

STUDENT b/n/f PARENTS, PETITIONERS	§	SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER
	§	
HOUSTON ISD, RESPONDENT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

This matter was presented to this Hearing Officer after ***, the parents of the child and the petitioners, filed for a Due Process Hearing pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA04”), 20 U.S.C. §1400 et.seq., on March 5, 2010, complaining against Houston ISD, the respondent.

On the 6th day of May, 2010, the petitioners and the respondent appeared at the Central Office for Houston ISD to commence a Due Process Hearing pursuant to IDEA04. The hearing concluded on the 7th day of May, 2010.

Parents appeared in person and through their attorney of record, Willard P. Conrad, and announced ready.

Houston ISD appeared through its district representative, Toni Pompa-Rodriguez, and through its attorney of record, Hans P. Graff, and announced ready.

A stenographic transcript of the proceeding was made by Patricia Gaddis, a duly licensed court reporter, of Gaddis Court Reporting in San Antonio, Texas.

“The Rule” was invoked by Mr. Conrad and all witnesses were admonished accordingly.

Evidence was presented through numerous documents and numerous witnesses, and all was considered in light of current law.

Issues Raised and Relief Sought

The petitioners raised numerous issues concerning the district in their Due Process Complaint, but these were narrowed down upon a Motion for More Definite Statement at the Prehearing Conference held on March 30, 2010 to one issue:

1. Whether the district denied the child a free, appropriate public education (“FAPE”) by failing to provide the child with sufficient or adequate speech therapy services.

At the said Prehearing Conference the petitioners outlined the relief sought from the Due Process Hearing:

1. That this hearing officer order the district to follow the recommendations of the private speech therapist as stated in her evaluation of the child; and
2. That the child be evaluated for intelligence in a non-verbal manner.

The district filed a Counterclaim seeking to override the lack of parental consent to fully evaluate the child. Shortly before the hearing began, the parents executed a proper Consent form to allow for the full evaluation on the child and such Consent form is in the district’s possession.

The hearing began on May 6, 2010 and concluded on May 7, 2010. After hearing and considering the testimony of the witnesses presented, reviewing the exhibits admitted into evidence, and weighing such evidence in light of current law, the relief requested from the petitioners is hereby DENIED. The relief requested by the district is CONDITIONALLY GRANTED. HELD, for the respondent and counter-petitioner, Houston ISD.

Findings of Fact

1. The parties each agree that the child is a *** year old *** student eligible for special education services under IDEA04 based upon a Speech Impairment. (See, Respondent’s

Exhibit #4, p. 393). The child's home school would be *** School (See, Respondent's Exhibit #8, p. 436 and Respondent's Exhibit #9, p. 1), but the child attends *** School (See, Respondent's Exhibit #4, p. 392, Trial transcript, Volume 1, pp.18-19).

2. The child was taken to the Texas Children's Hospital in 2008 over the parents concerns regarding the child's lack of speech. (See, Petitioner's Exhibit #14, pp. 433-435; Petitioner's Exhibit #4, p. 86). Texas Children's Hospital did a speech evaluation on the child and found that the child may have symptoms of apraxia. (See, Respondent's Exhibit #3, p. 750). They recommended the parents take the child to Houston ISD for entrance into their special education program. (See, Respondent's Exhibit #3, p. 751, Trial transcript, Volume 1, pp. 167-168, Volume 2, p. 6).
3. The parents appeared at Houston ISD in November 2008, and on November 10, 2008, the child's mother signed numerous documents to enroll the child in Houston ISD. Included in those enrollment documents was a Consent for Full and Individual Evaluation of the child which was signed ten days later on November 20, 2010. (See, Respondent's Exhibit #21). At the same time, the child's mother also filled out a form which provided the district with sociological and family data, as well as other data concerning the child. (See, Respondent's Exhibit #22). The parents' only concern regarding the child at this time was student's speech problems and no other concerns were noted.
4. The district performed a Speech and Language Evaluation on the child shortly thereafter and an ARD Committee meeting was scheduled for January 12, 2009. (See, Respondent's Exhibit #7, p. 392). The child was found eligible for special education services under a Speech Impairment and the child began receiving services from the district one week after this ARD Committee meeting. (See, Respondent's Exhibit #7, pp. 393-394). These services consisted

of the child attending *** School one day per week for thirty minutes of speech therapy. (See, Respondent's Exhibit #7, p. 400, 405-406, Trial transcript, Volume 2, pp. 37-38, 44-45). These services continued until *** sometime in early May, 2009. (See, Trial transcript, Volume 1, pp. 77, Volume 2, p. 96).

5. No services were provided to the child in the Summer 2009 (See, Trial transcript, Volume 2, p. 148), but the child was enrolled as a general education *** student at *** School in the Fall 2009 operating under an IEP developed for the child. (See, Respondent's Exhibit #10).
6. As part of the child's IEP, student was provided group therapy sessions and individual therapy sessions at 30 minutes per week to work on student's speech impairment and IEP goals. (See, Respondent's Exhibit #8, p. 444).
7. In the meantime, the parents had enrolled the child in *** in October 2009 to provide the child with private additional and individual speech therapy sessions. (See, Trial transcript, Volume 2, pp. 14-15). These sessions continued until the end of April, 2010. The parents also enrolled the child in *** for additional private speech services beginning January 2010 and continuing to the present. (See, Trial transcript, Volume 1, pp. 153). Thus, the child was receiving speech therapy services from Houston ISD, ***, and *** at the same time for a period of four months. (See, Trial transcript, Volume 1, pp. 199-201, Volume 2, pp. 14-15).
8. An ARD Committee met again on January 27, 2010 for an annual review of the child's IEP. (See, Respondent's Exhibit #9). The speech therapy services at school were increased to two thirty minute therapy sessions per week. (See, Trial transcript, Volume 2, p. 38).
9. The district had obtained an initial consent form signed by the parent on November 20, 2008, but the district only tested for speech. (See, Respondent's Exhibit #21). The district tried on numerous occasions afterwards to obtain another consent to perform a full and individual

evaluation on the child, but consent was not given. (See, Trial transcript, Volume 1, pp. 178-181, Volume 2, pp. 23-25, 81-83). All experts on both sides agreed that more testing is needed on the child. (See, Trial transcript, Volume 1, pp. 31, 106, Volume 2, p. 123).

DISCUSSION - APPLICATION OF FACTS AND LAW

The issue raised in this proceeding by the petitioners challenges whether the district denied the child FAPE. IDEA04 requires that as a condition of federal funding, the local education agency must provide the child with a free appropriate public education. *Adam J. v. Keller ISD*, 328 F.3d 804, 808 (5th Cir. 2003). In order to comply with this requirement, the district must comply with the procedural requirements of IDEA04 and must develop an individual education program (“IEP”) tailored to the unique and individual needs of the child which is reasonably calculated to enable the child to obtain an educational benefit. *Adam J. v. Keller ISD* at p. 809. The petitioners raise a denial of FAPE alleging the district provided insufficient or inadequate speech therapy services for the child.

Issue No. 1 – Did the district deny the child FAPE by providing inadequate or insufficient speech therapy services for the child?

The petitioners allege the district failed to provide adequate or sufficient speech therapy services for the child. Thus, the petitioners allege the district failed to develop an appropriate IEP based upon the child’s unique needs. That IDEA04 requires an IEP be crafted in light of the individual and unique needs of the child is undisputed. 20 U.S.C. §1414(d)(1)(A); See Also, *Adam J. v. Keller ISD* at p. 808. It is the fundamental requirement of IDEA04. The IEP developed for the child “need not be the best possible one, nor one that will maximize the child’s educational potential; rather, it need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit him ‘to benefit’ from the instruction.” *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 247-

248 (5th Cir. 1997); Adam J. v. Keller ISD at p. 808. IDEA04 guarantees only that the child will receive a “basic floor of opportunity” consisting of specialized instruction and related services which are individually designed to provide an educational benefit, which must be meaningful and likely to produce progress. Cypress-Fairbanks ISD v. Michael F. at p. 248. In this hearing, the petitioners called eight witnesses who testified about different aspects of this case. None of those witnesses, however, testified that the current set of speech therapy services the child was receiving at Houston ISD was insufficient, inadequate, or inappropriate.

Julie Goytia was called by the petitioners to testify as one of their expert witnesses. She testified she is a Speech Language Pathologist with a Master’s degree. (See, Trial transcript, Volume 1, p. 89). She further testified she had been working with the child two days per week since January 2010 in private speech therapy. (See, Trial transcript, Volume 1, p. 90). When asked if the amount of time she was working with the child was adequate, she testified that she did not think so because research indicates the child should be receiving between three to five sessions per week. (See, Trial transcript, Volume 1, pp. 93-94). But, Ms. Goytia admitted that the goals of a speech pathologist in a clinical setting (her setting) were different from those in a school setting. (See, Trial transcript, Volume 1, pp. 98-99). While with Goytia, the child was working more on speech production and than on language reception. (See, Trial transcript, p. 103). The school would have to work on both. When asked on cross examination about the current goals and objectives in the child’s IEP as developed in the January 2010 ARD Committee meeting at Houston ISD (which were currently in place at the time of this hearing), Ms. Goytia acknowledged they were all appropriate. (See, Trial transcript, Volume 1, pp. 110-115).

No witness testified that the child’s IEP was inappropriate or inadequate for any reason. No witness testified that the speech therapy services as being provided by the district through the child’s IEP were inappropriate or inadequate.

All witnesses testified that the child was making progress (See, Trial transcript, Volume 1, pp.46, 50-51, 78, 95-98, 101, Volume 2, pp. 82, 92, 139-140, 143-144), except for the child's parents. (See, Trial transcript, Volume 1, pp. 150-151, Volume 2, p. 15). Yet, even the child's parents acknowledge that student began showing progress after working with the private placements they had scheduled for student. (See, Trial transcript, Volume 1, p. 154, Volume 2, pp. 15-16). Whether the child was making progress due to the services the child was receiving at school, or due to the private services being provided to student, or due to a combination of the two, cannot be determined. No evidence was presented in an attempt to segregate the different services being provided to the child, and how each service was benefiting the child exclusive of the others. As such, it would be impossible for this hearing officer to determine the cause for the child's progress without credible evidence in this area. All that is known is that all witnesses were in agreement that the child was showing progress. Therefore, the petitioners have failed to carry their burden of proof and this issue must fail.

District's Counterclaim for the Overriding of Lack of Parental Consent

The district raised a counterclaim seeking this hearing officer to override the lack of parental consent to conduct additional testing on the child. Shortly before this hearing began, the parents executed a Consent to the have child tested in the necessary areas. That being the case, a order from this hearing officer is unnecessary and moot. However, it is well known that a parent may revoke consent at any time, and if the parents so chose to do so, the district would have as its only recourse the filing of a brand new due process complaint again seeking an order to override the lack of parental consent. Since all experts agreed that additional testing is needed regarding this child as referenced above in the Findings of Fact section, this hearing officer finds that the relief sought by the district is appropriate and is hereby conditionally granted. If the parents do not revoke the Consent executed prior to this hearing,

no order will be needed from this hearing officer. If, however, the parents do revoke their Consent, then this hearing officer orders that all necessary testing be conducted on the child.

Conclusions of Law

1. The child is a student eligible for special education and related services under the provisions of IDEA04, and its related statutes and regulations.
2. Houston ISD is the local education agency responsible for the providing the child with the free appropriate public education pursuant to IDEA04, and is a legally constituted independent school district operating as a political subdivision of the State of Texas.
3. The child's IEP, including the speech therapy services provided therein, is appropriate for the child.
4. The district must perform federal and state mandated evaluations and must develop an IEP based upon the specific needs of the child. These needs are not currently known by the district and cannot be known without a complete FIE, thus the district needs to perform a full and complete evaluation of the child.
5. The parents wholly failed to provide any evidence to support any opposition to the evaluations sought by the district, and their own expert agreed that further evaluations were needed.
6. The district has demonstrated good cause to override the parents' lack of consent for the requested evaluations.

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 the petitioners is DENIED.

Furthermore and 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 the district is CONDITIONALLY GRANTED.

If any of the parents of the child revoke the Consent given to perform the additional testing needed, then IT IS ORDERED that the lack of parental consent to perform the evaluations sought by the district is hereby OVERRIDDEN.

SIGNED this 28th day of May, 2010.

Tomas Ramirez III,
Special Education Hearing Officer

Cases Cited

Cypress-Fairbanks Indep. School Dist. v. Michael F., 118 F3d 245, 248 (5th Cir. 1997)
Adam J. v. Keller ISD, 328 F.3d 804, 808 (5th Cir. 2003)

Statutes and Regulations Cited

20 U.S.C. §1400 et.seq.
20 U.S.C. §1414(d)(1)(A)

TEA DOCKET NO: 158-SE-0310

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SYNOPSIS

ISSUE: Whether the district denied the child FAPE by providing inadequate or insufficient speech therapy services for the child?

HELD: For Respondent.

COUNTER-ISSUE: Whether the lack of parental consent should be overridden to allow the district to perform evaluations on the child.

HELD: For Counter-Petitioner (the district).