

**DOCKET NO. 198-SE-0408**

**STUDENT bnf** § **BEFORE A SPECIAL EDUCATION**  
**PARENT** §  
§  
**VS.** § **HEARING OFFICER**  
§  
**FORT BEND INDEPENDENT** §  
**SCHOOL DISTRICT** § **FOR THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

STUDENT (hereinafter “the student”) through his 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 Fort Bend Independent School District.

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

1. Failure to conduct timely and/or appropriate assessments, specifically timely and/or appropriate psychological, functional behavior, speech and social skills assessments.
2. Failure to conduct timely and/or appropriate occupational therapy and speech assessments.
3. Failure to maintain or obtain data to determine progress in the areas of speech, social skills, occupational therapy, and behavior.
4. Changing the student’s placement on 43 occasions during the 2005-2006 and 2006-2007 school years without ARD committee approval and/or parental notification, and without revising the Functional Behavior Assessment and/or Behavior Intervention Plan prior to change of placement.
5. Failure to respond to incidents of bullying during the 2005-2006, 2006-2007, and 2007-2008 school years, resulting in a denial of FAPE to the student.
6. Failure to respond to the child’s medical and emotional needs. Failure to follow the child’s medical plan.
7. Failure to have adequately trained staff working with the student.
8. Failure to implement the student’s IEP.
9. Failure to have necessary ARD Committee members present at the ARD meeting, including professionals requested by parent. Failure to list all invitees on the ARD Committee meeting notice.
10. Inviting alternative campus staff to ARD Committee meetings without notice to parent and prior to determining the student’s need.
11. Interfering with parental participation in the ARD Committee meeting by minimizing same.

12. Failure to appropriately respond to the parent's request for an IEE in May 2005 and September 2006. Failure to consider parent's choice of IEE contractors. Failure to allow parent right to review IEE.
13. Failure to timely convene an ARD Committee meeting requested by the parent in January 2008.
14. Failure to allow meaningful parental participation by refusing to allow parental access to educators providing services to the student.

Petitioner requested the following as relief:

1. Compensatory educational services in an amount deemed appropriate by the hearing officer in all academic/related service areas and in social skills training.
2. An Order that the District provide the student a FAPE, including appropriate related services.
3. Counseling services.
4. An Order requiring professional staff development to address sensitivity to children suffering from abuse and neglect and positive behavioral supports, with parental consideration in the choice of providers.
5. Staff development/training to identify strategies to ensure the student and his sibling has a positive experience in the District.

Respondent raised the affirmative defensive that all claims arising prior to April 28, 2007 are barred by the one-year Statute of Limitations.

Held for Respondent.

### **PROCEDURAL HISTORY**

Petitioner filed this request for hearing on April 28, 2008. Following multiple continuances for good cause, a hearing was held on August 12-13, 2008. Petitioner was represented by attorney Dorene Philpot. The Fort Bend Independent School District was represented by attorney Jeffrey Rogers. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended for good cause to allow an opportunity to submit written argument, and the Decision was initially due September 26, 2008. However, both parties requested additional time to make written submissions due to conditions caused by Hurricane Ike, so briefing deadlines and the Decision deadline were extended to October 3, 2008. The Decision was timely rendered and forwarded to the parties.

As Respondent raised the statute of limitations defense, a preliminary hearing on the limitations issue was conducted prior to the hearing on the merits. Petitioner failed to establish that she had been prevented from requesting the hearing prior to April 28, 2008 due to (i) specific misrepresentations by FBISD that it had resolved the problem forming the basis of the complaint; or (ii) that FBISD had withheld required information from the parent. *See* 20 U.S.C. §1415(f)(D). Therefore the one-year statute of limitations was applied in this case and all claims

arising prior to April 28, 2007 are barred and those complaints will not be addressed in this Decision.<sup>1</sup> See 19 T.A.C. § 89.1151(c); *Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency*, 112 S.W.3d 234 (Tex. App.—Austin 2003, no pet.).

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated “RR” with a notation of the volume number and page number. Citations to exhibits will be designated as P for Petitioner exhibits or R for Respondent exhibits, with a notation of the exhibit number.

### **FINDINGS OF FACT**

1. The student resides within the geographical boundaries of the Fort Bend ISD. Fort Bend ISD is responsible for providing the student with a FAPE. The student is eligible to receive special education and related services under the eligibility categories of Speech Impairment and Other Health Impairment.

2. The student has a tragic personal history involving removal from the care of his biological parents by Child Protective Services and was recently adopted by Petitioner. (P-8; testimony of parent) The student entered the FBISD in 2005 as a transfer student who had been previously identified as a student in need of special education services. The FBISD conducted a Full Individual Evaluation in October 2005 and the ARD Committee subsequently changed the student’s eligibility to speech impairment and emotional disturbance based on its evaluation in January 2006. (P-9) The District subsequently obtained additional psychological, occupational therapy, and speech evaluations. The District and the ARD Committee considered all evaluations in the development of the student’s IEP’s. In 2007, the ARD Committee changed the student’s eligibility from ED to Other Health Impaired, based on additional psychological data and a physician’s recommendation. The parent actively participated in this and all ARD Committee meetings and agreed with this decision. (R-4, R-5) The District further conducted a functional behavior assessment and considered an independent functional behavior assessment requested by the parent. The student’s triennial evaluation is due October 11, 2008.

3. The student’s behavioral issues were significant when he first entered the school district, in that he was reported to have emotional and violent outbursts. However, by the end of 2006-2007 school year the student demonstrated significant improvements. For example, during the administration of two functional behavior assessments, the student was observed to comply with directions, interact appropriately with peers and exhibited no aberrant behaviors. (R-10, R-14). All professionals involved with the student, including the parent’s private service providers, reported dramatic improvement in the student’s behaviors. The student’s \*\* grade teacher (2007-2008 school year) reported no behavioral or social skills problems and reported that the student made significant progress. I find the testimony of the school personnel to be credible with regard to the student’s educational progress.

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<sup>1</sup> The barred complaints include allegations of a failure to respond to bullying during the 2005-2006 and 2006-2007 school years; changing the student’s placement during the 2005-2006 and 2006-2007 school years without ARD Committee approval; and failure to timely respond to the parent’s request for an IEE in May 2005 and September 2006.

4. The student has made academic progress since entering the FBISD. During the 2007-2008 school year he made passing grades, performed at grade level and passed the TAKS test.

5. The District provided regular progress reports to the parent reflecting the student's progress toward his goals and objectives. The District provided and the parent received reports at the end of each grading period which also reflected the student's progress

6. The parent alleges that the student was subjected to bullying incidents during the limitations period. However, the credible evidence does not support the parent's allegations. The credible evidence supports a finding that there were no bullying incidents during the limitations period.

7. The District responded to the parent's concerns regarding the student's only reported medical need, a tendency to overheat. The district responded by notifying the school nurses and relevant school personnel regarding the condition and acted appropriately to respond if any needs arose. No medical emergencies occurred during the three years the student attended FBISD. (RR2-62-63; R-2; R-3)

8. The parent presented no credible evidence that the student's teachers were not qualified or had received inadequate training.

9. The District implemented the student's IEP at all relevant times.

10. The District conducted an occupational therapy evaluation to determine the student's need for related services. As a result, the District provided OT services to the student to address his apparent deficits in handwriting. Additionally, the occupational therapist and the teacher incorporated sensory modalities in the student's classroom to respond to the parent's concerns about his sensory issues. The student made progress in the area of handwriting during the relevant time period.

11. Multiple evaluators concluded that the District's program was appropriate for the student. In fact, an evaluator selected by the parent reported that the student appeared to be thriving in his educational environment. (R-10)

12. The District conducted a speech therapy evaluation for the student to determine the need for speech therapy. The services were provided to address the student's articulation and language deficits. At the parent's request, during the Fall of 2007, the ARD Committee adopted goals and objectives to address the student's pragmatic speech as well. The student made progress in speech therapy and the services provided were appropriate for the student

13. The parent actively participated in all ARD Committee meetings and the record affirmatively reflects that that ARD Committee considered and acted upon her requests in the development of the student's IEP goals and objectives.

## DISCUSSION

### *Failure to Conduct Timely Assessments*

Petitioner alleges that the student has educational needs which the District failed to timely evaluate, more specifically psychological, functional behavior, speech, social skills, occupational therapy and speech assessments. However, at the time of hearing, the District had conducted current assessments in each of the above areas, with the student's three-year re-evaluation being due in October 2008. (R-1) The evaluations conducted by the district enabled the ARD Committee to develop appropriate IEP's for the student and resulted in a program which has enabled the child to make significant progress.

All witnesses agree that the student entered the \*\* grade with severe behavioral and emotional problems. However, by the beginning of the \*\* grade (2007-2008 school year) the student had made remarkable progress and continued that progress throughout the \*\* grade year. In fact many of the witnesses referred to the student as a different child. (RR2-65, 79, 83, 86, 91) During the \*\* grade, the student exhibited emotional and sometimes violent outbursts, but by the \*\* grade year, there were no behavioral problems noted. In fact, the ARD Committee conducted further psychological assessment to determine if the student met the criteria for Emotionally Disturbed, and concluded that he did not, and began to serve the student as a student with OHI due to his ADHD. (R-4; R-5) In the Spring of 2007, the District considered an independent functional behavior assessment requested by the parent which noted that the student did not engage in any aberrant behaviors that would necessitate the need for a formal functional analysis. (R-10) In fact, the evaluator chosen by the parent stated that the student was thriving in his educational environment. (R-10) The student was observed to complete in-class assignments in an appropriate manner, exhibit appropriate turn-taking behavior, and participate appropriately with peers and adults. (R-10) The findings in the independent assessment are consistent with teacher reports as well as the assessments conducted by the district.

The District conducted an occupational therapy assessment to determine the student's needs for occupational therapy. (R-13) The ARD Committee identified the student's deficits in handwriting and developed specific goals and objectives to address those needs. Additionally, the occupational therapist recommended and the District provided modifications to address the student's sensory needs, and those appear to be working well for the student. The parent alleges that the student was not evaluated to determine if he has dysgraphia and that this failure has resulted in a denial of a Free Appropriate Public Education. However, the parent presented no evidence that the student in fact has dysgraphia. Petitioner has wholly failed to meet her burden of proof under *Schaffer v. Weast*, 126 S.Ct. 528 (2005). While it is apparent from the record that the student has handwriting deficits which have not been completely remediated, the District is addressing those deficits and the student's handwriting skills are improving.

The parent further alleges that the District failed to conduct an appropriate social skills assessment and appears to have a firmly held belief that the student has a deficit in social skills that impacts him educationally. However, the District's and the parent's evaluators observed

appropriate peer interactions in the classroom. This is consistent with teacher reports that the student exhibits no significant social skills deficits in the classroom and that he has made progress in this area. Petitioner has wholly failed to meet her burden of proof on this issue.

Finally, the parent alleges that the District failed to timely assess the student's needs in the area of pragmatic language. The District conducted an evaluation of the student to determine his eligibility as a student with a speech impairment. A school is required to assess a student in all areas of suspected disability. (CFR §300.304) The District met its obligation under IDEIA when it conducted its assessment of the student and identified him as a student in need of special education services as a student with speech impairment. The District began serving the student by providing speech services to the student, and added goals and objectives for pragmatic language to his IEP based on the parent's request and the observations of the teacher and the speech therapist that there may be mild deficits in this area. (R-2; RR1-158-159) The parent does not complain that student has not received adequate pragmatic language goals – just that no formal assessment tool was utilized to determine if he needed the services which she in fact requested at the beginning of the 2007-2008 school year. During the summer of 2008, while the case was pending, the District administered a formal assessment instrument that concluded that the student does not have a further need for speech therapy in the area of pragmatic language. (RR2-123)

The central basis of the parent's complaint with regard to the District's failure to administer formal testing instruments in areas of social skills and pragmatic language is that the child was not properly identified and therefore not properly served. However, as stated above, the District did identify the child's needs to receive special education related services in these areas and evaluated the Student in all areas of suspected disability. The District has and continues to address the student's needs as a result of those evaluations and ongoing assessment of the Student. The professionals working with the student responded to the parent's concerns about the student's pragmatic language, and the ARD Committee addressed those needs by adopting specific goals and objectives in the area of pragmatic language. At all relevant times, the Student has been properly identified as a student eligible to receive special education services as a student with speech impairment and other health impairment. The ARD Committee recommended and adopted goals and objectives designed to meet the specific needs presented by his disabilities. The Parent has failed to establish the manner in which these goals and objectives would or should be any different had formal testing instruments in the areas of social skills and pragmatic language been administered. The parent has failed to establish that the Student's IEP goals and objectives have been deficient in any way. In fact, given the child's progress, the goals and objectives appear to be appropriate for the Student and the Student in fact appears to have thrived in his current educational environment.

*Failure to Maintain or Obtain Data to Determine Progress in the Areas of Speech, Social Skills, Occupational Therapy and Behavior.*

The Parent complains that the District failed to maintain data to determine the child's progress in the areas of speech, social skills, occupational therapy and behavior. The evidence

establishes that the ARD Committee described the manner in which the student's progress would be measured and the frequency with which it would be reported. *See* 34 CFR §300.320(a)(3). A preponderance of the credible evidence establishes that the District provided the parent with timely progress reports regarding his progress on all IEP goals and objectives. The district collected data and maintained documentation in the areas of occupational therapy (R-21), social skills (R-23), psychological services (R-24), and speech therapy (P-41). (*See also* IEP Updates reflected in Respondent Exhibits 25-29.) The preponderance of the evidence establishes that the ARD Committee reviewed and discussed the data collected in developing the student's IEP's. Petitioner has wholly failed to meet her burden of proof on this issue.

#### *Failure to Respond to Incidents of Bullying*

The credible evidence establishes that there were no reports of bullying during the limitations period. (RR-2-61) Petitioner has wholly failed to meet her burden of proof on this issue.

#### *Failure to Respond to the Child's Medical and Emotional Needs or to Follow the Child's Medical Plan*

The parent alleges that her son has medical needs which the school did not appropriately respond to, specifically, that he was prone to overheating. The evidence establishes that this issue was discussed by the ARD Committee (R-2; R-3) and that the principal notified the school nurse and relevant school personnel at the beginning of each school year of his condition. (RR2-62) The teachers testified that they were aware of his tendency to overheat easily and responded to his needs. Moreover, the child has had no medical emergencies since being enrolled in FBISD. Petitioner has wholly failed to meet her burden of proof on this issue.

With regard to the child's emotional needs, Petitioner has failed to establish that the student has any emotional needs as they relate to his education which are not being met by the student's current IEP. Although the student's personal history prior to entering the District certainly presents a general need for ongoing counseling and assistance, his emotional needs do not appear to currently interfere with his educational progress.

#### *Failure to Implement IEP*

Petitioner presented no competent evidence that the District failed to implement the Student's IEP. The testimony of the teachers and other professionals establishes that the District in fact implemented the IEP's and that the Student made progress. Petitioner has wholly failed to meet her burden on proof on this issue.

#### *Complaints Regarding ARD Committee Meeting Participation*

The remainder of the parent's complaints revolves around ARD Committee meetings and a perception that the District impeded her meaningful participation. The evidence clearly establishes that the parent participated in each an every ARD Committee meeting and that the

District heard and responded to her concerns. (*See e.g.*, ARD Committee Reports at R-1, R-2, R-3, R-4, R-5, R-6, R-7 and R-8). The requisite members attended each ARD Committee meeting in compliance with the requirements in 34 CFR §320.321(a) (enumerating which members must attend an ARD Committee meeting). The parent's central complaint in this regard is that she requested an ARD Committee meeting in January 2008 and requested that the lead speech therapist, who had never worked with the Student, participate. The parent admitted that she declined to attend the ARD Committee meeting until the lead speech therapist could attend. (RR1-275) The District made numerous attempts to schedule and reschedule the ARD meeting, and the parent claimed that she did not receive five days notice and declined, when it appeared the notice was sent to her in a timely manner in the student's backpack. (RR1-276) (R-31) The parent acknowledged at the hearing that the ARD Committee eventually convened in May 2008 with the lead speech therapist in attendance. (RR1-276; R-1) The record reflects that the District diligently worked with the parent to accommodate her schedule as well as the schedule of the other participants when she requested an ARD Committee meeting.

Although there was a delay between the parent's request for the ARD Committee meeting and the actual meeting, I cannot find under the circumstances that the District did not attempt to convene the ARD Committee meeting in a reasonable time required by 19 Tex. Admin. Code §89.1045(b), in light of the efforts it made to accommodate the parent. Even, assuming, *arguendo*, the delay in scheduling the ARD Committee meeting was a procedural violation, procedural violations alone do not constitute a denial of a Free Appropriate Public Education. It is only procedural violations that result in impeding the child's right to a FAPE, significantly impede the parent's opportunity to participate as a decision maker, or cause a deprivation of educational benefit that will support such a finding. *See Adam J. v. Keller ISD*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003); 34 CFR §300.513(a)(2). The delay in the ARD Committee meeting did not result in a denial of FAPE under the circumstances in this case. The child made tremendous academic and behavioral progress while at FBISD and during the 2007-2008 school year, the parent was an active participant in the ARD Committee meetings and in the scheduling of the ARD Committee meeting in question and there was no deprivation of educational benefit. The parent does not prevail on this issue.

The parent further alleges that the District interfered with her participation in the ARD Committee meetings. Again, the evidence is abundantly clear that the parent was an active participant in the child's education and in all ARD Committee meetings and decisions regarding the student's educational program. Although the District may not have agreed with every request made by the parent, the right to participate does not equate to the right to dictate the outcome. *See White v. Ascension Parish School Board*, 343 F.3d 373 (5<sup>th</sup> Cir. 2003). The ultimate result in the collaborative process in this case was a program that proved to be successful for the student.

### **CONCLUSIONS OF LAW**

1. The student is eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations.

2. The district's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). Petitioner bears the burden of proving that it is not appropriate or that the District has not complied with the procedural requirements under the IDEIA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has wholly failed to meet her burden.

**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 Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

**SIGNED** this 3rd day of October, 2008.

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Sharon M. Ramage  
Special Education Hearing Officer

## SYNOPSIS

Issue No. 1: Whether the District failed to timely and appropriately assess the student in all areas of suspected disability?

Held: For the District. The District's assessments were timely and assessed the student in all areas of the suspected disability.

Citation 34 CFR 300.304; 14 USC 1414(b)

Issue No. 2: Whether the District failed to maintain data to measure the student's progress?

Held: For the District. The ARD Committee described the manner in which the student's progress would be measured and the frequency with which it would be reported and the District in fact maintained data regarding the student's progress

Citation: 34 CFR §300.320(a)(3).

Issue No. 3: Whether the District failed to implement the student's IEP?

Held: For the District. The parent presented no evidence that the District failed to implement the student's IEP. The parent failed to meet her burden of proof.

Citation: *Schaffer v. Weast*, 126 S.Ct. 528 (2005)

Issue No. 4: Whether the District impeded the parent's right to meaningfully participate in the decision making process?

Held: For the District. The parent participated in all ARD Committee meetings, requested ARD Committee meetings and the ARD Committee considered and responded to her input. The District made efforts to invite participants requested by the parent to the ARD Committee meeting and made reasonable efforts to accommodate the parent's schedules. Any delay in scheduling the ARD Committee meeting did not result in a denial of FAPE.

Citation: 34 CFR §320.321(a); 19 Tex. Admin. Code §89.1045(b); 34 CFR §300.513(a)(2)