DOCKET NO. 129-SE-0213

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

DECISION OF THE HEARING OFFICER

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

PROCEDURAL HISTORY

Petitioner filed this request for hearing on February 12, 2013. Petitioner was represented by student's parent, Pro Se. David Hodgins represented the Santa Fe Independent School District. Neither party requested a continuance or extension of the Decision deadline. The hearing was held on April 9-10, 2013, and the Decision was timely rendered and forwarded to the parties.

ISSUES

1. Petitioner alleges that the District failed to develop an appropriate IEP for the student on January 14, 2013, by removing necessary accommodations, and that the proposed IEP denies the student a FAPE.

2. Respondent filed a counterclaim, seeking a finding from the Hearing Officer that it has provided the student a FAPE during the 2012-2013 school year.

3. As relief, Petitioner requests a finding of a denial of a Free Appropriate Public Education (FAPE) and an Order requiring the District to implement the student's existing IEP (in place prior to January 14, 2013) until student's annual ARD meeting in May 2013.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The student is an *** grade student residing within the geographical boundaries of the Santa Fe ISD.

2. Santa Fe ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing the student with a FAPE pursuant to the IDEIA and is implementing regulations.

3. The student is eligible to receive special education and related services as a student with Other Health Impairment related to a diagnosis of ADD-NOS. R1-0096, R3-344; RR1-243.

4. On June 27, 2012, the ARD Committee reviewed the student's FIE, determined eligibility, and

developed an IEP. R3. The ARD Committee reviewed the student's the present levels of academic achievement and functional performance and determined that the student demonstrated needs in organizational skills and strategies for completing assignments. R3-343-346. No academic weaknesses were noted. R3-346. I find based on a preponderance of the evidence that the student's IEP for the 2012-2013 school year developed on June 27, 2012, and clarified on August 2 and October 10, 2012, was individualized based the student's assessment and performance. R3; R4; RR2-369.

5. According to the student's IEP, student receives instruction in the general education classroom with no curriculum or instructional modifications. The student's schedule *** classes. R3-364; R7; R8. It is undisputed that this is the least restrictive environment for the student. R7; R8; RR2-348.

6. The accommodations provided in the student's 2012-2013 IEP include close proximity to the teacher (front row of each class); extended time on exams of 150%; extended time up to 5 school days per assignment; contact parent by email on the first day assignment not turned in; note taking assistance (slot notes); FM Unit to be made available in all classes; and ability to take tests in a quiet location (to reduce distractions). R3-357-358. The ARD Committee decided that the accommodation of extended time for assignment completion would be reviewed at the end of the first semester and adjusted according to the student's progress. R3-337; R4-400.

7. The IEP also provided that the student would meet with a monitor teacher to review assignments and prepare for tutoring. R3-337. The assistant principal acts as the monitoring teacher and met with the student on a regular basis to assist the student in organizational skills, monitor assignment completion and oversee the implementation of student's BIP. R3-349-351; RR2-335, 339-345. The student's BIP addresses organizational skills and assignment completion. R3-349.

8. The ARD Committee adopted counseling goals to be implemented by the counselor to address organizational skills and assignment completion and to provide the opportunity for the student to access the counselor when student is depressed or anxious. R3-352. I find based on a preponderance of the evidence that the student has made meaningful progress on student's counseling IEP for the 2012-2013 school year. R10; RR1-244-245. The parent failed to produce any evidence that the student has not made progress on student's counseling IEP.

9. The student's class schedule for the 2012-2013 school year includes *** and ***. (R7, R8). The *** classes are high level, rigorous classes that generally require students to work at a faster pace and at a more advanced level than the regular *** courses. These courses also require significant work outside the classroom. RR2-346.

10. The parent and District personnel met multiple times and communicated through numerous emails regarding the parent's literal interpretation of the accommodations in the IEP. Multiple ARD committee meetings were held during the course of the 2012-2013 school year to clarify the accommodations for the benefit of the parent. R3; R4; R5.

11. There was some confusion regarding the term "close proximity" seating in that the IEP listed front row seating as an example for front row seating and the student's mother began to insist that the student must sit in the literal front row of each class. RR1-195-196; RR2-355-356; R4.

12. The ARD Committee met on October 2, 2012 and clarified that if front row seating is not available due to the structure of the class or activity, then a written justification should be sent to the parent and the monitor teacher. R4-400.

13. Some teachers believed other locations in the classroom gave the student closer proximity to the teacher while lecturing so they did not initially seat the student in the front row. Rather, they would seat the student in a location with the best proximity to the teacher during lecture time. R14. School personnel met with the parent to review seating charts and their explanation for alternate close proximity seating. However, the parent continued to insist that the student remain on the literal front row of the classroom. Several teachers testified that they did not believe this was the best seating for the student. RR1-158, 174, 197-199; RR2-270-271, 355-359; R4.

14. Despite being provided the written justification as outlined in the October 2, 2012 ARD meeting, the parent continued to complain that the student was not sitting in the literal front row in each class. ***. RR1-197-199; R14; R4; R5; R6.

15. The setup of classrooms varies depending on the content being taught and the instructional teaching style of each teacher. Determining where the literal "front row" of a class is can be difficult depending on the structure of a classroom and may not always be the best or most appropriate seat. Using the phrase "preferential to instruction" allows the teacher discretion to determine where the best and most appropriate seat for the student in his/her classroom would be. RR2-311-312.

16. The IEP includes a provision, at the request of the parent, that an FM device be made available to the student in all classes. R3-358; R5-851.

17. An FM device was consistently made available to the student. The Assistant Principal discussed the use of the FM device with the student on several occasions, explained it was available for student to use, and showed student where it was located. However, the student told the assistant principal to place it under the desk because student would not use it. RR1-158-159, 187-188; RR2-274, 309, 363-364. The student refused to use the FM device in all of student's classes. The student has never asked to use the FM device in any class during the school year. RR2-274-276, 308, 363-364. The student has also passed state assessments or achieved commended performance without the use of the FM unit. R9-871.

18. The IEP also provides an example of note taking assistance as "slot notes." There was significant dispute over the meaning of this accommodation. The student's teachers provided note taking assistance in varying formats. R13; RR1-29-30, 142, 193-194. The student frequently refuses to take notes provided by the teachers. RR1-28-29; RR2-273, 306, 308, 362-363.

19. The student's teachers testified that the term slot notes is a broad term that encompasses varied methods of note taking assistance. It is not limited to one particular format. RR1-186-187; RR2-272-273, 362.

20. A conference was held with the parent in November, 2012 to explain and provide examples of the types of note taking assistance or slot notes that were being provided. However, the parent interpreted the term to literally mean one particular form of notes and insisted upon that form being implemented. R5; RR2-386-387.

21. I find based on a preponderance of the evidence that the term "slot notes" is a broad term that encompasses varied methods of note taking assistance and is not limited to one particular form of notes. RR1-186-187; RR2-273, 306-307, 362.

22. I find based on a preponderance of the evidence that school personnel have offered the student an opportunity to test in a quiet location throughout the entire 2012-2013 school year. RR1-107, 199; RR2-276, 309-310.

23. The parent expressed concerns during the January 2013 ARD Committee meeting that the math and social studies classrooms were too loud during testing, so district personnel developed a plan to allow the student to go to an alternative location for testing if requested. R6. The student has never requested access to the alternative testing location, or taken advantage of it when offered to student. RR1-28-29, 38-39, 107-108, 200.

24. It is undisputed that the teachers have provided the student with extended time on exams. RR1-199; RR2-272, 299, 360.

25. The IEP developed during the June, 2012 ARD Committee meeting, and clarified in August and October, 2012, provided that the student would receive an additional 5 school days for assignment completion in the event student fails to timely turn in student's assignments. R3; R4.

26. The student's teachers are to contact the parent by email on the first day an assignment is not turned in. The accommodation does not require that the teacher contact the parent when the student misses a quiz or test. R3; RR1-40, 123, 185, 200; RR2-272, 302-303, 360.

27. There have been limited occasions during the 2012-2013 school year when a few of the teachers have failed to notify the parent of the missed assignment on the first day the assignment was due. This has occurred when a teacher did not realize the assignment was not turned in until she began to grade the assignments, and then the teacher immediately notified the parent of the missing assignment and provided the student 5 school days from the date of notice to the parent in which to complete and turn in the assignment. RR1-40; RR2-305-306.

28. I find based on a preponderance of the evidence that the student's teachers have provided the student with 5 extended school days for assignment completion in the event student fails to turn work in on its due date. To the extent some teachers have failed to perfectly implement the student's IEP with regard to parent notification, such failures are de minimus failures on the part of the District.

29. The ARD Committee convened in December, 2012, and concluded in January, 2013, to address confusion regarding preferential seating and note taking assistance and to make a slight reduction in the amount of extended time the student was to receive on assignments. R5; R6.

30. The ARD was a duly constituted ARD, consisting of the parent, an administrator, a general education teacher, a special education teacher, ***, and an assessment representative. R5, R6.

31. During this ARD Committee meeting, District personnel recommended that the term "preferential to instruction" be used instead of the term "front row." The parent disagreed with this recommendation. R5-859; R6-869. I find that the clarification proposed by the District personnel members of the ARD Committee is appropriate.

32. District personnel also recommended that the term "slot notes" be clarified as a general term referring to various guided note taking techniques. The parent disagreed and requested that other types of notes could only be used with her prior approval. R6-869.

33. Limiting note taking assistance to only one particular form is impractical given the varied content of each course and different teaching styles. This premise is consistent with the testimony of the teachers, who all credibly testified that they provided varying forms of note taking assistance. The teachers

should be allowed professional discretion to determine the most appropriate form of note taking assistance for the student in their class. R6-869.

34. District personnel also recommended a decrease in the student's accommodation of extended time for assignments from 5 days to 3 days. The parent disagreed. R5-859; R6-869

35. Teachers testified that providing the student 5 extra days to complete assignments is more detrimental than beneficial because it encourages procrastination, leads to the student falling behind, and distorts the scope and sequence of the content being taught. R1-201-203; RR2-287-288, 301-302, 373-376.

36. Teachers testified that on occasions when the student takes an extra 5 days to complete an assignment, the assignment will frequently not become due until after the test occurs on the material, so the student has not received the benefit the of the practice the assignment provides. *See, e.g.*, RR1-203. In spite of this, the student has continued to make passing grades.

37. A reduction in the amount of extended time ***. RR2-283-284, 315, 373.

38. The student is capable of completing the work with a reduced extended time. RR1-201; RR2-282-283, 313, 373. Some of student's teachers testified that student could complete the work with no additional extended time. RR2-289-290, 301, 313, 323-324.

39. The decision to reduce the student's extended time for assignment completion was based on a review of the student's progress as contemplated in student's October 2, 2102 ARD meeting. I find based on a preponderance of the evidence that the recommended change to this accommodation is appropriate.

40. The parent produced no evidence that the student has not made meaningful educational progress. In fact, the record is clear that the student has excelled academically.

41. ***, the student made passing grades in all of student's classes, several of which were *** classes. The student's grade *** R7.

42. The student's *** math teacher reported that student excels in her classroom and achieved *** on the district-wide assessment. RR1-109-110, 114-116; R9. Student's *** teacher reported that student maintains an A average and that student is a leader in her class. RR2-268-269. All teachers reported that student is an excellent student and exhibits no behavioral issues that interfere with student's learning.

43. The student is currently ***. R16; RR2-349.

44. I find based on a preponderance of the evidence that District personnel implemented significant elements of the student's IEP and that any failure to implement accommodations was *de minimus* and resulted in no harm to the student.

45. I find based on a preponderance of the evidence that the modification to the student's accommodation regarding length of time for assignment completion is appropriate for the student.

46. I find based on a preponderance of the evidence that the clarification of the preferential seating accommodation from front row seating to "preferential to instruction" is appropriate. The accommodation is based on the student's needs to access education, not a matter of classroom geography.

47. I find based on a preponderance of the evidence that the ARD Committee appropriately clarified

that the form of note taking assistance or slot notes should be left to the judgment of the educator.

48. I find based on a preponderance of the evidence that the student's IEP as developed in December, 2012 and January, 2013 is appropriate for the student.

49. I find based on a preponderance of the evidence that the SFISD provided the student a Free Appropriate Public Education at all times during the 2012-2013 school year to the date of the hearing as evidenced by the student's grades and progress in student's *** classes and student's behavioral progress.

DISCUSSION

Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized" but that it enables to the student to receive some educational benefit from student's program.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.; Houston ISD* v. *Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

1. Procedural Sufficiency

IDEIA establishes certain procedural requirements in formulating and implementing a child's IEP. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. However, procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP result in the denial of a free appropriate public education." 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003).

The parent has failed to produce any evidence of procedural errors in formulating and implementing the student's IEP. Additionally, as set forth below, the IEP developed and implemented by the District has provided the student a FAPE at all times during the 2012-2013 school year to the date of hearing, and the IEP proposed at the December 2012 and January 2013 ARD Committee meetings is reasonably calculated to provide the student a FAPE.

2. Substantive Sufficiency

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student'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?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047

(1998). The Fifth Circuit has also noted that a court (or hearing officer) need not apply the four factors in any particular way, but that they are merely indicators of an IEP's appropriateness intended to provide guidance in a fact-sensitive inquiry of evaluating whether an IEP has provided an educational benefit. *Richardson ISD v. Michael Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

The student's IEP for the 2012-2013 school year, including the IEP developed in December 2012 and January 2013, is individualized based on the student's assessment and performance. The initial IEP for the school year was developed in June, 2012, following the completion of the student's FIE, and was based on student's assessment, teacher observations, and present levels of performance. In evaluating the student's present levels of performance, the ARD Committee determined there were no academic weaknesses, and therefore, the IEP required implementation in the regular classroom with no modifications to the curriculum. Additionally, the ARD Committee identified the student's weaknesses in organizational skills and assignment completion and approved accommodations, assignment of a monitor teacher, counseling goals and behavioral goals to address those weaknesses. R3.

Additionally, the ARD Committee determined that the extended time for assignment completion issue should be revisited after the first semester and adjusted according to the student's performance. In reviewing student's performance during ***, it is very clear from the record that the student was excelling in student's classes, many of which were *** classes. R7. Teachers discovered during *** that the length of extended time offered was counterproductive in that it encouraged procrastination and resulted frequently in the student not completing the assignments until after testing on the subject matter. *See e.g.,* RR1-201-203. There was a concerted effort to not eliminate the accommodation altogether, but to reduce it to a reasonable amount of time that addresses student's organizational skill deficits and still ensure that the student is able to complete the work in a timely manner in advance of being tested on the material. The decision to change this accommodation was an appropriate one and based on the student's individualized needs.

The IEP has been consistently carried out in a coordinated and collaborative manner by key stakeholders. The parent's central complaint in this case is that the District did not implement accommodations in the precise manner that she dictated. For example, the parent insisted that the student sit in the front row of the class rather than in the place most preferential to instruction based on the reality in the teacher's classroom. She also insisted that note taking assistance be implemented in the manner dictated by her. Although IDEIA requires collaboration with the parent as a stakeholder in the student's education, the right to collaborate is not the right to dictate the method in which a teacher carries out instruction in his or her classroom. The manner in which accommodations is implemented in this case is essentially a matter of methodology, which is an issue to be resolved be the District, not the hearing officer. *See Daniel R.R. at* 1044; *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988).

The student receives instruction in a mainstream setting, with no curriculum modifications. Student's schedule includes *** classes, and student excels in student's program. The student's accommodations are minimal and determined based on student's individualized needs. It is undisputed that the student's educational program is being implemented in the least restrictive environment.

Additionally, the parent asserts that the District's failure to perfectly implement all accommodations is a *per se* denial of a FAPE. The parent elicited testimony from teachers who acknowledged that they did not always timely notify her on the first day the student had a missing assignment due to failing to discover it immediately. However, the student was provided the full amount extended time for completion of assignments beginning on the day of notification. A party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of an IEP. The party must demonstrate that the District failed to implement substantial or significant portions of the IEP. *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 200). As set forth in the findings of fact herein, any failure on the part of the District to implement the student's accommodations perfectly was *de minimus* and resulted in no loss of educational opportunity or denial of a

FAPE.

It is undisputed that the IEP has provided the student with academic and non-academic benefits. The student is an A-B student in *** classes, made *** in student's class on the district wide math assessment, and has met expectations or been commended on statewide assessments. Teachers referred to the student as performing above average and being a leader. The testimony and the evidence unequivocally demonstrate that the student's 2012-2013 IEP is appropriate and that it is reasonably calculated to confer, and has in fact conferred, an educational benefit. The testimony and the evidence also unequivocally demonstrate that the revisions and clarifications to the IEP proposed by the District in December, 2012, and January, 2013, are also reasonably calculated to confer an educational benefit.

In sum, the SFISD has provided the student with a FAPE at all times during the 2012-2013 school year and the proposed IEP is reasonably calculated to continue providing the student with a Free Appropriate Public Education.

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 under the category of Other Health Impaired.

2. 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 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 this burden.

3. The District has provided the student with a Free Appropriate Public Education at all times during the 2012-2013 school year. To the extent the District failed to perfectly implement the student's accommodations, this failure resulted in no harm to the student. *Houston ISD* v. *Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

4. The IEP developed at the December 2012 and January 2013 ARD Committee meeting is appropriate for the student. The District appropriately clarified and revised the student's accommodations based on the student's assessment, academic, developmental and functional performance. 34 CFR §300.324.

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 effective immediately. This Decision is final and is appealable to state or federal district court.

SIGNED this 26th day of April, 2013.

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

SYNOPSIS

Issue No. 1: Whether the District's proposed IEP that modified extended time for assignment completion and clarified the accommodations of preferential seating and note taking assistance denied the student a FAPE.

Held: For the District. The IEP was developed by a duly constituted ARD Committee that considered the parent's concerns and was based on the student's current assessment, academic, developmental and functional needs, and student's strengths and weaknesses.

Citation: 34 CFR §300.324(a)(1)

Issue No. 2: Whether the District provided the student a FAPE during the 2012-2013 school year.

Held: For the District. The student's educational program was provided in conformity with the requirements for an IEP pursuant to 34 CFR §300.320-300.324.

Citation: 34 CFR §300.17; 34 CFR §320.