DOCKET NO. 330-SE-0812

STUDENT	**§**	**BEFORE A SPECIAL EDUCATION**
	§	
VS.	**§**	**HEARING OFFICER FOR**
	§	
HUTTO ISD	**§**	**THE STATE OF TEXAS**

DECISION OF HEARING OFFICER

*** (hereinafter "the student") through student's next friend Parent, 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 Hutto Independent School District.

PROCEDURAL HISTORY

Petitioner alleged that the District denied the student a FAPE during the 2010-2011 school year when student was enrolled in HISD, until student withdrew from the District on or about ***, 2011. Additionally, Petitioner alleged that Respondent has not fulfilled its Child Find obligations from ***, 2011 to present by failing to reevaluate the student and failing to provide special education and related services under the proportionate share provisions of IDEIA.[1]

The parties appeared for the due process hearing on September 21, 2012. Petitioner appeared in person with attorney of record, Chris Schulz. The District appeared with its representative, ***, and with attorneys of record, Heather Rutland and Abraham Barker. Both parties requested an opportunity to submit written arguments. The decision was timely rendered on October 23, 2012 and forwarded to both parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. References to the court reporter's record will be designated "RR" followed by the page number. References to the exhibits will be designated "P" for Petitioner or "R" for Respondent, followed by the exhibit number and page number if applicable.

ISSUE AND RELIEF REQUESTED

Petitioner alleged that HISD denied the student a FAPE as set forth below.

1. Petitioner alleged that Respondent failed to provide petitioner with a FAPE during the 2010-2011 school year through the date of petitioner's removal from HISD on ***, 2011.

2. Petitioner alleged that Respondent failed to timely reevaluate the student.

[1] Petitioner's complaint regarding proportionate share services was dismissed for want of jurisdiction.

3. Petitioner alleged that Respondent failed to provide petitioner Procedural Safeguards as well as required Prior Written Notice.

Petitioner requested the following relief in petitioner's request for hearing.

1. Reimbursement for private therapy at *** (***) since ***, 2011.

2. Prospective private school placement.

3. Provision of a neuropsychological evaluation with an evaluator selected by the parents.

4. Compensatory education, including counseling, for the denial of a FAPE.

Respondent asserted that all of Petitioner's claims arising out of alleged acts or omissions of the District occurring prior to August 2, 2011 are untimely. After considering all the evidence and arguments of counsel, I find that Petitioner's claims for acts or omissions of HISD occurring prior to August 2, 2011 are barred by the statute of limitations.[2] However, the student's complaint that the HISD failed to timely reevaluate student as a parentally placed private school student is within the statute of limitations.

FINDINGS OF FACT

1. During all relevant times, the student resided within the geographical boundaries of the Hutto ISD. The parent withdrew the student from the District *** beginning in ***, 2011. The parent *** the student within the geographical boundaries of HISD from ***, 2011 through April of 2012.[3] *See Pre-Hearing Conference Transcript, p. 7.*

2. It is undisputed that the student's *** is a private school.

3. The student received special education services from the District during the 2010-2011 school year. Petitioner filed petitioner's request for hearing on August 2, 2012. It is undisputed that the student has not attended HISD since ***, 2011 and that the District has not provided educational services to the student since that time.

4. The parents received Procedural Safeguards following every ARD Committee meeting while the student was enrolled in HISD. (P-11)

5. On January ***, 2011, the principal of the student's school received information that an aide working in the student's classroom ***. (P-3; RR-103-104) The District removed

[2] As Petitioner's FAPE claims are barred by the statute of limitations, I make no substantive findings of fact regarding the appropriateness of the student's IEP or services prior to the time student was withdrawn from HISD.

[3] It is undisputed that the student ***.

the aide from the campus and the principal immediately investigated the claims. (R-11) The aide was dismissed and the parent was notified on ***, 2011. (P15; RR-101)

6. On ***, 2011, the parent provided the District written notice that he was withdrawing the student from HISD ***. The student's effective date of withdrawal was ***, 2011. (P-14) More than ten days after the student's withdrawal from the district, the special education director spoke with the parent and offered placement at a different campus if student re-enrolled. The notes also reflect that she offered "related/homebound services", which the parent declined. According to the special education director's testimony, the purpose of the meeting was to offer the parent an opportunity to discuss proportionate share services. (R-10-0172; RR-63-65)

7. On ***, 2011 the Director of Special Education sent a letter to the parent, notifying him of the District's Child Find obligations to parentally placed private school students. The letter also notified the parent of the student's potential eligibility for services with proportionate share federal funds. (R-10-0173)

8. The District sent a letter to the student's parent during August of 2011, offering a re-evaluation and requesting the return of a questionnaire and informed consent no later than October 3, 2011. Although the letter was not dated, the Special Education Director testified, credibly, that it was her practice to send out letters to *** parents in August of each year. The letter notified the parent that the student's three-year re-evaluation was due July 11, 2011, and was not timely sent to the parent. (RR-66; P-10-0174-0175)

9. The August 2011 letter to the parent informed the parent that a failure to provide consent for a reevaluation would result in the student no longer being considered eligible to receive special education services. (R-10-0176)

10. The August, 2011 letter also informed the parent that HISD remained ready, willing and able to provide the student with a FAPE should student enroll in the District. (R-10-0175)

11. The District sent an identical letter to the parent in August of 2012, notifying the parent of his right to a reevaluation and proportionate share services. (R-10-0177-0180)

12. The evidence is undisputed that Petitioner failed to contact the HISD regarding a reevaluation and failed to provide written consent in response to either the August 2011 or August 2012 notices.

13. The student's last evaluation with the District was on July 18, 2008. R-5-0117. A three-year reevaluation would have been due on or before July 18, 2011.

14. Following the student's withdrawal from HISD, the District's offer to reevaluate the student was untimely because the District failed to send notice to the parent until August, 2011, when the reevaluation was due July 18, 2011. However, the parent did not contact the District to return requested data or consent for a reevaluation after receipt of the August of 2011 or August 2012 notices.

15. The Petitioner presented no evidence that the District's procedural error was of consequence to petitioner or that it impeded petitioner's opportunity to participate in the process. In fact, the parent's testimony was clear that he did not desire to seek or consent to any services from the District once *** the student.

17. The parents filed the request for hearing on August 2, 2012, seeking reimbursement for private ABA therapy at *** (***) as well as a neuropsychological evaluation. I find from a preponderance of the evidence that the parent's decision to seek services through *** was unrelated to the District's untimely notice of reevaluation.

DISCUSSION

Statute of Limitations

The threshold issue in this case is whether any of the student's claims are barred by the statute of limitations. The applicable federal law provides the following with regard to the statute of limitations:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows." 20 U.S.C. §1415(f)(3)(C).

Texas has established an explicit time limitation within which a petitioner must request a special education due process hearing:

> ….[a] parent or public education agency must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request. 19 T.A.C. § 89.1151(c).

The Individuals with Disabilities Education Improvement Act of 2004 added the following exceptions to the applicable statute of limitations:

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –
>
> (i) specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local education agency's withholding of information from the parent that was required under this part to be provided to the parent.

20 U.S.C. §1415(f)(D).

Petitioner's FAPE claims while enrolled in HISD

Petitioner complains of a denial of FAPE beginning in approximately January 2011 through the date of petitioner's withdrawal from the District in *** 2011. *See Prehearing Conference Transcript. p. 7, 15.* Petitioner filed petitioner's Request for Due Process Hearing on August 2, 2012. *See Request for Due Process Hearing.* It is undisputed that the student received special education and related services in the District beginning in the 2008-2009 school year through the date of withdrawal on ***, 2011. Application of the one-year statute of limitations would require dismissal of all claims based on acts or omissions of the District prior to August 2, 2011. It is undisputed that the student has not attended school in HISD since ***, 2011 and that HISD has not provided educational services to the student since that time. Petitioner contends that the statute of limitations should not be applied in this case because of the District's failure to provide prior written notice to the parent following what the parent contends was a proposed change in placement. However, the discussion in question occurred *after* the student was no longer enrolled in HISD and occurred during a discussion of proportionate share services and the possibility of the student returning to the district. Additionally, Petitioner contends that the District failed to provide the parent with Procedural Safeguards during the 2010-2011 school year. The parent does not allege that the District made specific misrepresentations that prevented him from filing a complaint.

Clearly, based on the Petitioner's pleadings and the undisputed evidence, the student was not enrolled in HISD within the relevant limitations period. In order to not apply the statute of limitations pursuant to IDEIA with regard to the student's FAPE complaint, I must find that the district prevented the parent from requesting the hearing by withholding information from the parent that was required under 20 U.S.C. §§ 1411-1419 (Part B).

Did the District withhold information from the parent that was required under IDEIA?

The relevant exception to the statute of limitations requires a determination that the student's parents were prevented from requesting a due process hearing because the school district withheld information from them it was otherwise obligated to provide under *IDEIA*. 20 U.S.C. § 1415 (f)(3)(D)(ii) (*emph. added).* The information a school district is required to provide for statute of limitations purposes is specific and includes, in part:

1. Prior written notice to a parent when it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child - 20 U.S.C. § 1415 (c); 300 C.F.R. § 300.503(a);
2. Procedural Safeguards Notice – 20 U.S.C. §1415(d); 34 C.F.R. § 300.504(a) . . .

The parent first complains that the District did not provide him with a copy of the Procedural Safeguards during the 2010-2011 school year. The preponderance of the credible evidence establishes that the parent was an active participant in all ARD Committee meetings during the school years in question and that the District provided him with a copy of his

Procedural Safeguards each year at the annual ARD Committee meeting. When the student was first referred to the District's special education program, the District initiated a Full Individual Evaluation and provided the student with a copy of student's Procedural Safeguards. (P-11; R-8-0140) An additional copy of the Procedural Safeguards was provided to the student on August 19, 2008, when the parent consented to initial placement. (R-4-0116). The student's IEP for the 2009-2010 school year was developed at an ARD Committee meeting on May 29, 2009, and the parent acknowledged receipt of the Procedural Safeguards at that time. (P-11; R-3-0095). The District provided the parent with Procedural Safeguards at the next annual ARD Committee meeting on May 24, 2010. (P-11; R-1-0027). The student's most recent annual ARD meeting would have occurred on or before May 24, 2011. The evidence clearly establishes that the District provided the Procedural Safeguards to the parent at each annual ARD Meeting. A district must provide a copy of the Procedural Safeguards one time per school year. 34 CFR § 300.504(a). The parent withdrew the student from HISD prior to student's annual ARD meeting and prior to the expiration of the school year. The parent received a copy of the Procedural Safeguards within one year of withdrawing from the District. Petitioner's contention is without merit.

Petitioner also contends that the District failed to provide the requisite "Prior Written Notice" of an intended change in placement on ***, 2011. This contention is also without merit. The parent provided written notice to the District of his intent to withdraw the student and *** on ***, 2011. On ***, 2011, 14 days after the student's withdrawal from the District, the Special Education Director spoke with the parent and suggested placement at a different campus in the event student chose to re-enroll the student. The follow-up letter dated February 18, contains a notation that she offered "related/homebound services" and the parent declined. (R-10; RR-63) The testimony is unclear that a homebound placement was being offered as opposed to related services to be provided in the home under the proportionate provisions of IDEIA. However, even if the special education director discussed the possibility of a homebound placement in the event the student re-enrolled, this discussion would not have prompted the Prior Written Notice requirements under IDEIA. The parent's contention fails because the student was no longer enrolled in the District, and was, in fact, a parentally placed private school student. The District no longer had an obligation to provide the student a FAPE or the ability to implement a change in the student's placement. *See* 34 C.F.R. 300.137; 19 Tex. Admin. Code §89.1096. The purpose of the prior written notice requirement under IDEIA is to provide the parents a reasonable time to fully consider the proposed change in placement and respond prior to the time the school implements that change. *See Letter to Chandler*, 59 IDELR 100 (OSEP 2012). At the time of the discussion between the parent and the special education director, HISD did not have a present ability to implement any change in placement for the student because student was no longer a student in the District. Therefore, any discussions between the parent and the special education director regarding possible homebound services after the student's withdrawal from the district did not give rise to the prior written notice requirements.

Did the parent know, or should the parent have known, about the alleged action that forms the basis of his August 2012 request for due process hearing?

The Texas statute of limitations applicable to special education complaints provides that a parent must bring an action within one year of the date the parent knew *or should have known* of

the facts forming the basis for the hearing request. 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.). Texas hearing officers have consistently applied the one year statute of limitations. *See, e.g., ***. v. Lake Travis ISD,* Dkt. No. 329-SE-0603 (Sept. 2003); **** v. Houston ISD,* Dkt. No. 332-SE-0603 (Jan. 2004). The child was not attending HISD at any time during the relevant limitations period because the parent had withdrawn student from school, purportedly to ***. The Texas rule on its face explicitly requires the exercise of diligence on the part of the litigant to discover the facts giving rise to the claim or the nature of the injury in the same way the discovery rule is applied in other litigation contexts. The running of limitations begins at the time a litigant is entitled to seek a remedy, and contemplates the exercise of reasonable diligence on the part of the litigant to discover the facts giving rise to the claim or the nature of student's injury. *See, e.g., Moreno v. Sterling Drug*, 787 S.W.2d 348, 351 (Tex. 1990); *Student v. El Paso ISD, Dkt. No. 010-SE-0906 (SEA Tex. 2006).*

The parent participated in each and every ARD Committee meeting at which the student's educational program, evaluation and eligibility were discussed and received a copy of student's IEP and FIE. The parent, by his own admission, had legal counsel following the February 2011 incident and the student's subsequent withdrawal. (RR-172) The parent did not exercise due diligence in pursuing a claim on behalf of the student within the limitations period. The facts which form the basis of the complaint, as well as the facts surrounding the incident involving the classroom aide, were available to the parent at all times. The one year statute of limitations, and an expectation of the exercise of reasonable diligence on the part of the litigant, is consistent with the legislative intent that special education disputes be resolved in an expeditious manner. *Texas Advocates Supporting Kids, supra.* Petitioner's claims based on acts or omissions of the district arising prior to August 2, 2011, are barred by the one-year statute of limitations. 19 Tex. Admin. Code § 89.1151(c).

HISD's Obligation After the Student's Withdrawal from the District

It is undisputed that the student was identified as a student with a disability and determined to be eligible for special education services in February 2008, soon after the completion of an initial evaluation and the student's enrollment in HISD. Thereafter, the student received special education and related services from HISD until student's parents withdrew student from the District to *** student on ***, 2011. Thus, the District fulfilled its initial Child Find obligation in July 2008 when it identified and evaluated the student and began to provide special education and related services. On ***, 2011, the parents rejected the District's program when they withdrew the student to ***. At that time, the student became a parentally-placed private school child with a disability as that term is defined in 34 CFR § 300.130. There is no dispute that the student's *** program is a private school under Texas law. *See* 19 Tex. Admin. Code § 89.1096***.

The question of HISD's obligations to the student beginning on ***, 2011 depends on the role of HISD after the student's withdrawal, and that role is somewhat complicated by the fact that the student's private school *** and located within the same school district that had an obligation to make a FAPE available to student. If the parents had chosen to re-enroll the student at any time, HISD would have had a duty to provide a FAPE to the student. If the parents had

contacted HISD to request a reevaluation, HISD would have been obligated to evaluate the student to determine whether student continued to be eligible for special education services. *See Letter to Eig*, 52 IDELR 136 (OSEP, Jan. 28, 2009) However, once the parent withdrew the student from HISD, and never again contacted the District, the school no longer had a duty to provide special education and related services to the student. *See* 34 C.F.R. §300.137; 19 Tex. Admin. Code § 89.1096. However, given that HISD is also the school district where the student's private school was located, HISD assumed different obligations with regard to the student after student's withdrawal and placement in a private school within its boundaries.

A local education agency in which a private school is located is responsible for conducting a thorough and complete Child Find process, after consultation with private school representatives, to identify and determine the number of parentally-placed children with disabilities attending private schools located within the district's boundaries. 34 CFR §§ 300.130-130.144. The purpose of this process is to ensure equitable participation and an accurate count of disabled private school children. The school district, under these provisions, is not responsible for making a Free Appropriate Public Education (FAPE) available to the child, although the student may receive some proportionate share services. In fact, the child does not have an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. 34 CFR § 300.137(a); *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 1371 (5th Cir. 1997). The only issue over which a hearing officer may assume jurisdiction between a school district and the parentally placed private school student is a Child Find complaint. Any complaints regarding equitable participation, consultation and service plans for the student are only subject to the state's complaint process. 34 CFR § 300.140.

HISD had the same obligation to the student as any other student of a private school within its boundaries. That is, after consultation with the parent, to locate, identify and evaluate student. 34 CFR §300.131(a) In this case, an initial evaluation of the student was completed on July 18, 2008, when the student was enrolled in HISD. The ARD Committee reviewed the evaluation, identified the child as a student with a disability eligible to receive special education and related services under the eligibility classifications of Autism and Speech Impairment. (R-4) Through the District's Child Find process, it identified and began to provide special education and related services to the student and continued to do so until the student's withdrawal from the District on February 7, 2011. Although HISD did not have an obligation to provide a FAPE to the student until the parents chose to re-enroll student, HISD did have a duty to reevaluate the student because it is the public school in which the student's home school is located, *and* HISD had actual knowledge of the student's disability and of student's attendance of a private school within its boundaries. The obligation to reevaluate the student does not arise out of an ongoing duty on the part of HISD to provide a FAPE for the student, but rather, is a part of its ongoing Child Find and evaluation obligations to parentally placed private school children under the proportionate share provisions of IDEA. The District's responsibilities under these circumstances include the duty to reevaluate the student on at least a triennial basis. 34 CFR.300.131; 300.140(b); 34 CFR 300.303. *See also Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools* (OSERS April 1, 2011).

The District did not offer a reevaluation of the student until August of 2011, after the due

date of the evaluation. In its notice to the parent, the District requested that the parent contact HISD to discuss the reevaluation, provide consent, and return a questionnaire. The notice to the parent was not timely and was a procedural violation of IDEIA. However, the parent did not respond to the communication or contact the District to provide consent to an evaluation. By failing to respond to the District on or before October 3, 2011, as requested, the parent is deemed to have refused consent to a reevaluation. Any procedural error associated with the August, 2011 notice was of no consequence to the parent. The parent's testimony and actions clearly establish that the parent was not seeking any services or evaluations from the District after student withdrew the student from HISD.

CONCLUSIONS OF LAW

1. The student was eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations until student's withdrawal from the district on ***, 2011. HISD identified the student as a student eligible to receive special education and related services while student was enrolled in HISD.

2. HISD's obligation to provide the student with special education and related services terminated upon the parent withdrawing the student from HISD and enrolling student in ***. 34 C.F.R. §300.137; 19 Tex. Admin. Code § 89.1096(b).

3. The District's discussion with the parent about "related/homebound services" after he had withdrawn the student from HISD did not require Prior Written Notice under IDEIA. 34 C.F.R. §300.503(a).

4. The one-year statute of limitations is applicable in this case. All claims arising prior to August 2, 2011, are barred by the statute of limitations. 19 Tex. Admin. Code §89.1151(c).

5. The *** is a private school. 19 Tex. Admin. Code § 89.1096(a)(2).

6. The student's *** was located within the geographical boundaries of the HISD.

7. HISD had actual notice of the student's disability and that the student was a parentally placed private school student with a disability.

8. HISD had an obligation as the local education agency where the student's *** was located to conduct a reevaluation of the student. 34 CFR § 300.131(a). The District's obligation to a parentally-placed private school child under these circumstances existed without regard to whether or not the parent sought services or an evaluation on behalf of the student.

9. The student's three-year reevaluation was due on or before July 18, 2011. In August, 2011, the District sent its notice to the parent that it would reevaluate the student with the parent's consent. Although the District's notice of reevaluation was untimely, the parent rejected the offer to reevaluate by failing to respond to the District or provide consent for the evaluation by October 3, 2011.

10. Beginning October 3, 2011, HISD was no longer required to consider the student as eligible to receive proportionate share services under 34 CFR §§ 300.132-300.144. *See* 34 C.F.R. §300.300(d)(4)(ii).

11. The district'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 it is not appropriate and that petitioner is entitled to relief under IDEIA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has wholly failed to meet petitioner's burden on all issues.

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 23rd day of October, 2012.

/s/Sharon M. Ramage
Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue: Whether the District violated its Child Find obligation with regard to the student *** by failing to timely complete a reevaluation.

Held: For District. Although the District's notice was untimely, the parent failed to provide consent for the reevaluation. Once the parent failed to provide consent, the District was no longer required to consider the student eligible to receive proportionate share services under 34 CFR §§ 300-132-300.144.

Citation: 34 CFR § 300.131(a); 34 CFR 300.303(b)(2); 34 CFR § 300.300(d)(4)

Issue: Whether the District's failure to provide Prior Written Notice to the parent following a discussion regarding homebound services after the parent withdrew the student from the District to *** tolls the statute of limitations.

Held: For the District. The discussion with the parent occurred when the student was no longer enrolled in the District but was a parentally placed private school child. As such, the District was not required to provide a FAPE and had no present ability to implement a change in placement. The one-year statute of limitations is applicable in this case.

Citation: 34 C.F.R. 300.137; 19 Tex. Admin. Code § 89.1096; 34 CFR § 503(a)(1); 20 U.S.C. § 1415(f)(3)(D)(ii)