

DOCKET NO. 084-SE-0121

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT and PARENT	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
ALLEN INDEPENDENT	§	
SCHOOL DISTRICT	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER

Introduction

Petitioner, *** (“Student”), by next friends, *** and *** (“Parent” or “Parents”), filed a request for due process hearing and complaint January 11, 2021. Respondent, Allen Independent School District (“District,” Allen ISD” or “AISD”) timely filed its response to the complaint.

Party Representatives

Jordan McKnight, attorney, represented Petitioner. Debra Liva, Paralegal of Mr. McKnight was present. Parents were present.

Kelly Janes and Jennifer Carroll, attorneys, represented Respondent. ***, Executive Director of Special Services for District, and ***, Director of Special Education for District, appeared as party representatives for District.

Procedural History

Respondent filed a notice of insufficiency of the complaint and pled to the jurisdiction of the hearing officer to hear matters outside the Individuals with Disabilities Education Act (“IDEA”). The complaint was found to be sufficient. The hearing officer dismissed all matters outside the jurisdiction granted under the IDEA, including Petitioner’s request for costs and representation fees.

Petitioner did not plead exceptions to the one-year statute of limitations. At the request of Petitioner’s counsel, this hearing officer allowed counsel until February 3, 2021 to consult with his client and provide a status report on the subject; Petitioner did not return a status report. The one-year statute of limitations rule applies and allegations of failures by Respondent that occurred prior to January 11, 2020 are DISMISSED and not considered in this decision.

Petitioner filed a motion to compel production of documents. Respondent filed a response to the motion. The hearing officer offered dates on which the parties could argue Petitioner’s motion. Petitioner did not respond to the offer.

The hearing was held May 11 and 12, 2021. Following each party’s case in chief and rebuttal, Petitioner requested an extension of the decision due date. As reason for the request, the parties needed

time to receive the hearing transcript and file closing arguments. Respondent had no objection. The decision was extended to July 9, 2021.

Issues for Hearing

Student is ***-year-old child who resides within the geographical boundaries of the District. Student receives special education services from the District under IDEA as a child with Autism (“AU”) and Speech Impairment (“SI”).

Petitioner alleges the following:

1. District failed to timely evaluate and identify Student as a child with known and/or suspected disabilities in need of specialized instruction and related services with appropriate modifications and accommodations to meet Student’s unique needs;
2. As a result of District’s failure in its child find duties, it failed to develop an individualized education program (“IEP”) and provide goals, accommodations and supports to meet Student’s unique needs, thus denying Student a free, appropriate public education (“FAPE”);
3. District failed to timely respond to Petitioner’s request for a functional behavior assessment (“FBA”) independent educational evaluation (“IEE”), failed to request a due process hearing to defend its FBA, and failed to provide a response without unnecessary delay pursuant to 34 C. F. R. §300.502(b)(2);
4. District failed to provide a FAPE by not requiring related services of speech, occupational therapy for toning and sensory support, ABA/*** training, *** therapy to address Student’s needs.
5. District unilaterally changed Student’s services and/or failed to provide such services including speech therapy and ***, thus failed to follow Student’s IEP during COVID closures and remote learning; and ^{[[]]}_{SEP};
6. District failed to collaborate or consult with Parent regarding changes it made to Student’s programming outside an admission, review, and dismissal (“ARD”) committee meeting. ^{[[]]}_{SEP}

Requested Relief

As relief, Petitioner requests an order that directs District to do the following:

1. Provide compensatory services, specifically speech therapy and behavior strategies/support such as ABA, tutoring, and ***;
2. Provide an IEE in the areas of all suspected or known disabilities including cognitive, achievement, occupational therapy to include sensory and/or toning, and a functional behavior assessment (“FBA”) and an occupational assessment;
3. Convene an Admission Review and Dismissal (“ARD”) committee meeting after completion of the IEE’s to review the results and establish specific measurable goals to address Student’s unique needs;

4. Provide for participation of all IEE providers;
5. Provide Student with a mentor;
6. Establish a sensory diet for Student;
7. Build a sensory lab into Student's schedule;
8. Find that Parent was not made an equal partner;
9. Find a denial of FAPE; and
10. Any and all other remedies to which Petitioner may be entitled.

Joint Stipulated Facts

The parties stipulated to the following facts:

1. In August 2017, Petitioner enrolled in Allen ISD as *** and has been enrolled in Allen ISD for the 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years.
2. For the 2020-2021 school year, Petitioner was ***-year-old ***grade student.
3. On January ***, 2020, during a Student Intervention Team ("SIT") meeting, the District proposed conducting a special education evaluation. On January ***, 2020, the District provided the Parents a copy of the Procedural Safeguards, Guide to the ARD Process, Review of Existing Evaluation, and Prior Written Notice of Full and Individual Initial Evaluation ("FIIE"). On January ***, 2020, Parents signed consent for the FIIE.
4. On April ***, 2020, the District completed Petitioner's FIIE. Petitioner demonstrated superior intellectual ability. Evaluators recommended the ARD committee consider eligibility under Autism ("AU") and Speech Impairment ("SI") for pragmatic language. The FIIE also concluded that Petitioner regularly exhibits behaviors and difficulties consistent with Attention Deficit Hyperactivity Disorder ("ADHD").
5. On May ***, 2020, the District convened Petitioner's initial ARD committee meeting and found Petitioner eligible for special education as a student with AU and SI. Areas of need identified in the present levels of academic achievement and function performance ("PLAAFP") included ***/pragmatic language and focus/concentration. The ARD committee addressed these needs with accommodations, IEP goals, direct speech services, and *** instruction.
6. On December ***, 2020, the District convened a revision ARD committee meeting to review evaluation. After reviewing the occupational therapy ("OT") evaluation, based on the OT evaluation and teacher input, the District proposed and the ARD committee agreed to add an accommodation for Petitioner to be able to ***. Based on Parent and teacher input, Parent requested and the ARD committee agreed to add *** as needed to Petitioner's accommodations. The District did not propose OT as a related service. Parent disagreed. Based on Petitioner's mastery of IEP goals, the District proposed, and the ARD committee agreed to add new IEP

goals. Rather than discontinue mastered goals as proposed by the District, Parent requested, and the ARD committee agreed to increase the mastery criteria of the already mastered IEP goals. Parent requested a Behavior Intervention Plan (“BIP”). Based on Petitioner’s FBA and information from District staff, the District rejected this request and proposed conducting another FBA. Parent declined and stated intent to obtain an independent FBA. The ARD committee did not reach consensus on whether Petitioner demonstrates a need for a BIP and OT as a related service.

Findings of Fact

Based on the parties’ documentary evidence and testimony of witnesses before this hearing officer and in addition to the above-stipulated facts, the following are the findings of fact in the instant action. Citations to the Petitioner’s Exhibits, Joint Exhibits, and Respondent’s Exhibits are designated with a notation of “P,” “J,” or “R,” respectively, followed by exhibit and page numbers as appropriate. Citations to the transcript are designated with a notation of “T” followed by the page numbers.

1. Student’s father and mother have joint custody of Student. They share equally all rights and duties regarding Student, including educational rights. They talk with each other about decisions for all of their children. T-pg. 36
2. In *** grade, Student’s teacher reported Student’s struggles with completion of work, difficulty focusing, and processing information. Student required numerous redirections during the school day. P-6; T-pgs. 37-39
3. When there is concern regarding a Student, a Concerned Person Report is completed. Then, a Student Intervention Team (“SIT”) meeting is held to determine the next logical step for the student. In the interim, the general education teacher continues to determine what can best help the child in the classroom. T-pg. 271
4. District convened a Student Intervention Team (“SIT”) meeting in February 2019. District recommended an evaluation. Parents declined and wanted to wait until they had more detailed information from the doctors. The group agreed to meet after Parent got more detailed medication information from the doctors. Following the meeting, District sent Parent prior written notice and procedural safeguards. P-6; T-142-144
5. Student was privately evaluated in December 2018 and January 2019. Student’s neuropsychological profile reflected the presence of AU and Attention-Deficit/Hyperactivity Disorder-Combined Type (“ADHD”). Student’s level of intellectual functioning fell within the very superior range. Academic achievement was at expected levels although somewhat lower than expected. The report was not provided at the February 2019 SIT meeting. P-1; T-142-144

6. At a second SIT meeting held January ***, 2020, Student was noted to require redirection, would sometimes become overwhelmed and would shut down, and *** and sometimes with friends. Student's biggest weakness was writing which was Student's least favorite subject. Student had no behavior issues. Student's *** told the team that she would provide reports from Student's doctors. The committee recommended a special education evaluation and Parent agreed. In the interim, the team put in place accommodations such as ***, frequent reminders to stay on task, one on one directions, checking for understanding before and during independent work, and opportunities for Student to move around the room, among other accommodations. J-1
7. District's FIIE included a private Speech-Language Pathology Initial Evaluation conducted by ***, dated October ***, 2019. District's Speech Language Pathologist ("SLP") agreed that the private evaluation contained sufficient data and covered the same areas that would be included in a school evaluation. P-2; T- pgs. 357-358
8. Student's IEP dated May ***, 2020 included speech for pragmatics needs in the amount of ***. It also included *** in the amount of ***. The committee included sensory breaks for Student. The schedule of services in the IEP reflected services and supports that would apply once campus-based learning resumed. During the time of at-home learning, District offered virtual learning opportunities to meet Student's needs with support from Special Education staff. The manner in which Speech Therapy would be addressed during at home learning was explained to Parents. Parents agreed with eligibility, goals and schedule of services. Parents did not waive the five-day waiting period for implementation of the IEP. Thus, the IEP began May ***, 2020. J-5; T-pgs. 53-54, 79
9. Student's *** goals were directed toward learning to independently initiate a conversation with peers related to school or extra curricular activities, learning to take turns by attending to peer's conversation, and waiting for Student's turn to respond. District staff collected progress data for the goals. P-10, 13, 17, 25; J-5, pgs. 5-6
10. Accommodations for Student included access to sensory tools, preferential seating, extra time to complete assignments, individual visual schedule, movement breaks, visual, verbal or tactile reminders to stay on task, among others. J-5, pg. 6
11. In March 2020, Texas mandated school closures because of the COVID-19 pandemic. District remained closed through the end of the school year. Due to the closure, District's OT assessment was delayed. The May 2020 ARD committee agreed that it would be completed no later than 30 school days after on-campus learning resumed. J-5, pg.19; T-pgs. 237-239
12. District's OT was completed September ***, 2020. Student exhibited an overall generalized weakness and low tone, but was able to move around the school building and participate in

academic activities without difficulty. Due to the overall generalized weakness, the OT evaluator indicated a likelihood of fatigue when Student was required to do long writing assignments. She recommended that Student be allowed to type certain assignments. The evaluator determined that Student demonstrated all physical motor abilities that enable function and participation in the school day. J-8

13. *** conducted a private OT evaluation of Student. The October 2019 assessment concluded that Student had deficits in attention, sensory processing regulation, activities of daily living, bilateral coordination, and strength/endurance. The evaluation indicated that Student would benefit from OT services and recommended skilled OT intervention once a week and a skilled home exercise program. P-3; T- pg. 101
14. At the May ***, 2020 ARD meeting, Parents orally requested an independent FBA. The request was noted in the ARD deliberations. J-5, pg. 19; T-138
15. On May ***, 2020, District's Educational Diagnostician emailed Parents and attached a copy of the Procedural Safeguards. The email states, "I have also attached a copy of the Procedural Safeguards. This explains how you can request an Independent Functional Behavior Assessment." The email contained no other documents explaining District's process for a request for IEE. P-31; R-4; P-31; R-16, pg. 1
16. In May 2020, students were not attending class in person, but were learning remotely. When school resumed in August 2020, students continued with remote learning for three weeks. In person learning resumed September 2, 2020. T-54, 234-235, 341
17. Provision of speech services typically are not provided the first and last week of a school year. T-326-327
18. On August ***, 2020, the SLP emailed Student's mother and provided the virtual speech schedule. On August ***, Student's mother responded with questions about absences. She explained that Student's *** was Student's caregiver while both Parents worked and that he had difficulty with Zoom. On the same day, the SLP responded and offered a Temporary Virtual Service Plan ("TVSP") that would temporarily change Student's speech direct services to "consult-only." She explained that it would not affect Student's IEP for in-person learning. Mother emailed her agreement August ***. J-7
19. District generated a document entitled "Admission, Review, and Dismissal/Individualized Education Program (ARD/IEP) Committee Report" dated August ***, 2020 ("August *** Document") and attached a TVSP IEP Supplement Form. The purpose of the document was to reflect an Agreement to Change ("ATC") that would temporarily amend Student's May ***, 2020 IEP. The form adjusted Student's Speech Therapy to a consult basis for *** while Student

- received services in a virtual classroom setting. The TVSP indicated that District's SLP reviewed the plan with Parent August *** and Parent agreed. P-4; J-6, pg. 25; J-7; T-pgs. 89-90,
20. A TVSP is put in place when students are doing at-home learning. T- pg. 140-141
 21. District did not provide speech to Student during the last week of May 2020 or the first week of the 2020-2021 school year. Student did not log in for speech in the second week of that school year. On the third week, Student's TVSP was in place and speech services were provided on a consult basis. T- pgs. 304-342, 345
 22. Per a November ***, 2020 email from Petitioner's advocate, ***, District had not responded to Parent's request for an independent FBA. P-57
 23. After District informed the advocate that there was no release of confidential information on record that allowed it to communicate with her, Parent provided the release December ***, 2020. P-42; T-pgs. 159-160
 24. District agreed to provide an independent FBA on December ***, 2020 and sent Parent the procedures associated with an IEE including Respondent's IEE Operating Guidelines that require a request for an IEE to be submitted in writing to the Executive Director of Special Services. P-44, 45, 46; R-16; T-157
 25. The FBA IEE was conducted March ***, 2021. Four behaviors were shown as problem behaviors: ***, and non-compliance. The evaluator did not observe two of the behaviors, but was informed of them occurring one time each. During the observation, the evaluator observed two instances of ***, and three instances of ***. P-55; T- pgs. 172-175, 204-206
 26. The FBA IEE included recommendations reinforcement of leisure conversation, pairing with a student rather than the teacher, a token system, and *** curriculum on coping skills and interacting with peers and included use of video modeling. To reduce ***, the evaluator recommended a scheduled sensory diet such as a place Student could access regularly. The FBA IEE did not recommend a BIP. P-55; T-pgs. 176-182, 209
 27. The ARD committee met December ***, 2020 and reviewed District's OT evaluation and Student's program. The committee added an accommodation that provided Student the ability to type lengthy written assignments. The committee determined that Student did not meet eligibility criteria to receive the related service of OT at that time. The advocate disagreed. At Parent request, the mastered speech goals mastery level was increased and new speech goals were added. The advocate wanted a BIP for Student. Because Student did not demonstrate a pattern of behaviors, a BIP was not warranted. Parents were again requested to complete their portion of a Parent Training Needs Assessment that was requested at the May 2020 ARD meeting. The

meeting ended in disagreement and was scheduled to reconvene. Parent did not attend the reconvene ARD meeting. J-11, 12

28. Student's *** grade teacher used slides to assist the class with organization and transitions with materials. Student referenced the slides frequently. A weekly dashboard was used for students to keep track of assignments. T-pgs. 273-275
29. Student's assessment history reflects Student's overall achievement levels in *** grade as high-average in ***, and high in ***. Student's performance compared was higher than Student's peers. Student's 1st semester *** grade averages were as follows: ***. Student's grades for the 4th reporting period of *** grade were comparable to the 1st semester grades. J-16, 17; R-8, pgs. 7-11, 19-22; T-pgs. 277
30. At the time of hearing, Student had mastered all but one speech goal for the annual ARD meeting. The end date for the speech goals was May ***, 2021. R-34; T-pgs. 334-337

Burden of Proof

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE.¹ The burden of proof is therefore on Petitioner to show the District violated its obligations under the IDEA and did not provide Student a FAPE.

Free Appropriate Public Education

Under the IDEA, students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs, and prepare them for further education, employment, and independent living.² A school district must offer a FAPE to all students with disabilities living in its jurisdiction between the ages of three and twenty-one.³ These students must receive specially designed, personalized instruction with sufficient support services to meet their unique needs and confer educational benefit. Instruction and services must be at public expense, and comport with the Individualized Education Program developed by the student's Admission, Review, and Dismissal Committee.⁴

Texas One-Year Statute of Limitations/Child Find Claim

Following a "Concerned Persons Report" from Student's teacher, District initiated a SIT meeting February ***, 2019. A District Administrator asked to evaluate Student and explained the reasons for the request. The District Diagnostician explained the characteristics of autism. The committee recommended an evaluation and Parent declined consent. Parent could not recall for certain whether he received

¹ *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. West*, 126 U. S. 528 (2005)

² 20 U.S.C. § 1400(d)(1)(A)

³ 34 C. F. R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3)

⁴ 20 U.S.C. § 1401(9)(A)-(D); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982)

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procedural safeguards at the meeting. District's Educational Diagnostician attended the SIT meeting and testified that he gave procedural safeguards to Parent.

Texas has established a one-year time limitation within which a petitioner must request a special education due process hearing.⁵ The Texas legislature intended that special education disputes be resolved expeditiously. The one-year statute of limitations, and an expectation of the exercise of reasonable diligence on the part of the litigant, is consistent with that intent.⁶

“When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance. Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA. Conversely, in the absence of some other source of IDEA information, a local educational agency's withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights.”⁷

In the instant action, the one-year limitations rule means that Petitioner cannot complain of actions that occurred prior to January 11, 2020. Petitioner does not dispute this limitation. Petitioner failed to complain until Petitioner filed this due process hearing request on January 11, 2021. Petitioner's child find complaint is untimely and thus, is dismissed.

On January ***, 2020, District initiated a second SIT meeting. Parent was available to meet January ***. At the meeting, District staff again recommended a special education evaluation of Student. By February ***, both Parents signed consent. Leading up to the second SIT meeting, Student's teacher provided one on one directions, checked for understanding, gave reminders to stay on task, and reduced the number of problems when mastery of content was able to be preserved.

The FIIE was completed April ***, 2020. It recommended consideration of eligibility for special education services.⁸ The initial ARD committee met May *** and found Student eligible for services as a child with AU and SI. Parent gave consent to place Student in special education, and did not waive the 5-day waiting period. Special Education services began May ***.

Development of Student's IEP

An IEP, including related services, must be reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances.⁹ The school district's plan is presumed to be

⁵ 19 Tex. Admin. Code § 89.1151(c)

⁶ *Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency*, 112 S.W.3d 234 (Tex. App.—Austin 2003, no pet.)

⁷ *El Paso Indep. Sch. Dist. v. Richard R.* 567 F. Supp. 2d 918, 945 (W. D. Tex. 2008)

⁸ 19 T.A.C. §89.1011(c)(1)

⁹ *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017)

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appropriate.¹⁰ The party attacking the plan bears the burden of proof, by a preponderance of the evidence, of demonstrating why it does not comply with the IDEA.¹¹

When a Parent challenges the appropriateness of an IEP, two questions must be asked: whether the state has complied with the procedural requirements of the IDEA, and then, whether the IEP developed through such procedures was “reasonably calculated to enable the child to receive educational benefits.”¹² An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement.¹³

Implementation of IEP/Unilateral Change of Services

Despite Petitioner’s allegation of failure to require speech services, Petitioner take issue with the District’s implementation of student’s speech services. To prevail on Petitioner’s claim of failure to implement the service, under IDEA, Petitioner must show more than a *de minimus* failure to implement all elements of Student’s IEP, and, instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

Petitioner argues that District failed to implement the IEP speech services by not providing speech services at the end of May 2020 and the first three weeks of the 2020-2021 school year, for a total of four weeks. Student’s IEP became effective the last week of school May 2020. Per District practice, no speech services are provided in the first and last week of a school year. District provided virtual learning when the 2020-2021 school year began. In the three weeks leading up to in person learning, no speech was provided in the first week of that school year. Student did not login for the second week, and the TVSP was in effect the third week. Even if District was required and failed to provide speech the last week of May and during the first three weeks of the following year for a total of four weeks, such failure to implement was a *de minimus* failure to implement all elements of Student’s IEP. Further, the testimony is clear that Student was provided FAPE as reflected by Student’s mastery of all Student’s speech goals during the fall semester of 2020. The evidence shows that on the current Speech goals, Student mastered all but one at the time of hearing.

In addition, Petitioner claimed that District failed to provide speech while Student was at home on COVID quarantine. Petitioner failed to show when Student was on COVID quarantine or how long the quarantine lasted. Petitioner’s evidence was too indefinite to prove a failure to implement speech services during any COVID quarantine.

¹⁰ *R. H. v. Plano Indep. School Dist.*, 607 F.3d 1003 (5th Cir. 2010)

¹¹ *Id.* at 1010-11

¹² *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982)

¹³ *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)

Petitioner also argues that Respondent unilaterally changed Student's speech services. Student's initial IEP states, "The schedule of services in this IEP document reflects services and supports that will apply once campus-based learning resumes. During the time of at-home learning, the school district is offering virtual "at home" learning opportunities to meet [Student's] needs with support from Special Education staff." Parent agreed with the schedule of services.

Speech services began virtually prior to the beginning of campus-based learning in the fall 2020. After Student's mother emailed the SLP regarding technological difficulties, the SLP suggested changing direct services to consult services and Student's mother agreed. Thus, for a single week before in-person learning resumed, Student received speech services on a consult basis.

The discussion surrounding the change from direct speech to consult was between the SLP and Student's mother. ***, Petitioner failed to present evidence of the date when ***, ***. There was no convincing testimony to support that Student's father did not know about the TVSP after Student's mother agreed to the change.

Witness testimony likened a TVSP to an IEP amendment. Changes to an IEP may be made when a parent of a child with a disability and the school district agree not to hold an ARD meeting for the purposes of making those changes, and instead develop a written document to amend or modify the child's current IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.¹⁴

The evidence reflects that District and Parent agreed to the TVSP. In an apparent effort to memorialize the agreement, District staff generated the August *** document and attached the TVSP. Student's May 2020 IEP was reflected in that document. The deliberations page indicated that the ARD committee discussed and agreed to the TVSP. In reality, there was no meeting, but rather an agreement between Student's mother and District.

The August *** document was misleading and caused confusion. It could be a procedural violation had Petitioner pled such. Despite the faulty manner in which District memorialized the TVSP, the evidence supports a finding that the change from direct to consult speech services was made between Student's mother and District, not unilaterally by District. Student's mother initiated the discussion regarding difficulty with logging in for the speech services, emailed with the SLP, and agreed to the temporary change. Further, the TVSP was in effect for one week before District resumed in person learning, and there was no credible evidence that Student suffered an educational loss.

District Response to Petitioner's Request for FBA IEE

¹⁴ 34 C. F. R. §§300.324 (a)(4) and (a)(6)
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“Each public agency must provide to Parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations...”¹⁵ If a Parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process hearing complaint to show its evaluation is appropriate or ensure that an IEE is provided at public expense.¹⁶

In the instant action, Petitioner requested an FBA IEE at the May ***, 2020 ARD meeting because Parent wanted Student to have a BIP. The request was memorialized in the ARD minutes. The District was on notice at that time. The following day, the Educational Diagnostician emailed both Parents and attached a copy of the Procedural Safeguards. The Diagnostician said the attachment explained how to request an IEE FBA. The Procedural Safeguards states, “When you ask for an IEE, the school must give you information about its evaluation criteria and where to get an IEE.”

District did not file a due process hearing complaint to support its IEE. Neither did it communicate with Petitioner regarding the IEE request until late November when the advocate emailed District inquiring about the requested IEE FBA. Why Petitioner waited until November to inquire about the IEE request is unclear.

Approximately two weeks later, District’s Executive Director for Special Services (“Executive Director”) acknowledged receipt of Parent’s request for the IEE and granted the request. For the first time, District sent information about its evaluation criteria and where to get an IEE. Also for the first time, District sent its Operating Guidelines that require a requesting party to do so in writing to the Executive Director. District offered no convincing explanation for its silence from May to December. Upon Parent’s request for an IEE, District failed to provide information about where an independent educational evaluation may be obtained, and the agency criteria applicable for IEEs without unnecessary delay.

Although District failed to comply with the IDEA procedures to respond to a request for an IEE without unnecessary delay, Petitioner failed to show any substantive educational harm to Student. Student continued to receive numerous supports and accommodations including some of the FBA IEE recommendations such as *** instruction for interacting with peers and a reward system similar to a token system. Further, neither District’s nor the FBA IEE recommended a BIP.

Four Factors Test for FAPE

The Fifth Circuit defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational

¹⁵ 34 C. F. R. §300.502(a)(2)

¹⁶ *Id.*

program individualized on the basis of the child'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; and 4) Are positive academic and non-academic benefits demonstrated?¹⁷

Is the Educational Program Individualized on the Basis of the Child's Assessment and Performance?
Occupational Therapy

Related services include occupational therapy as may be required to assist a child with a disability to benefit from special education.¹⁸ An educational model is used in a school setting when making a decision regarding OT. The model looks at a child's participation in the educational environment and whether there is OT assistance that would help the child access Student's education.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Parent's child; or caused a deprivation of educational benefit.¹⁹

District's FIIE Report was dated April ***, 2020 within the IDEA 45-school day requirement, and included reference to Parent's outside evaluations including speech, OT, and neuropsychological evaluations. District's FIIE was to include an OT evaluation due to fine motor and sensory concerns. According to District's OT evaluator, OT evaluations need to be conducted in person. In Petitioner's case, District could not conduct the evaluation due to school closures during the COVID-19 pandemic. The ARD committee agreed that the OT evaluation would be conducted within 30 days after on-campus learning resumed.

Petitioner accurately argues that there was no waiver of federal timelines related to special education compliance. Thus, schools were required to complete FIIE evaluations within the required timelines. In other words, the OT evaluation should have been completed within 45 school days.

The Texas Education Agency *ARD Guidance and Contingency Plans During Remote Learning-Summer of 2020* states, "If the LEA cannot complete all components of a Full Individual and Initial Evaluation (FIIE) face-to-face during remote learning related to an emergency as it would have in typical circumstances, an LEA *should create a plan.*"

Student's ARD committee recognized the need for an OT evaluation, and having determined that it should be conducted in person, planned for the evaluation to occur no later than 30 days following return to in-person learning. Parent was present at the meeting and fully informed of the plan.

¹⁷ *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997)

¹⁸ 34 C. F. R. §300.34(a) and (c)(6)

¹⁹ 34 C. F. R. §300.513(a)(2)

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Respondent's OT evaluation was completed within the timeframe prescribed by the May ARD committee.

Petitioner's private OT evaluation reflected that Student's fine and gross motor skills were in the average range. Despite that finding, the private evaluator believed Student would benefit from skilled OT to address both fine motor and gross motor concerns. The clinical-based report noted other deficits including strength/endurance, sensory processing/regulation, and attention. For all the deficits that the evaluation reported, the evaluator indicated that Student would benefit from OT.

Respondent's education-based OT evaluation found that Student exhibited good general fine motor and in-hand skills. Student was able to do all the fine motor activities that were asked of Student during the evaluation. Student's writing was legible and correctly sized. Student had good writing skills that are supported by documentary evidence. Student demonstrated all motor abilities that enable function and participation in the school day. Noting that Student exhibited an overall generalized weakness and low tone, the evaluator indicated that strengthening exercises could be used to address weakness. However, the evaluator determined that Student was able to move around the school building and participate in academic activities without difficulty.

The evaluation recommended sensory breaks to address Student's difficulty with maintaining attention and alertness for certain non-preferred activities. The OT testified that a sensory diet is scheduled in a child's day and Student was successful with the use sensory breaks when needed; thus, Student does not need a sensory diet.

Student tends to have a low energy level that tends to be dependent on Student's level of interest in the assignment. Student is accommodated with a keyboard and has been successful when writing lengthy assignments. To assist Student with Student's reluctance to participate in class activities, the evaluation report recommended allowing Student to choose the activity. Despite the private OT evaluation's position that Student would benefit from OT, the evidence shows that Student is functional in the school setting; thus, Student does not require OT as a related service to assist Student in the educational environment.

While Respondent did not complete the OT evaluation within 45 school days, there is no finding that the postponement impeded the child's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Parent's child, or caused a deprivation of educational benefit. Parent was present and participated in the ARD meeting when the committee planned and agreed to postpone the OT evaluation until it could be conducted in person.

Speech Therapy

Petitioner argues that since Respondent incorporated the private speech therapy report, it should have included that recommended amount of speech therapy at two times per week, rather than the one time per week that the ARD committee agreed to provide. Petitioner further argues that District failed to provide prior written notice when refusing to adopt the evaluation in its entirety.

Prior written notice is required when a District proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.²⁰

Evaluations provide information that assists persons in determining whether the child is a child with a disability under the IDEA and the educational needs of the child. Included in that information are evaluations provided by Parents of a child.²¹ Petitioner cites no authority that requires an ARD committee to adopt an evaluation in its entirety.

When District held the initial ARD committee meeting, the members considered parental concerns, results of the initial or most recent evaluation, and Student's strengths, academic, developmental, and functional needs. It then developed measurable goals in the areas of need, *** and speech therapy. Based on Student's needs, it considered recommendations and developed accommodations such as preferential seating, access to sensory tools, extra time to complete assignments, directions in small, discrete steps, brief movement breaks, advance warning before being called on, and visual, verbal or tactile reminders to stay on task.

Petitioner alleges that District failed to provide related services of Speech and OT, ABA/*** training, *** to address Petitioner's needs. Student's program included speech instruction focused on Student's pragmatic needs. Student's *** addressed Student's need to learn to interact with peers, to use non-preferred topics in discussion, and turn-taking in conversation with peers. As above discussed, Student does not need OT for the provision of FAPE. Based on evaluations, Student's IEP included *** instruction to assist Student with interaction with peers. Petitioner failed to present evidence to support a finding of need for ***. Petitioner failed to carry Petitioner's burden of proving that Student's IEP was not individualized on the basis of assessment and performance.

Is the Program Administered in the Least Restrictive Environment?

The IDEA requires that school districts ensure to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with

²⁰ 34 C. F. R. §300.503(a)(1) and (2)

²¹ 34 C. F. R. §§300.304 and 300.305 (a)(1)
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children who are nondisabled.²² Except for speech services and *** instruction, Student is educated in the general education setting. Petitioner failed to argue or prove that Student's program is not administered in the least restrictive environment.

Are Services provided in a coordinated and collaborative manner by the key stakeholders?

Parent participated in all ARD committee meetings with the exception of the reconvene ARD meeting of January ***, 2021 despite attempts by District staff to contact them by phone at the onset of the meeting. At the December 2020 ARD meeting, Student had mastered Student's Speech goals. The SLP proposed new speech goals. In response to Parent request, Student's prior speech goals were continued with an increased mastery level of 95% accuracy. The SLP sent home resources to assist in the generalization of speech skills from school to home. Parent requested and received Student's use of *** as a classroom accommodation. Petitioner's advocate discussed her opinion that Student needed a BIP. After consideration, District offered to conduct another FBA.

Student's mother and District staff communicated numerous times with questions regarding the use of the Zoom app, Student absences, Student's daily demeanor, among other matters. District staff promptly responded to her emails. Throughout Student's time receiving special education services, either one or both Parents have been active participants in the process. ***. While there was disagreement with the ARD committee's decision that OT is not necessary and that Student has no need for a BIP, Parent input was considered. Although collaboration between Parent and districts is required, such requirement does not extend to giving a Parent veto power regarding a child's IEP.²³

While District's documents regarding the TVSP were confusing, Student's mother and the SLP understood the temporary change in services. Temporary Speech Services were provided as agreed upon by the parties.

Are Positive Academic and Non-Academic Benefits Demonstrated?

Student's overall achievement levels are in the high average level in most all subjects. Student's grades continually rank in the mid-90's. Student's teacher observed that writing is a strength for Student. Student's writing length, grammar and syntax is comparable to Student's peers. Student is able to ***, a unique skill for *** graders. Student chooses reading topics other than Student's preferred topic, and also selects fiction materials.

By mid-December, 2020, Student had mastered a *** goal, and had progress on Student's other *** goal that required independent initiation of a conversation with peers related to school or extra curricular activities. Student could ask one of two required follow-up questions to help maintain the

²² 34. C. F. R. §300.114

²³ *White ex Rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003)

conversation. Student's classroom teacher testified that Student is excited about projects with peers and asks if Student can work with someone. Student spends more time with peers ***.

Student's teacher reported that Student is well behaved at school. Student exhibits no pattern of behaviors that might require a BIP. Student responds positively to teacher redirection and correction.

Student mastered Student's first set of speech goals in the first semester of speech services. Recently, the SLP was able to discontinue the use of visual cues for Student. While Student continues to be a child with AU and SI, Student has improved in interactions with Student's peers, responding positively to same-aged peers even with non-preferred topics or activities. The SLP testified that Student's interactions appeared to flow naturally as opposed to thinking of the steps Student should go through as if "checking off boxes in Student's head." The evidence supports a finding that Student received both positive academic and non-academic benefits from Student's education program.

Conclusions of Law

1. Student is eligible for special education services as a student with a disability under IDEA, 20 U.S.C. §1400 et. seq. and its implementing regulations. Allen Independent School District is responsible for providing the student with a FAPE. [L] [SEP]
2. Respondent's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that the education program is not appropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Respondent's educational program was appropriate in light of Student's circumstances and provided Petitioner a FAPE. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d .
3. [L] [SEP] Respondent unnecessarily delayed its response to Petitioner's request for a functional behavior assessment independent educational evaluation. The failure was a procedural violation of the IDEA. The violation did not deny Student a FAPE. 34 C. F. R. §300.502(b)(2).
4. Petitioner failed to carry the burden of proving that Respondent either unilaterally changed or failed to implement Student's IEP. Any failure to follow the IEP was *de minimus*. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).
5. Petitioner failed to carry its burden of proving that Respondent failed to collaborate or consult with Parent regarding changes to Student's IEP. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDER

Given the broad discretion of the hearing officer in fashioning relief, the hearing officer makes the following order:

1. No later than August 31, 2021, Respondent, Allen Independent School District, shall train District teachers, administrators, and para-professionals regarding IDEA regulations and District policies and procedures for responses to parental requests for independent education evaluations including oral requests.

All other requests for relief are **DENIED**.

SIGNED June 30, 2021.

BRENDA RUDD
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).