approximately 59 exhibits contained in two extremely large, three-ring binders. The court reporter produced a 350-page transcript

on the occupational therapy assessment that was performed, and that Student would continue to demonstrate a need for continued direct services.

14. The November 3 ARD meeting was recessed and continued on November 11, 2009. The meeting ended without the parties reaching consensus. Specifically, Parent requested an independent educational evaluation. Parent's advocate reported they did not agree with the IEP goals, the placement in Life Skills, and the failure to provide an extended school year. A separate list was provided that was attached to the ARD meeting records. RX 1.
15. The *** – Revised (***) is a skills-based, criterion-referenced test that actually measured Student's skills. ***. By using a criterion-referenced test, a pattern of strengths and weaknesses can be seen more in-depth; therefore, it provides more relevant data for development of an IEP. Vol. 2, pp. 44-45.
16. The Texas ***, also a criterion-referenced test, differs from the *** in that it is criterion-referenced against state standards regarding the *** curriculum. Vol. 2, pp. 45-46. Although both tests are criterion-referenced, the *** would most closely identify Student's true strengths and weaknesses. Vol. 2, p. 46.
17. Student came to the 2009-2010 school year with existing IEP goals he had when he was in *** addressing cognitive skills, language skills, and self-care skills. Student continued work on those goals in the Life Skills classroom until a new IEP was developed. The goals were revised at the September 30, 2009, ARD meeting. One of the goals developed was: Listen attentively and engage actively in a variety of oral language experiences. Two objectives cascaded from that goal: (1) By January 2010 [Student] will participate in songs, rhymes, discussions and conversations using gestures and words 4 out of 5 times 40% of the time. (2) By June 2010 [Student] will participate in songs, rhymes, discussions, and conversations using gestures and words 4 out of 5 times 50% of the time. RX 5, RX 2.
18. Teacher B drafted many of the goals and objectives for Student in that IEP and others later in the school year. They read similarly to the one quoted above.
19. The instruction programs used in both the general education and special education classrooms in Respondent for Student are scientifically-based, peer-reviewed methods. Vol. 2, pp. 53-54.
20. Student has demonstrated academic progress since the beginning of the 2009 school year. One such example is a *** that he was not able to complete in September. By the end of school when he ***, the result was recognizable as ***. Vol. 1, pp. 118-119. RX 32, pp. 9, 40.
21. Additionally, Teacher B has seen non-academic progress in Student since the beginning of the 2009 school year. In the beginning he had difficulty understanding and following instructions, even simple things such as getting up and getting in line or going to the bathroom. Now Student knows and follows the routine without any difficulty. He is more engaged with the other children in the class. He is no longer over-cautious at recess. While he is still a very calm, well-mannered child, he will occasionally initiate conversation. Vol. 1, pp. 103-105.
22. Those benefits have carried over into Student's participation i

24. Teacher B sent regular reports home to Parent regarding Student's progress. The reports explained what activities Student worked on, what behaviors Student exhibited, and how his overall day went. The reports also informed Parent of school events and activities. These reports went to Parent on at least a weekly basis. Vol. 1, pp. 119-120; Vol. 2, pp. 225-226.
25. Student's IEP specified certain modifications and accommodations, such as check for understanding, allow extra time for oral response, simpl

report dated October 26, 2009; and 4) the eligibility classifications for Student. In discussing all of the general areas, the most important, overarching consideration is the standard to which Respondent is held.

Respondent must provide a free appropriate public education to Student, described as one that enables a student to obtain “some benefit” from her education. *Board of Education of the Hendrick Hudson Central School District v. Rowley*

information she did as the basis for drafting the goals and objectives to Student's IEP, Petitioner's complaints must be rejected.

Least Restrictive Environment

Much of Petitioner's focus during the hearing was on the provision of services to Student in the general education setting. The decision to move Student to Life Skills occurred with good reason, even though Parent disagrees. In *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036 (5th Cir. 1989), the Fifth Circuit devised a two-part test to determine whether LRE has been complied with:

First, we ask whether the education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second whether the school has mainstreamed the child to the maximum extent appropriate. *See id.* A variety of factors will inform each state of our inquiry; the o deterthe o ryoQNh101qH4xN%IqMqH5AqAyaAÿB)N3H3H3ANŌ&H3ANŌH3B

intended. As to the instruments assessing intelligence, materials were used that assessed specific areas of educational need and not just a single, general intelligence quotient. All of the persons administering assessments were trained and knowledgeable.

The evidence in this case showed the Respondent used pictures and other visually stimulating methods to enrich Student's educational experience. It would be incorrect to conclude that only verbal communication was being used with Student during his school day. Regardless of terminology – whole language, total communication, or anything else – Respondent has been aware that an enriched program works best for Student and has worked toward that end.

Concerning Petitioner's complaint about staff development, it might be useful if Respondent provided training to its staff about Down Syndrome, but it is not a violation of FAPE that it did not.

Procedural Complaints

Petitioner complained about progress reports, receipt of records, and participation at ARD meetings. The law is clear in this area. Unless there is a loss of an educational opportunity, there is no violation of FAPE where procedural violations alone are concerned. *Adam J. v. Keller ISD*, 328 F.3d 804, 812 (5th Cir. 2003). Parent participated in every ARD meeting, a fact abundantly clear from the record in this case. The advocates were active on Parent's behalf as well. Whatever complaints Petitioner may have, they do not rise to the level of a loss of FAPE.

VI. CONCLUSIONS OF LAW

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is eligible for special education services under the IDEA under the following categories: mental retardation, speech impairment. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.8 (c) (6), (11); 19 TEX. ADMIN. CODE § 89.1040 (c) (5), (10).
2. Petitioner bears the burden of proof with respect to its claims in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005).
3. Petitioner did not meet his burden of proof to demonstrate the program provided by Respondent for the 2009-2010 school year was inappropriate. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. Petitioner did not meet his burden of proof to demonstrate the eligibility determination by Respondent is inappropriate.
5. There were no procedural violations that rose to the level of a violation of FAPE. *Adam J. v. Keller ISD*, 328 F.3d 804, 812 (5th Cir. 2003).
6. Respondent bore the burden of proof to demonstrate that the evaluations it conducted in October 2009 on Student were appropriate.
7. Respondent met its burden of proof. Consequently, Respondent is not required to provide independent evaluations to Petitioner in the areas of assistive technology, occupational therapy, speech therapy, and full and individual evaluation.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner at the conclusion of the Due Process Hearing on June 2, 2010, is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 19th day of July 2010.

Lucretia Dillard
Special Education Hearing Officer