

STUDENT *b/n/f*
PARENTS,

Petitioner,

V.

DALLAS INDEPENDENT
SCHOOL DISTRICT,

Respondent.

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I.

STATEMENT OF THE CASE

Petitioner, Student *b/n/f* Parents (“Petitioner” or “Student”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that Respondent, Dallas Independent School District (“Respondent” or “DISD” or “the District”), denied Student a free, appropriate, public education (“FAPE”). Student asserts that DISD failed in its child find obligation, thereby denying him special education services during school year 2006-2007. Student asserts additional deficits related to the development, and implementation, of his special education program during school year 2007-2008. Student’s specific claims are as follows:

1. DISD failed to timely evaluate Student in all areas of concern;
2. DISD failed to timely provide Student’s parents with the results of Student’s evaluations;
3. DISD failed to provide Student the academic and educational support he needed during school years 2006-2007 and 2007-2008;
4. DISD failed to provide Student appropriate speech and language therapy during school years 2006-2007 and 2007-2008;
5. DISD failed to appropriately assess Student for assistive technology services during school years 2006-2007 and 2007-2008;
6. DISD falsified records to extend timelines, resulting in a denial of a timely evaluation for special education and related services and a delay in services;

7. DISD failed to comply with legally required timelines in accordance with required procedures; and
8. DISD failed to provide measurable IEP goals and objections.¹

Student seeks the following relief:

1. DISD shall pay all costs associated with a private placement at public expense, including, but not limited to, tuition, registration fees, admission fees, books, and transportation, at a school chosen by the parents for two school years as compensatory services for the years of educational instruction lost to Student;
2. DISD shall provide thirty-six (36) hours of one-on-one tutoring in math with a certified teacher, thirty (30) minutes twice weekly after school, as compensatory services;
3. DISD shall provide thirty-six (36) hours of one-on-one tutoring in writing composition with a certified teacher, thirty (30) minutes twice weekly after school, as compensatory services;
4. DISD shall provide thirty-six (36) hours of speech and language therapy services as compensatory services;
5. DISD shall provide an independent neuropsychological evaluation at public expense to address the scatter in Student's WISC-IV scores;
6. DISD shall pay for an advocate of the parent's choice to attend all ARDs held for Student during the 2008-2009 and 2009-2010 school years;
7. DISD shall designate a district level liaison to facilitate communication between the parents and the campus staff; and
8. any other compensation the Hearing Officer sees fit to award.

DISD asserts the affirmative defense of Statute of Limitations, arguing that Student is precluded from seeking relief associated with DISD's acts or omissions occurring more than one (1) year prior to Student's Request for Due Process Hearing. Student asserts exceptions to this one-year statute of limitations.

¹ Student also alleged discrimination violations, which were dismissed by the Hearing Officer for want of jurisdiction during the first pre-hearing telephone conference.

II. PROCEDURAL HISTORY

On July 8, 2008, the Texas Education Agency (“TEA”) received the Request for Due Process Hearing filed by Student. On July 9, 2008, TEA assigned the case Docket No. 267-SE-0708 and initially assigned it to Hearing Officer Lucretia Dillard. However, due to Ms. Dillard’s work schedule, TEA re-assigned the matter to the undersigned Hearing Officer. On July 10, 2008, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on June 29, 2008, the Due Process Hearing would take place on August 19, 2008, and the Decision would issue by September 21, 2008. Due to scheduling conflicts the telephone conference was re-scheduled to July 31, 2008.

On July 31, 2008, the parties convened for the pre-hearing telephone conference. In attendance were the following: 1) Ms. Yvonnilda Muniz, counsel for Student; 2) Ms. Joni R. Jalloh, counsel for the DISD; 3) Ms. **, Special Education Supervisor; 4) Mr. **, Principal of ** **; 5) Mr. **, Critical Care Coordinator; 6) the undersigned Hearing Officer; and 7) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for September 18-19, 2008. Additionally, the parties discussed DISD’s affirmative defense of statute of limitations and its request that all issues and requests for relief be confined to the one-year statute of limitations implemented in Texas. The undersigned instructed the parties to file briefing related to the limitations argument.

On August 6, 2008, Student filed his Brief in Support of Finding Exception to the Statute of Limitation. DISD filed its Response on August 11, 2008. On August 12, 2008, Student filed its Response to DISD’s Response to Student’s Motion for Exception to the Statute of Limitations. On August 13, 2008, DISD filed an Objection to Student’s August 12, 2008, Response. On August 20, 2008, the undersigned issued an Order Carrying Limitations Defense With Case.

On August 29, 2008, the parties filed a Joint Motion for Continuance in order to complete mediation. On September 4, 2008, finding good cause, the Joint Motion for Continuance was granted and the Due Process Hearing was re-scheduled to Tuesday and Wednesday, October 22-23, 2008, with the Disclosures due October 15, 2008, and the Decision deadline extended to November 26, 2008.

On September 4, 2008, DISD filed its Responses to Student’s Second Request for Production of Documents to DISD and First Request to Shorten Deadline for Service.

On October 8, 2008, the parties convened for a second pre-hearing telephone conference. In attendance were the following: 1) Ms. Muniz, counsel for Student; 2) Student’s Parent; 3) Ms. Jalloh, counsel for DISD; 4) Ms. **, Special Education Supervisor; 4) Mr. **, Critical Care Coordinator; 5) the undersigned Hearing Officer; and

6) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for November 12-13, 2008.

On October 12, 2008, the undersigned issued the Third Order Re-Scheduling Due Process Hearing, which continued the hearing to November 12-13, 2008, set the Disclosure Deadline of November 5, 2008, and extended the Decision Deadline to December 17, 2008.

On October 29, 2008, Student sent a letter to DISD requesting documents that were responsive to the production requests. The undersigned Hearing Officer contacted all parties for a third pre-hearing telephone conference to discuss this discovery issue.

On November 3, 2008, the parties convened a third pre-hearing telephone conference. In attendance were the following: 1) Ms. Muniz, counsel for Student; 2) Student's Parent; 3) Ms. Jalloh, counsel for DISD; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The parties discussed the discovery issues and re-scheduled the Due Process Hearing for November 13-14, 2008. The undersigned ordered DISD to produce all documents responsive to Student's Request for Production Nos. 8 and 12. Such production would be accomplished by Friday, November 7, 2008.

On November 7, 2008, the undersigned issued the Fourth Order Re-Scheduling Due Process Hearing, which continued the hearing to November 13-14, 2008, set the Disclosure Deadline of November 6, 2008,² and extended the Decision Deadline by one (1) day to December 18, 2008.

The Due Process Hearing convened on November 13-14, 2008. Both parties introduced documentary evidence; Student called eleven (11) witnesses; DISD called four (4) witnesses. Both parties conducted extensive cross-examination of the witnesses.

During the hearing Student was represented by counsel, Ms. Muniz. Student's Mother attended the hearing both days. DISD was represented by counsel, Ms. Jalloh. Also in attendance throughout the hearing were the following District representatives: Mr. **, Principal of **; and Mr. **, Critical Case Coordinator.

At the conclusion of the hearing on November 14, 2008, the parties and Hearing Officer agreed to a post-hearing schedule. The undersigned instructed the parties that post-hearing closing arguments were optional. However, if the parties wanted to file closing arguments, they would be due December 19, 2008, and the Decision would be rendered December 23, 2008. The Hearing Officer issued a letter with these dates

² Student's and DISD's Disclosures were timely made on November 6, 2008. The parties agreed to extend Student's Disclosure Deadline to 5:00 p.m., Monday, November 10, 2008, related to all documents produced by DISD on Friday, November 7, 2008.

included and requested that the parties notify her if they were not going to file closing arguments.

Due to personal problems, the court reporter could not complete the Transcript of the two-day hearing by her deadline. The undersigned notified the parties of the problem and informed them that they could get an extension of time for their closing arguments if needed. Petitioner requested an extension of this deadline, which was granted. On December 10, 2008, the undersigned informed the parties that their post-hearing briefing would be due December 29, 2008, if they chose to file such briefing, and the Decision Deadline was extended to January 3, 2009.

Petitioner filed his Proposed Findings of Fact and Conclusions of Law on December 29, 2008. Respondent did not file closing arguments by that date nor did it inform Petitioner or this Hearing Officer that it would not be filing closing arguments. Fearing that due to the school holidays, Respondent had not received the closing argument information, the undersigned sent a letter to the parties on December 31, 2008, extending their briefing to January 7, 2009, and extending the Decision Deadline to January 14, 2009.

Petitioner objected to the extension proffered by the Hearing Officer. On January 6, 2009, the parties convened for a fourth telephone conference. In attendance were 1) Ms. Muniz, counsel for Student; 2) Ms. Jalloh, counsel for DISD; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. DISD confirmed in that telephone conference that it would not be filing post-hearing briefing. This deadline was extended to January 15, 2009, by agreement of the parties.

III. FINDINGS OF FACT

1. Student is a ** year old who resides with his parents and siblings within the jurisdictional limits of DISD. Student attends ** School and has always attended school in DISD.
2. DISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. In August 2007, Student's Admission, Review, and Dismissal Committee "ARD Committee" determined that Student is eligible for special education services under the eligibility categories of a) learning disability in math reasoning ("LD") and b) speech impairment ("SI"), evidencing a moderate language disorder with difficulties in oral and written expression. Student received special education services during school year 2007-2008. Prior to that school year, Student had never received special education services.

School Year 2006-2007

4. Student has always had trouble with math. He received “***” five (5) out of six (6) grading periods in **; he received “***” in six (6) out of six (6) grading periods in ** grade; he failed math with a ** in the first semester of ** grade; he failed math with a ** in the second semester of the ** grade. On the ITBS Student scored at the ** level in math at the end of his ** year and at the ** grade level two (2) years later at the end of his ** grade.
5. Student’s mother discussed her concerns about Student’s performance in math at a September 2006 SST meeting for her other son.³ At that time Student was in the ** grade and was failing math. Student’s mother requested that Student be evaluated for special education. Ms. **, Student’s counselor and head of the SST during school year 2006-2007, reported to Student’s mother that his math teacher confirmed that Student was struggling in math, refusing to do his work, turning incomplete work in to the teacher, and generally, appearing sad and depressed.
6. In October 2006, Student’s reading and math teachers referred Student for counseling services because he was not doing his work; he appeared upset and manifested low self-esteem. Ms. ** contacted Student’s mother regarding these services on October 18, 2006, and November 8, 2006, recommending that Student receive counseling services from one of the District’s divisions. Student’s mother refused these services, claiming that Student was happy and content at home and that the problem was at school, specifically his inability to perform math.
7. During the fall semester, Student’s teachers attempted several interventions to aid him in succeeding in math, reading, and social behaviors. Student passed language arts the first semester of school year 2006-2007, but he failed all six weeks in math. By the end of the first semester, Student’s behavior had deteriorated substantially. Student’s math teacher told his mother that she believed he had a learning disability in math. Student’s reading teacher did not suspect a learning disability in language, although she was very concerned that his behavior was affecting his academics.
8. Student’s teachers made numerous attempts to conference with Student’s Parents but they were unresponsive.

³ The SST, or Student Support Team, is the referral process utilized by DISD. Special education referrals can result from this general education screening system. The SST is a group of professionals who assist teachers with instructional strategies, programming, placement recommendations, and monitoring of “at risk” students.

9. In January 2007, Student's mother met with Ms. ** to inquire about the SST progress. Ms. ** gave her a referral for testing at the Youth & Family Centers, basing her referral on Student's perceived depression. Student's mother did not follow through with the referral to the Youth & Family Centers.
10. On February 21, 2007, Student's parent received the Notice of Referral to SST, informing Student's mother that the SST would meet on February 28, 2007. At this time Student was failing language arts and it was his language arts teacher, Ms. **, who chaired the SST meeting. Ms. ** had begun keeping a behavior log for Student and sending that home to Student's mother noting her concerns about Student's "disturbing behavior."
11. The SST has three (3) stages: a) Stage I is the referral to the SST; b) Stage 2 is the meeting of the SST; and c) Stage 3 is the referral to special education, if appropriate. Every student referred for special education evaluations must go through DISD's SST process.
12. Student's SST met on February 28, 2007. Student's parents were not in attendance. DISD's pre-Stage 2 documentation, entitled "Referral Problem Identification & Intervention Monitoring Documentation" notes that the SST was concerned about Student's incomplete class work, below-grade-level achievement in math, science, and social studies, and behavior. The SST agreed that Student needed help and agreed to move on to the next stage: evaluation.
13. On March 27, 2007, Ms. ** interviewed Student's mother to gather information for the SST. Student's mother concurred that he had all but "shut down" at school and that he "needs a lot of help in math. He does not understand math at all."
14. DISD uses the enCORE method of tracking SST and special education timelines and activities. On April 3, 2007, Ms. ** entered data related to Student's timelines under the SST referral and the next applicable deadlines. On that same date, Ms. ** completed a suicide risk assessment of Student, although she did not obtain consent for this evaluation until April 4, 2007. This assessment found Student to be in the low-medium range of risk.
15. According to the enCORE records, it was April 3, 2007, when the SST made the recommendation for special education assessment. On April 4, 2007, Ms. ** provided Student's mother with a) the Notice of FIE Including Psychological Evaluation, b) the Consent for Full Individual Evaluation Including Psychological Evaluation, and c) Receipt for Explanation of Procedural Safeguards. Student's father signed the Consent for Full Individual Evaluation Including Psychological Evaluation on April 11, 2007. Student's father also signed a Receipt for Explanation of Procedural Safeguards, verifying that he had "received a copy of the *Explanation of Procedural Safeguards*" informing him of his rights throughout

the educational process and specifying that he understood its contents. Student's mother testified that she did not, in fact, receive a copy of the *Explanation of Procedural Safeguards* at that time. On April 26, 2007, these documents were locked into the enCORE system as having been duly executed.

16. In May 2007, Student's parents withdrew their consent for a psychological evaluation. On May 22, 2007, Student's father signed another Notice of Proposal for Evaluation, which deleted the referral for a psychological evaluation. Contained on that document above his signature was an acknowledgement that the parents had been provided a full explanation of all procedural safeguards.
17. Although Student's parents returned the Consent for Evaluation on April 11, 2007, Student's FIE was not completed until August 2007. The diagnostician coordinating Student's FIE had difficulty garnering all the proper documentation to complete Student's FIE. The diagnostician began assessing Student in June 2007. On June 14, 2007, the diagnostician completed a "classroom observation" of Student while he was participating in his FIE, not in the classroom with his peers. She administered the Wechsler Individual Achievement Test II, Bender Gestalt, and an assistive technology checklist on June 14, 2007. Speech assessments were administered in August and Student's FIE was completed in August 2007.
18. Student failed math each six (6) weeks during this his ** grade school year. Student failed language arts the last six (6) weeks of this school year. Student failed the math assessment, Texas Assessment of Knowledge and Skills ("TAKS") in spring 2007; he passed the reading TAKS in spring 2007 on his second try.
19. The request of Student's mother to evaluate Student in September 2006 activated the timelines for special education assessment. DISD did not complete the assessment until twelve (12) months later. Accordingly the evidence established that DISD failed to timely evaluate Student and ascertain that he is a student qualifying for special education services.
20. The evidence established that DISD failed to provide Student the academic and educational support he needed during school year 2006-2007.

School Year 2007-2008

21. Student's ARD Committee convened on August 22, 2007. Student's parents were in attendance. The Committee found Student eligible for special education and related services as a child with a) a learning disability in math reasoning and b) a speech impairment and developed Student's Individualized Education Program ("IEP"). No formal assistive technology assessment was requested at that time. The ARD Committee noted that Student was receiving the Texas Essential Knowledge and Skills objectives ("TEKS") on, or near, grade level, but he needs

accommodations on TAKS. Student would participate in the TAKS with accommodations in math, reading, and writing. Student would receive forty-five (45) minutes per day of modified TEKS instruction in math; forty-five (45) minutes per day of modified TEKS instruction in language arts and reading, both of which were to be delivered in the general education setting; and one hundred eighty (180) minutes per six weeks of speech therapy pull out with additional services delivered in the special education setting. Other modifications and accommodations were devised for other subjects. The Committee determined that no additional evaluations were needed at that time, including an assistive technology evaluation. The Committee reached consensus. Student's parents provided written consent for special education services for school year 2007-2008.

22. DISD provided the in-class support in math and language arts/reading. Student made academic progress in math and reading. His final averages were passing in all subjects: ** (music); ** (language arts); ** (math); ** (science/health); ** (P.E.); ** (reading); ** (social studies); and ** (fine arts). In spring 2008 Student passed the TAKS Accommodation in reading and writing, but failed the TAKS Accommodation in math.
23. Due to a vacancy, Student did not receive all of his speech therapy during 2007-2008. This issue was addressed in Summer 2008, when Student received some of the deficient hours of speech therapy, and at Student's August 2008 ARD Committee meeting, where all agreed to make up the deficient hours during school year 2008-2009.
24. Student made progress in his behavior, which positively affected his academic progress. He became more outgoing and self-assured in class. His negative behaviors, such as slamming books and non-responsiveness, diminished.
25. There was no evidence that Student needed an assistive technology assessment or services during school year 2007-2008.
26. There was no evidence that DISD failed to evaluate Student in all areas of need.
27. There was no evidence that Student's IEPs did not contain measurable IEP goals and objections.
28. The evidence was insufficient to establish that the August 2007 IEP was not developed in a coordinated and collaborative manner by Student's key stakeholders and that it was not delivered in a coordinated and collaborative manner by Student's key stakeholders.
29. The evidence was insufficient to establish that the August 2007 IEP failed to render positive benefits to Student in both academic and nonacademic areas.

30. The evidence was insufficient to establish that DISD failed to provide Student the academic and educational support he needed during school year 2007-2008. While the evidence established that Student did not receive all of his speech therapy during 2007-2008, it established that prior to the Due Process Hearing the parties agreed upon the provision of all deficient services during school year 2008-2009.

Statute of Limitations

31. The evidence was insufficient to establish any exception to the one-year statute of limitations.
32. The evidence was insufficient to establish that DISD made specific misrepresentations to Student's parents that it had resolved the problem forming the basis of Student's complaint.
33. The evidence was insufficient to establish that DISD withheld required information from the parents.
34. The evidence was insufficient to establish that Student's parents only acquired knowledge of the facts forming the basis of this complaint less than one (1) year prior to filing the subject Request for Due Process Hearing.
35. The evidence was insufficient to establish that DISD falsified enCORE records in an effort to extend SST and/or special education timelines.
36. The evidence established that Student's parents received copies of the procedural safeguards in April 2007.
37. The one-year statute of limitations confines Student's complaint to acts or omissions on the part of DISD occurring between July 8, 2007, and July 8, 2008.

IV. DISCUSSION

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a FAPE. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." An educational benefit must be meaningful and provide the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving a FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

The IDEIA has established procedural safeguards that are designed to promote compliance with its mandates. *Honig v. Doe*, 484 U.S. 305, 308 (1988). One of these safeguards provides the parents of a disabled child, and/or the local district, the right to file a complaint with the state educational agency related to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. 20 U.S.C. §1415(b)(6). When the complaint is received by the state educational agency, the parents or local district shall have an opportunity for an impartial due process hearing.

A. THE ONE-YEAR STATUTE OF LIMITATIONS

Student claims that he was denied a FAPE during school years 2006-2007 and 2007-2008. Student filed his Request for Due Process Hearing on July 8, 2008. DISD asserts that any claims arising prior to July 8, 2007, are barred by the one-year statute of limitations in Texas. Student counters that DISD has waived this limitations argument because the facts establish exceptions to the one-year limitations period. The evidence does not support Student's contention.

Under IDEIA, two limitations options are provided: 1) the parent or agency has two (2) years from the date the parent or agency knew, or should have known, about the alleged actions that form the basis of the complaint; or 2) if the state has a different, explicit time limitation for requesting a hearing, such time limitation is applicable to complaints filed within that state. 20 U.S.C. §1415(f)(3)(C). In Texas, IDEIA complaints

must be brought within one year of obtaining “knowledge of facts” forming the basis of the complaint. 19 Tex. Admin. Code §89.1151(c).

The IDEA allows very narrow exceptions to its time limitations: 1) the statute of limitations shall not apply if a parent was prevented from requesting a due process hearing due to specific misrepresentations by the local district that it had resolved the problem forming the basis of the complaint; 20 U.S.C. §1415(f)(3)(D)(i); 34 C.F.R. §300.511(f)(1); and/or 2) the statute of limitations shall not apply where a parent failed to exercise his/her right to a due process hearing because the local district withheld information that it is required to provide to the parent. 20 U.S.C. §1415(f)(D)(ii); 34 C.F.R. §300.511(f)(2).

In the instant case, Student’s mother requested a special education evaluation in September 2006. This evaluation was not completed, and Student’s IEPs developed, until eleven (11) months later in August 2007. However, Student’s parents did not file the subject complaint until July 8, 2008, twenty-two (22) months after the initial request for an evaluation. Allowing Student to obtain remedies for acts and omissions occurring almost two (2) years prior to the filing of the subject complaint is allowed only under a very strict application of the exceptions to the one-year limitations period adopted in Texas.

The record established that Student’s mother participated in Student’s education throughout school year 2006-2007. Student’s mother knew in September 2006 that Student was struggling in math. Student had not passed math since the first semester of kindergarten and he had never passed the state assessment in math. Student’s math teacher indicated to Student’s mother in fall 2006 that she thought Student had a learning disability. Student’s mother knew enough about the process to realize that DISD was not following through with the September 2006 referral. Student’s mother inquired about the status of Student’s assessment in January 2007, which apparently ignited the SST process for Student. Student’s mother met with the school’s counselor, Principal, and teachers, especially in spring 2007 when Student’s behavior and academics began to plummet. Student’s parents participated in the SST process, providing information to the counselor in March 2007 related to Student’s assessment. Student’s parents received report cards throughout the year indicating that Student was continuing to fail math and was incurring problems in other academic classes.

On April 11, 2007, Student’s father signed the Consent for Full and Individual Evaluation Including Psychological Evaluation and the Receipt for Explanation of Procedural Safeguards. On May 22, 2007, Student’s father signed the revised Notice of Proposal for Evaluation.⁴ Above his signature is the following statement related to safeguards:

⁴ At the hearing, Student’s mother testified that she had not received a copy of the procedural safeguards in April 2007. The receipt, however, was signed by Student’s father acknowledging that he had received the safeguards. Student’s father did not attend the hearing or provide any testimony refuting his acknowledgment.

Your rights were explained to you when your child was initially referred for special education evaluation. Federal regulations require that parents and adult students be provided a full explanation of all procedural safeguards in your native language or other mode of communication each time the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of your child/you or the provision of a free appropriate public education (FAPE) to your child/you. The State complaint procedures (including how to file a complaint and the timelines) are included. A full explanation of all procedural safeguards is included with this form.

Student's mother was on a parallel track during 2006-2007 involving the SST and special education referral of her younger son. This child's evaluation was completed in April 2007 and the subsequent ARD Committee, which met prior to June 2007, found that this child did not qualify for special education services. Student's mother subsequently filed a complaint with TEA, dated July 22, 2007, regarding issues with this child's assessment and the ARD Committee's finding that he did not qualify for special education services. Testimony at Student's hearing established that Student's mother would have received procedural safeguards related to Student's younger brother at the initiation of the referral process in April 2007 and at the ARD Committee meeting occurring between April and June 2007.

Misrepresentation of facts and withholding of information are narrow exceptions to the one-year statute of limitations, requiring that the local district's actions be intentional or flagrant rather than merely a repetition of an aspect of determining whether a student received a FAPE. *Brea Orlinda Unified School District*, 108 LRP 46017 (Ca. July 21, 2008). The "knowledge of facts" requirement does not demand that the party know the specific legal theory or even the specific facts of the relevant claim. Rather the party must have known, or reasonably should have known, the facts underlying the supposed learning disability and IDEIA rights. *Id.*

Student's parents were aware of their rights at least as early as April 11, 2007. Because the limitations period is not waived, all claims accruing prior to July 8, 2007, are barred. The one-year statute of limitations confines Student's complaint to acts or omissions on the part of DISD occurring between July 8, 2007, and July 8, 2008, which precludes the following allegations: 1) DISD failed to timely evaluate Student in all areas of concern; 2) DISD failed to provide Student the academic and educational support he needed during school year 2006-2007; 3) DISD failed to provide Student appropriate speech and language therapy during school year 2006-2007; and 4) DISD failed to comply with legally required timelines in accordance with required procedures.

B. STUDENT'S 2007-2008 IEPs

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four (4) factors that aid in evaluating whether a student is receiving the “basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit” to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment (“LRE”); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

1. Student's 2007-2008 IEP Was Individualized And Based Upon His Assessments And Performance.

Student argues that the 2007-2008 IEPs were not based upon sufficient and appropriate teacher input, appropriate observations of Student working with his peers, and that it failed to include an appropriate assistive technology assessment.⁵

Evaluation procedures are carefully spelled-out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the public agency, *i.e.*, the school district, must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The school district must ensure that the assessments are selected and administered in a non-discriminatory manner, provided in the child's native language and in a form likely to provide accurate information, used for the purposes for which the assessments are valid and reliable, administered by trained and knowledgeable personnel, and administered in accordance with any instructions provided by the producer of the assessments. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs.

As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based,

⁵ Student did not present evidence or argument related to the parents' receipt of Student's evaluations at the 2007 ARD Committee meeting. Accordingly, that issue is not addressed.

local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARD Committee must consider all of the information gathered and make a recommendation based upon that information. In determining whether the child is a child with a disability and an educational need for special education intervention, the ARD Committee must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as physical condition, social or cultural background and adaptive behavior. 34 C.F.R. §300.306.

Student's ARD Committee met on August 22, 2007, to review his assessments and determine whether he qualified for special education services. The ARD Committee reviewed the following evaluation data and attendant information: 1) information from school personnel (March 6, 2007); 2) information from the parents (March 27, 2007); 3) vision/hearing/medical information (March 1, 2007); 4) the speech/language evaluation (August 9, 2007); 5) the assistive technology assessment (June 14, 2007); and 6) the FIE completed on August 9, 2007.⁶

The ARD Committee determined that 1) Student has a speech impairment and a communication need in oral speech; 2) behaviorally, Student adjusts easily to new situations, interacts appropriately with adults, has difficulty working independently, and has respect for authority; and 3) Student's disability significantly interferes with his ability to meet regular academics in language/communication, science, and math. The ARD Committee found that Student is not functioning at the developmental level in 1) oral reading, 2) reading comprehension, 3) written language, 4) mathematics, and 5) listening comprehension. As to assistive technology, the ARD Committee determined that his needs could be met by interventions within the educational environment without further need of assistive technology. Based upon the entirety of Student's assessments, the ARD Committee determined that Student could benefit from the following accommodations and supports: 1) written content would be presented orally; 2) additional time would be provided to complete work; 3) math questions would be read to Student; and 4) Student could work in small groups. The general education and special education providers would coordinate 1) the monitoring of Student's performance; 2) the assignment of grades; and 3) consultation. Student's ARD Committee provided

⁶ Student's FIE consisted of the following assessments: 1) emotional/behavioral information, based upon observation and reports from Student's parents and teachers; 2) sociological information, based upon reports from Student's parents and his education records; 3) intellectual information, based upon the administration of the Wechsler Scales–III/IV, as well as parent and teacher information; 4) adaptive behavior, based upon parent and teacher information; 5) academic achievement, based upon the Wechsler Individual Achievement Test II, parent and teacher information, and information from Student's education records; 6) speech and language abilities, based upon the assessment of Student's oral-peripheral speech mechanism, Goldman-Fristoe Test of Articulation, speech samples, and informal observations; 7) fluency, based upon speech samples and information observations; 8) voice, based upon speech samples and observations; and 9) language, based upon standardized tests, language samples, and informal observations.

Student with inclusion services in English language arts/reading and math, and pull-out services for speech therapy.

The record establishes that DISD assessed Student by using a plethora of instruments, consisting of standardized tests, observations, and interaction with Student. The assessors were qualified professionals. Based upon these assessments, Student was provided with a program entailing clearly articulated, measurable goals and objectives for services in his areas of need: English language arts/reading, mathematics, and speech-language. Student's ultimate performance under the 2007-2008 IEP manifests the appropriateness of Student's assessments and the resulting 2007-2008 IEP.

2. Student's Special Education Services Were Provided In School Year 2007-2008 In A Coordinated And Collaborative Manner By The Key Stakeholders In The Least Restrictive Environment.

The record established that Student received inclusion services in his math and language arts/reading classrooms. His providers were all certified and properly trained to provide these services. Student's teachers used the recommended modifications and accommodations, often allowing Student to work on the computer, which is something he enjoyed. Student's teachers testified that there were often overtures made to the parents to conference but these requests were generally ignored. The record established that Student's teachers coordinated daily with each regarding updates and classroom strategies.

The record established that due to a vacancy, some of Student's speech therapy services were not provided during 2007-2008. However, the parties agreed that these delinquent services would be provided during summer 2008, which was done, with the remainder being provided during school year 2008-2009. The problem with the missing speech therapy was corrected to the parties' agreement.

To prevail on his claim that DISD failed to implement his IEP, it was incumbent on Student to show more than a *de minimis* failure to implement all elements of the IEP. Student had to show that DISD failed to implement substantial or significant provisions of the IEP. *Houston Independent School District*, 200 F.3d at 349. This burden was not met. To the contrary, the record reveals Student has many highly competent, devoted adults working with him in a collaborative manner so that he can, and does, receive educational benefit. The delivery of these services is in the least restrictive environment for Student.

3. Student Made Academic And Non-Academic Progress During 2007-2008.

Student's 2007-2008 IEP provided him with academic and non-academic progress. He passed every class every six (6) weeks of his fourth grade year. In many areas he is working on grade level. His service providers and teachers note much

improvement in his behavior. He interacts with his peers, his teacher, and his service providers. His depressed demeanor is no more. He manifests positive self confidence and is loved by the staff. Although Student did not pass the TAKS-Accommodation math assessment, he did improve his score from the 2007 TAKS. Further, he passed the reading and writing TAKS in 2008.

Going into the hearing the legal presumption was that Student's 2007-2008 IEP provided him a FAPE. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). To overcome this presumption, Student had the burden of proving that DISD failed to provide him a FAPE under this IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Student failed to meet this burden.

V. CONCLUSIONS OF LAW

1. Student is eligible for special education services, based upon his classification of learning disabled in math reasoning and speech impairment, as mandated under the provisions of IDEA and its implementing regulations. 20 U.S.C. §1400 *et seq.*
2. The one-year statute of limitations bars Student's claim for acts or omissions arising prior to July 7, 2007. 20 U.S.C. §1415(f)(3)(C); 20 U.S.C. §1415(f)(3)(D)(i); 20 U.S.C. §1415(f)(D)(ii); 34 C.F.R. §300.511(f)(1); 34 C.F.R. §300.511(f)(2); Tex. Admin. Code §89.1151(c).
3. Student failed to meet his burden of proving that his 2007-2008 was inappropriate because it was not based upon assessments in all areas of need. 34 C.F.R. §300.304; 34 C.F.R. §300.305; and 34 C.F.R. §300.306.
4. Student failed to meet his burden of proving that DISD failed to implement substantial and significant provisions of his 2007-2008 IEP. *Houston Independent School District v. Bobby R.*, 200 F.3d at 349.

VI. ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

Signed the 15th day of January 2009.

/s/

Deborah Heaton McElvaney
Special Education Hearing Officer

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