

DOCKET NO. 157-SE-0310

STUDENT bnf PARENT	§	SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
ENNIS ISD	§	THE STATE OF TEXAS

**ORDER CLARIFYING
DECISION OF THE HEARING OFFICER**

Student (hereinafter “the student”) through student’s next friend, Parent (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 et. seq. The Respondent is the Ennis Independent School District.

1. In the Request for Hearing, Petitioner alleged that EISD denied the student a Free Appropriate Public Education (FAPE) in the following particulars:

- a. Failing to develop measurable IEP goals and objectives;
- b. Failing to provide appropriate goals and objectives;
- c. Failing to provide appropriate special education counseling;
- d. Failing to provide appropriate speech services;
- e. Failing to provide full instructional days for the student;
- f. Failing to provide appropriate Occupational Therapy services;
- g. Failing to provide appropriate Assistive Technology;
- h. Failing to provide and develop an appropriate BIP;
- i. Failing to appropriately implement the student’s BIP.

2. The student’s placement was inappropriate and not in the least restrictive environment.
3. Petitioner unilaterally placed the student in a private school after providing notice to the district that Petitioner would be seeking reimbursement and placement at public expense.
4. Petitioner alleges that the private placement is appropriate.

The relevant time period pursuant to the one year statute of limitations is March 5, 2009 through the date of hearing.¹

Petitioner requested reimbursement for her unilateral private placement of the student at the *** School and an order requiring prospective placement of the student at the *** School.

¹ Many of Petitioner’s complaints regarding repeated IEP goals and objectives and the failure to develop and implement an appropriate BIP and provide appropriate related services of counseling, occupational therapy and assistive technology arise from acts or omissions that occurred prior to March 5, 2009 and are outside the limitations period. Therefore, the findings of fact, discussion and relief will be limited to the appropriateness or implementation of any IEP or services developed or provided on or after March 5, 2009.

7. There were many staff changes with regard to the student's *** during the Fall of 2008 and the school and parent attributed many of student's behavioral difficulties to the staff changes. Additionally, the student experienced medication changes during the early part of the semester which caused student to become agitated. (R1-38) The student's progress report as of March 5, 2009 indicated the student's behavior improved.

8. The student's cognitive functioning is in the *** range. During the most recent FIE, student's IQ on the Kaufman Brief Intelligence Test-2nd Edition was ***, and *** on the Wechsler Nonverbal Scale of Ability. These scores are consistent with the student's 2007 IQ testing. An independent evaluation reflected higher IQ scores in the ***. However, both the FIE and the IEE support a finding that the student meets the eligibility criteria for ***. Student also meets the criteria for *** and speech impairment. Student is affected by ***.²

9. There was conflicting testimony regarding the severity and frequency of the student's behaviors during the 2008-2009 school year. Neither the school witnesses nor the parent were credible in this regard. Both parties provided conflicting testimony regarding the nature and frequency of the student's behaviors. Data sheets were allegedly kept regarding the student's behaviors but not made available by the District during the hearing. (T2-76, 141-142, 167-168)

10. A Behavior Intervention Plan was developed for the student on November 6, 2008, following the completion of a Functional Behavior Assessment. The BIP targeted the following behaviors: off-task behaviors, appropriate requests for help, engaging with peers, and aggression. (P8). The BIP was not properly implemented. This is evidenced by the testimony of the student's *** regarding her own inappropriate interventions. For example, the student's BIP provided that the student would communicate student's needs by indicating a need for a break in stressful situations. (R1

13. There was much dispute over whether the March 5, 2009 proposed placement for *** and *** was in the resource class or in a life skills class with the life skills teacher. According to the school's diagnostician, the student's placement was changed to *** and ***, which was delivered in a resource setting. (T3-163-165) According to the parent, the district's *** consultant, and the student's

level, the student was not able to do work above a *** grade level and needed assistance with all tasks. (R16-00316)

30. The *** teacher reported that his major concern about the student was that student could not stay in one place and pay attention and was disruptive. The student was removed from the class when student did not meet expectations that were demanded of student. (R16-00317).

31. Dr. *** noted that the school staff had not implemented preventative strategies with the student, such as social stories, visuals and adapted (rather than shortened) work tasks. She also noted the lack of interventions in place to teach the student appropriate behaviors to gain peer attention rather than reaction to negative attempts to gain attention.³ (RR16-00323)

32. Dr. *** recommended that the student's academic needs for core subjects would best be met within a resource class setting, with the material being further individualized for student's needs. She further recommended an alternative elective class in a general education setting. She recommended that the student be able to dictate response to written activities and that the recommendations from the Assistive Technology assessment be implemented. (R16-00324)

33. Dr. *** found the student's BIP had not been implemented properly and that staff primarily reacted to the student's behaviors rather than engaging in preventative measures. (RR16-00324)

34. Dr. *** recommended speech therapy as an integral component of the student's educational program.

35. The independent behavior specialist that conducted an independent FBA concurred with the FBA and BIP. (RR15-00304; T3-105, 112)

36. On October 30, 2009, the ARD Committee, including the parent and parent's attorney met to review the independent evaluations and the assistive technology assessment. Dr. *** and the independent behavior specialist participated in the ARD meeting. The ARD recessed for the revision of the IEP goals and objectives, however the parent and attorney did not attend the reconvened ARD meeting on November 11, 2009, and requested mediation instead. The District provided notice to the parent that the ARD Committee would proceed as scheduled. R5-6) Dr. *** participated by phone and the minutes reflect that Dr. *** approved the speech goals and the independent behavior specialist approved the social skills goals. (R5-205-207) The evidence shows that speech services were increased to 45 minutes per week and counseling services to 30 minutes per week. (R5-177-178). The remaining academic goals and objectives were developed in a collaborative manner with the consensus of all ARD Committee members and with the input of Dr. ***. The *** was completed, with an agreement that an in-home needs assessment would be completed when the parent re-enrolled the student in the school. (R5-208). IEP goals for speech, social skills, reading, math, science and social studies were approved by the ARD Committee, are measurable, and in language that is more easily understood than the March 2009 IEP. (In fact, the minutes reflect that the District was requested by its attorney to use "normal

language” in the development of the IEP, without reliance solely on numerical code descriptors.) (RR5-203) Additionally, the ARD Committee appears to have followed Dr. ***’s input with regard to measurability. The ARD Committee also adopted a plan for assistive technology trials.

37. The District notified the parent of its proposed IEP on November 30, 2009. (R5-210)

38. I find based on a preponderance of the credible evidence that the November 11, 2010 IEP developed for the student is appropriate.

39. The parent failed to meet her burden with regard to proof that the District denied the student a full instructional day and appropriate Occupational Therapy Services.

40. The Director of student’s private placement testified that the student functions in the *** range, consistent with a student with an IQ between *** and ***. The director’s assessment of the student’s cognitive abilities is consistent with prior testing conducted by the District as well as the independent evaluator selected by the parent. (R16, R12, R31)

41. The Director testified that the student currently functions on a *** to *** level. (R31-00523) This is consistent with the testing and conclusions of the private evaluator selected by the parent

(R31-

March 5, 2009 IEP

IDEIA requires an IEP to contain a statement of measurable annual goals, including academic and functional goals designed to (a) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (b) meet each of the child's other educational needs that result from the child's disability. 34 CFR § 300.320. In this case, the IEP developed on March 5, 2009, is not measurable, and many of IEP goals were scheduled to extend more than one school year.

For example the Speech goals adopted on March 5, 2009 involve the student demonstrating progress toward the acquisition of developmentally appropriate pragmatic skills, with specific objectives. Two of the objectives are not measurable and are vague in that they require the student to generally express emotions through verbalization and appropriately request permission. There is no mastery criterion for either objective and the objectives are vague with regard to which emotions the student is to verbalize, under what circumstances student is to verbalize the emotions and the circumstances in which student should ask for permission and the manner in which student is to do so. (R1-40) The semantic language goal appears to be a goal carried over from 2007, with objectives for defining and describing items from categories and actions, without any mastery criteria. (R1-41) The IEP also has the goal of demonstrating progress toward the acquisition of developmentally appropriate academic skills by increasing curriculum based vocabulary and sequencing pictures to relate a story, with no mastery criteria and no statement of what is developmentally appropriate for the student. The goal of improving intelligibility of speech is vague and non measurable. (R1-42). Many of the goals are continued from the previous year. (R1-45-46)

Similar issues exist with the reading, language arts, math, science, behavior and social studies

the parent's ability to be a meaningful participant in the development of the IEP is infringed. This results in a denial of a FAPE. 34 C.F.R. § 300.513(a)(2)(ii).

November 11, 2010 IEP

The parent has failed to meet her burden with regard to the November 11, 2010 IEP. The parent has neither alleged nor proven procedural violations in connection with the November 11, 2010 IEP that rise to the level of a denial of a FAPE. Petitioner does not prevail on this issue.

2. Substantive Sufficiency

March 5, 2009 IEP – 4 Factor Test

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

In applying the relevant factors to the facts of this case, I find that the student's educational program developed on March 5, 2009 was not calculated to and did not provide a meaningful educational benefit. The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met this burden. Th-319>421004445thincb9(-)198TJETBT6ihn

Additionally, as discussed above, the manner in which the development of the IEP and the school's reliance on its software program resulted in an unintelligible IEP infringed upon the parent's ability to meaningfully participate in its development is evidence of the lack of a collaborative and coordinated effort to develop an meaningful IEP for the student.

Is the program administered in the least restrictive environment?

Both the proposed March 5, 2009 and November 11, 2009 IEPs provided for services being delivered in the least restrictive environment for the student. The 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 proposed to educate the 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. If not, then we must evaluate whether Respondent has mainstreamed (or proposes to mainstream) the student to the maximum extent appropriate, taking into consideration student's particular disability and its manifestations.

The testimony from all sources is very clear that the student's core academic needs cannot be met in the general education classroom. The parent's experts agreed with this premise. The District made more than a mere token effort, and attempted to mainstream the student for *** and ***, unsuccessfully, resulting in the aide actually doing the student's work for student and intervening inappropriately to behaviors. The proposal to provide instruction in all core academic areas in the resource class was appropriate. There was also testimony that the student's aggressive and disruptive behaviors were such that they could present detrimental effects on the student as well as others in the classroom. The student will have access to non-disabled peers through electives, such as *** or *** and other school activities in a general education setting. The student will also be able to attend school in student's home community, a factor weighing in favor of the district's proposed IEP. By contrast, at the *** School, the campus is comprised of *** students,

Sch. Comm. Of Burlington v. Dept. of Educ. Of Mass, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. V. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009). Although the private placement need not meet all state education standards for public schools, it must nonetheless be appropriate in light of the student's needs. *Florence County School District Four v. Shannon Carter bnf Emory Carter*, 510 U.S. 7, 13 (1993).

As the only period in which reimbursement is an option is from the date of enrollment (August 31, 2009 (R27)) through the date of the November 11, 2009 ARD, when the appropriate IEP was developed, the student's academic progress when measured over the entirety of the year is not as

ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the request for private placement reimbursement and prospective private placement is **DENIED**. However, I grant the relief set forth above and order as follows:

1. The District shall engage the services of *** to assist the ARD Committee in the

NOTICE TO THE PARTIES

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

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SYNOPSIS

Issue: Whether the District's March 5, 2009 IEP and program were inappropriate and denied the student a FAPE?

Held: For the Parent. The IEP did not contain measurable annual goals or goals for ESY and