DOCKET NO. 253-SE-0613

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

DECISION OF HEARING OFFICER

Student (hereinafter "the student") through next friends, *** and ***, 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 Beaumont Independent School District (hereinafter "BISD").

PROCEDURAL HISTORY

Petitioner filed a Request for Due Process Hearing on June 17, 2013, alleging that BISD denied the student a FAPE during the 2012-2013 school year through the date of hearing.

The parties participated in a due process hearing on September 10-11, 2013. Petitioner was represented by attorney of record, Dorene Philpot. Respondent was represented by attorneys of record, Heather Rutland and Abraham Barker.

Both parties requested an opportunity to submit written arguments and the decision due date was extended for good cause to October 16, 2013. The decision was timely rendered 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.

ISSUES PRESENTED BY PETITIONER

Petitioner raised the following issues for hearing:[1]

1. Whether BISD failed to timely and appropriately evaluate the student in all areas of suspected disability;

2. Whether BISD failed to appropriately evaluate the student by failing to conduct audiological and assistive technology evaluations;

3. Whether BISD failed to appropriately identify the student in all appropriate eligibility categories;

4. Whether the student's IEP is appropriate;

5. Whether the District failed to properly consider ESY services;

[1] The Petitioner lists 18 separate issues, which are more appropriately divided into the following categories: the nature of BISD's obligation; when the duty to the student arose; whether BISD provided a FAPE; and what relief, if any, is equitable under the circumstances.

6. Whether the parent's participation was impeded by the District's failure to provide a copy of the IEP, FIE and BISD's alleged alteration of records;

7. Whether the District failed to implement the IEP and failed to provide the related service provider a copy of the goals and objectives or the student's FIE;

8. Whether BISD provided appropriate services;

9. Whether BISD committed procedural violations by failing to have appropriate personnel at the ARD Committee meeting, failing to provide the parent with a copy of the IEP, failing to allow the parent access to the student's speech folder, or made decisions outside the ARD Committee meeting;

10. Whether BISD reduced the student's services based on staffing needs rather than the student's needs;

11. Whether BISD failed to provide Prior Written Notice;

12. Whether BISD failed to re-convene an ARD meeting with requisite notice;

13. Whether BISD failed to timely provide Procedural Safeguards;

14. Whether the BISD predetermined the student's placement for the 2013-2014 school year;

15. Whether BISD appropriately responded to the parent's IEE request;

16. Whether BISD should be ordered to provide reimbursement for private services obtained by the parent;

17. Whether the student and/or parent were subjected to bullying and/or harassment that resulted in a denial of FAPE;

18. Whether the hearing request is frivolous, unreasonable, groundless, meritless, without foundation, or pursued in bad faith for an improper purpose.

Petitioner requested the following relief under IDEIA:

1. An order requiring the District to provide the student an appropriate IEP in the least restrictive environment;

2. Reimbursement for private placement as well as prospective placement;

3. Compensatory education in an amount deemed appropriate by the hearing officer;

4. Any and all other relief deemed appropriate by the hearing officer.

DISMISSAL OF CLAIMS NON-IDEIA CLAIMS

Petitioner's claims under Section 504 of the Rehabilitation Act were dismissed for want of jurisdiction prior to the hearing,

FINDINGS OF FACT

1. The student is a ***-year old who became age eligible for services under IDEIA in ***. P14-23 (student *** years *** months on ***).

2. The student's parent is ***.

3. Sometime before the student's ***, the parent began noticing difficulties in the student's speech intelligibility and confided in the speech-language pathologist on *** campus, as well as other ***. At the time, the student was enrolled in a full-time *** program. RR451, 548.

4. According to the testimony and the exhibits, the speech language pathologist informed the parent that the District could not conduct an FIE unless and until the student enrolled in the District. RR609; P10-1. The speech language pathologist referred the parent to the District's Child Find screening process and placed the referral on hold. P10-1.

5. The District engages in affirmative Child Find efforts by engaging in monthly meetings with ***, communicating with families prior to *** who are served by ***, placing advertisements and brochures in newspapers, doctors' offices and other locations, and organizing screenings at a local church. RR71.

6. On January 27, 2013, the speech pathologist from *** campus screened the student and notified other District personnel that the student needed a referral for special education and that referral would be placed on hold until student enrolled in the District. P10-1. The speech language pathologist's documentation and testimony is consistent with the parent's testimony that she was referred to the District's *** screening. RR215-216; P10-6. The parent declined the screening and eventually requested a referral packet for a special education evaluation in late March, 2013. RR-216. The school did not provide the referral packet at that time, but waited until the speech pathologist on the *** campus screened student on April 17, 2013. P2-45.

7. The parent completed the referral packet on April 26, 2013 and signed a Consent for Assessment/Evaluation on May 8, 2013. P2-40; P2-44. The consent authorized the assessment of the student in all areas

8. The District's FIE only consisted of a speech evaluation. The District did not assess the student in all areas, did not conduct an audiological evaluation, and did not conduct an assistive technology evaluation. P2-1; P2-22; P2-46; P18-62.

9. The District did not conduct an audiological assessment which was necessary to determine whether hearing issues were contributing to student's speech deficits. The parent obtained an independent audiological evaluation from the *** on April 23, 2013. P-14. The parent notified the District that she was obtaining the evaluation and requested payment. P10-2. A speech language pathologist from the district accompanied her to the evaluation. RR214.

10. On May 24, 2013, the District provided the parent with a notice of an ARD Committee meeting to be held on May 28, 2013 and the parent waived her 5 day notice period. P4-22; 4-23. The document refers to the meeting as a Service Plan Meeting.

11. The District convened a meeting with the parent on May 28, 2013. There is a dispute as to whether the meeting was a Service Plan meeting (for a private school student) or an initial ARD Committee meeting. I find, based on a preponderance of the evidence, and conclude as a matter of law, that the District was required to conduct an ARD Committee meeting to offer the student a FAPE.

12. The speech language pathologist was responsible for scheduling the meeting and invited the parent and an administrator. It is undisputed that she did not invite a *** or private school representative and that there was no general education representative. The administrator left the meeting early due to a campus emergency. The parent asked to continue the meeting, telling the speech language pathologist she knew her rights. RR568-575.

13. There are four different versions of the documentation from the May 28, 2013 meeting. It is undisputed that the parent had difficulty obtaining documents from the District, requiring intervention of the hearing officer directing that she have access. The parent also attempted to view the records while the case was pending, with one occasion resulting in ***. (*See* testimony of parent).

14. One version of the document is entitled "Service Plan." P422-33. This document refers to the student's Speech and Language Evaluation dated May 24, 2013 and contains the signature of both parents waiving the right to 5 days' notice of the meeting. Although the signature page is completed with the notation that all in attendance agreed, this section contains no names or signatures of committee members. P4-28.

15. The document also includes speech goals and objectives dated August 27, 2013. P4-26. It is not clear from the evidence if these goals and objectives were completed after the ARD Committee meeting or if District personnel used the start date of the 2014-2015 school year as the date of the goals in anticipation of the goals being implemented during the 2014-2015 school year. The document contains no goals for the remainder of the school year and no goals for ESY, but contains a consent for initial placement signed by the parent dated May 28, 2013. P4-32.

16. The first version also contains 2 different sets of minutes which reflect different deliberations. The first set of minutes states that the student's services under the "Service Plan" will begin during the 2013-2014 school year, with speech services to be provided one time per week for 30 minutes. P4-33. The second set of minutes has a handwritten line drawn through them and reflects 2 sessions per week for 30 minutes each beginning the last week of the 2012-2013 school year, with the student also receiving 6 weeks of ESY services, and walk-in services beginning in the 2013-2014 school year. These deliberations contain a statement that all ARD Committee members agreed to the services. P4-39.

17. It is undisputed that this version of the documentation from the May 28, 2013 meeting was not provided to the parent until July 8, 2013, when it was faxed to the parent's attorney by the District's counsel following an order of the hearing officer.

18. It is undisputed that the only meeting that occurred between the parents and the District to determine the student's special eligibility for special education and services, whether through a Service Plan or IEP, was May 28, 2013. No meetings were held after that date.

19. A second version of the meeting documentation is entitled "ARD Meeting" and is dated June 1, 2013. P18-15. It is undisputed that there was no meeting on June 1, 2013. The signature page has no names or signatures but reflects that the ARD Committee meeting was in disagreement. P18-23. This document also contains deliberations identical to the second set of minutes referred to in the first version, except they are entitled "ARD Meeting Deliberations" rather than "Service Plan Meeting Deliberations."

20. A third version of the meeting documents is dated June 7, 2013 and is entitled "Service Plan." P18-143. It is undisputed that no meeting occurred on June 7, 2013.

21. The third version of the meeting documents reflects an FIE date of May 28, 2013, rather than May 24, 2013 as noted on the first two versions. P18-143. The signature page is completed with a notation that the plan was reached by mutual agreement, contains the typed names of the parents and school personnel, a

notation that no instructional staff or administrator was present, but contains no signatures. P18-147. The typed deliberations page states that the ARD Committee met on May 28, 2013, that the student has"mild" speech impairment, that the parent reported that the student stutters and disagreed that the student has a mild speech impairment, contains recommendations for ESY and no reference to services beginning the last 7 days of the school year. P18-152. The deliberations page also contains the written notation that the minutes were not typed by the speech pathologist. P18-152.

22. There are four different versions of the FIE. The first version purports to have been completed on May 24, 2013 and classifies the student's articulation deficit as moderate. P2-1.

23. The second FIE purports to have been completed on May 28, 2013 and classifies the student's articulation deficit as "mild." P2-22.

24. The third FIE purports to have been completed on May 24, 2013 and classifies the student's articulation deficit as "mild." P2-46.

25. The fourth FIE purports to have been completed on May 24, 2013 and classifies the student's articulation deficit as "moderate." P18-62

26. The first and fourth versions of the FIE indicate a six member multidisciplinary team. The second and third versions indicate a seven-member multidisciplinary team. P2-22; P2-23.

27. The second version of the FIE is signed and contains a signed FIE Disability Report. P2-30-31. This version also appears to be in a different format from the other versions in that the pagination style is different. P2-31. The first version identifies a special education teacher and general education teacher as participants in the multi-disciplinary team. P2-19.

28. The third version of the FIE Disability Report is dated May 24 2013, and is not signed. P2-22.

29. At the time of the referral for the FIE, the parent had already registered the student in *** School for the 2013-2014 school year. The student's sibling is also a student at the private school. P4-33; P15-2.

30. At the time of the evaluation, the student was attending a private ***.

31. It is undisputed that the school did not invite a representative from *** to the meeting on May 28, 2013.

32. The parent enrolled the student in *** School on May 31, 2013, and student began to receive speech services on that date. P6; R13. Someone withdrew the student from the District on June 8, 2013 without the parent's consent. P12-5.

33. The speech therapist provided services on May 31, June 3, and June 4, 2013. P6 The District and the parent agreed to ESY 2 times per week for 30 minutes for a period of 8 weeks during the pendency of the case.

34. The student received no speech services between June 4 and July 31, 2013. P6. According to the District's Compliance Monitor, no one within the District followed up on insuring that the student received speech services when she was on vacation during the summer. RR530.

35. The District attempted to catch up on missed ESY services by providing additional hours per week in order to achieve 16 sessions of speech therapy for the student prior to the time the student began school

in mid-August. RR530, P6.

36. On the first date of services, the speech therapist appeared at the school to work with the student not having seen an FIE. The parent provided her with a copy of the FIE which had been provided to her. RR292-293.

37. The District did not provide the speech therapist with goals for the student. Rather, she stated that she based her activities with student on the version of the FIE she was provided. RR419.

38. The speech therapist who actually provided services for the child at BISD characterized the student's speech deficit as "moderate." RR427.

39. As of the date of the hearing, the student continued to receive speech therapy for 30 minutes 2 times per week. District personnel recommended 1 hour per week for 30 minutes each, but no one could provide an adequate explanation for why that was appropriate for the student. RR554-557.

40. Based on a preponderance of the evidence, and the parent's direct testimony, at the time of the evaluation, the parent's intent was to cause the student to be dual enrolled in the private school and BISD. RR356.

41. The student was not enrolled in a private school at the time of the referral for special education.

42. The parent obtained private speech services for the student at *** during the summer of 2013.

43. The student's private speech therapist testified the student's deficit is moderate and that the student made progress. RR194.

44. The student's private evaluator testified that the student's speech deficit is moderate and that an appropriate amount of speech services for student is 2 times per week for 1 hour each to work on articulation and phonological processing skills. RR42, 51; P14-16-19. I found the private evaluator's testimony to be credible.

45. On March 4, 2013, the parent registered the student and student's sibling for the *** School for the 2013-2014 school year. RR15-2. I find, based on a preponderance of the credible evidence, that the parent's decision to enroll the student in the private school was independent of any acts or omissions of the District.

DISCUSSION

The appropriate analysis of this case involves the resolution of four questions:

1. What was the nature of BISD's duty to the student?
2. When did BISD's duty to the student arise?
3. What did BISD do to fulfill its obligations?
4. What, if any, relief is equitable under the circumstances?

What was BISD's Duty to the Student?

The student in this case was not enrolled in BISD at the time of the referral for special education and related services. BISD asserts that the student was a "private school" student, and therefore BISD's duty was limited to Child Find responsibilities and equitable participation services through a "Services Plan." The parent

asserts that BISD had an obligation to make a FAPE available to the student, although she intended from the outset to seek *** during the 2014-2015 school year.

At the time of the referral, the student was in private ***. According to school witnesses, they considered this to be a private school because it is a private entity. 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). Rather, the student may receive services selected by the District under a "Services Plan." 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. *See Student v. Hutto ISD, Docket No. 330-SE-0812* (Oct. 23, 2012); *Student v. McKinney ISD., Docket No. 107-SE-110,* (April 28, 2010).

A parentally placed private school child is a child with a disability enrolled by child's parents in a private school or facility that meets the definition of *** under ***. *See* 34 CFR §300.130. *** school is defined as ***. According to the District, since the *** is a "private entity", it is therefore a private school. This is contrary to federal and state law. The Commissioner's Rules define "private school" as a nonprofit entity that provides elementary or secondary education that incorporates an adopted curriculum designed to meet basic educational goals, including scope and sequence of courses, and formal review and documentation of student progress. 19 TAC §89.1096(a)(1). There is no evidence that the student's *** provided *** education as that term is defined under state and federal law. Moreover, BISD did not consult with a *** representative in developing the student's plan for speech services, and it would have been required to do so if the student was entitled to a services plan. *See* 34 CFR 300.134. Therefore, BISD's obligations to the student during the 2012-2013 school year were not governed by the Proportionate Share provisions of IDEIA. Rather, BISD, had an obligation to offer a FAPE to the student upon a finding of eligibility.[2] In this case, the District had an obligation to convene an ARD Committee meeting and develop an IEP for the student for the 2012-2013 school year. The meeting on May 24, 2013 should have been an ARD Committee meeting formed for the purpose of offering a FAPE, not a services plan.

The complicating factor in this case, however, is the evaluation occurred at the end of the school year, the District was on notice that the parent intended to enroll the student in the *** School for the 2013-2014 school year. In fact, prior to the dispute in this case, the parent, in recapping her understanding of the ARD meeting on May 28, 2013, stated that the student would be attending the private school. P18-111 The parent also testified that her intent for the 2013-2014 school year was ***. RR356 The federal guidance on this issue provides that the school district where the student resides (BISD) must make a FAPE available to the student unless the parent makes clear his or her intent to keep the student enrolled in the private school. *See Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools,* 111 LRP 32532 (OSERS April 1, 2011).

***. In this case, BISD, as the resident school district, is responsible for providing special education and related services to the student. It is BISD's responsibility to identify the student, then convene an ARD Committee to develop an IEP to designed to provide a FAPE in the least restrictive environment. BISD and the parent shall then determine which special education and/or related services shall be provided by BISD. 19 TAC

[2] The student's eligibility for special education and related services is not in dispute.

89.1096(c). In this case, the District did not offer a FAPE for the 2013-2014 school year, as the parent had made her intention known that she intended for the student to attend the private school. The District treated the student as a student eligible for proportionate share services and offered only a services plan. The District, however, should have only proposed a services plan in consultation with *** school representatives and the parents **after** the parent ***. *** and the District failed to offer a program, other than speech services. The District's failure election to offer a services plan, ***, is a procedural violation of IDEIA.

When Did the District's Duty to Identify and Provide Services for the Student Arise?

BISD, as a local education agency, has a duty to identify, locate and evaluate children within its boundaries who are disabled and due to such disability, are in need of special education and related services. 34 CFR §300.111. ***.

The District's Compliance Monitor testified regarding the District's affirmative Child Find practices, and the parent, ***, was certainly familiar with those practices. The parent informally confided in *** and friend that she was having difficulty understanding her child's speech sometime prior to child's ***. RR205-206. Her friend gave her some suggestions and encouraged her. However, she returned to *** after student's *** and told them she wanted student evaluated. RR207. The friend, who also was a speech language pathologist at ***, told her the student could not be evaluated unless enrolled in the district. This is not a correct statement of the law and the parent informed school personnel that she was aware that it was not. P10-6.

On January 28, 2013, the speech language pathologist notified other school personnel that the student needed further evaluation that could not be completed until student was enrolled. The speech language pathologist's email corroborates the parent's testimony that she was told the evaluation could not occur unless the student was enrolled. P10-1. The speech pathologist also stated in the email that the evaluation would be put on hold until the student attended a Special Education screening at a local church, where monthly screenings were administered by the District.

The District was on notice that the student required an evaluation for special education and related services on January 27, 2013. This is the date that the District's duty to the student arose.[3]

What did BISD do to fulfill its obligations?

The educational program offered by the school district is presumed to be appropriate. 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 the program enable the student to receive some educational benefit from student's program. The Petitioner has met its burden.

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).

[3] Even the parent acknowledges that she did not request an actual referral until March 2013. RR207. However, the District was clearly on notice that the student had a suspected speech disability on January 27, 2013 and should have initiated the referral process at that time.

Procedural Sufficiency

In this case, it is clear that the District did not comply with IDEIA's procedural requirements. The District's procedural failures not only resulted in delay in offering services to the student, but also denied the parent meaningful participation in the development of the student's educational program.

First, the District delayed the evaluation of the student upon the parent's referral for special education and related services. Although the District was on notice that the parent requested a referral for special education and related services on January 27, 2013, District personnel delayed the process by informing her that the referral would be on hold until the student enrolled in the District. Eventually, at the parent's request, *** administered a "screening" for the student on April 17, 2013. P2-45. The District did not provide a referral packet to the parent until April 24, 2013, which she completed on April 26, 2013. RR207-208; P-2-38. The District's insistence in relying upon the screening process to delay evaluation is without merit. The duty to evaluate a student arises at anytime the school *or the parent* requests it. 34 CFR §300.301.

Prior to the evaluation, the parent signed the appropriate consents and provided the District with the outside audiological evaluation she had previously obtained from the ***, vision screening information, and a prescription from the physician for a speech evaluation and services. P13; P14-3. The District obtained consent from the parent for the evaluation on May 8, 2013, and conducted a speech evaluation on May 24, 2013, just days before the May 28, 2013 meeting. Although there was a delay in obtaining consent, had the District obtained consent on January 27, 2013, it would have had 60 days from that date to complete the evaluation, and thirty days after it was completed to conduct the initial ARD meeting to determine eligibility and services. 34 CFR 300.301(c); 300.323. This procedural error resulted in a delay of services for the student of approximately 30 days, as the student began to receive services on May 31, 2013.

The parent is not without blame, however. The parent, ***, insisted that the evaluation as well as services be completed by school personnel of her own choosing, *** rather than the student's home campus. RR440; 454. The parent also declined the opportunity to participate in the *** screening because she would not have control over the personnel evaluating the student. The District agreed to her requests. District personnel conducted the evaluation on May 24, 2013. According to the evaluator's testimony, the multidisciplinary team determined the student had a mild speech impairment and recommended speech therapy 1 time per week for 30 minutes duration. RR553-555.[4] According to the witness, 30 minutes per week was recommended in order for the student to receive services in the least restrictive environment. RR558. This testimony reflects a lack of understanding of the difference between services and placement. The amount and duration of services should be determined first. The least restrictive environment provisions of IDEIA relate to the placement in which the services are delivered. 34 CFR §115-120.

On May 28, 2013, the parent and the speech pathologist met for what the District characterized as a Services Plan Meeting and what the parent characterized as an ARD Committee meeting. According to the parent, she believed the evaluation was completed at that time. According to the speech pathologist, it was not. RR559-560. In an effort to move quickly, the speech pathologist met with the parent to review it and determine services for the 2013-2014 school year even though it would need further completion. *Id.* The only people in attendance were the parent, the speech pathologist, and for a portion of the time, the principal, who left early due to a campus emergency. This was not a duly constituted meeting, whether it is characterized as an ARD Committee or a Services Plan Meeting. 34 CFR 300.321 However, there is credible evidence that the parent insisted on going forward with the meeting without the proper members in an effort to obtain services quickly for ***. RR17-1153. Her actions do not excuse the school's failure, but they provide the context in which many mistakes were made.

The District uses a computerized IEP program, SuccessEd. Technology can be a valuable tool in

[4] This testimony is inconsistent with various versions of the FIE and IEP.

managing and creating the voluminous documentation required under IDEIA. However, as the facts in this case illustrate, such programs, when not used properly, can lead to situations in which the integrity of the collaborative process is undermined and may result in a denial of meaningful parental participation.

There are four versions of the FIE. The first version is dated May 24, 2013, unsigned, indicates a team of 6 professionals, classifies the student's level of impairment as moderate and lists *** campus as the student's home campus. P2-1. The second version is signed, dated May 28, 2013, classifies the student's level of impairment as mild, lists a 7-member multidisciplinary team, and lists the student's residential home campus. P2-22. The third version of the FIE is dated May 24, 2013, lists the student's residential home campus, indicates a 7-member multidisciplinary team, and classifies the student's impairment as mild. P2-46. The fourth version of the FIE is dated May 24, 2013, is unsigned, lists a 6-member multidisciplinary team, and characterizes the student's impairment as moderate. P18-62. Versions 1 and 4 appear to be drafted in an entirely different format from the other two versions, with differences in pagination. The first version does not contain an FIE Disability Report. P2-1-21. However, the second, third and fourth versions do. Although the third and fourth versions are not signed, the forms have been pre-filled with the signature boxes indicating agreement checked "yes". P2-55; P18-81. The District's Executive Director for Special Education testified that the FIE was dated May 24, and that the May 28, 2013 version was a draft, even though it is a subsequent version of the document. RR153. A second speech pathologist involved in the student's assessment said that the "locked" version would have been presented during the May 28, 2013 meeting. However, she acknowledged that it was impossible to determine from a review of the documents which FIE was locked or finalized in the Success Ed Program. RR393. The Success Ed staff record access log reflects that the student's electronic file was accessed 11 times between the May 28, 2013 meeting and June 7, 2013, the day the FIE was actually "locked." P4-57. In other words, an evaluation occurred on May 24, 2013, but there are 2 versions reflecting that date and two versions reflecting the May 28, 2013 date. However, the FIE was still subject to revision until it was locked on June 7, 2013, 10 days following the meeting, a dispute between the parties, and after the parent filed a complaint with TEA.

Additional confusion exists surrounding the student's IEP, which the District characterizes as a service plan. There are three versions of the IEP, all with different dates, including June 1 and June 7, 2013, and two of which are identified as Service Plans. It is undisputed that the meeting was held on May 28, 2013. It is hard to fathom how two additional versions of the IEP could exist for dates on which there was no meeting. The IEP's are inconsistent in the characterization of the student's speech deficit, the nature and duration of student's services, the campus where student will be served, and whether the document is a Services Plan or an IEP. None of the testifying personnel, except the speech language pathologist who is no longer employed by the District, could identify which document actually represented what occurred at the meeting. The speech language pathologist testified that the May 24, 2013 version, which contains a signed consent for services, is the actual document generated from the meeting. However, she testified that the meeting ended in disagreement, when the document itself reflects an agreement was reached. P4-28, 30, 32, 33. There are no signatures on the signature page for the document or any other IEP/Service Plan. P4-28, 30. The deliberations page reflects speech services to be provided 1 time per week for 30 minutes, when the goals and objectives page reflects 2 times per week for 30 minutes. P4-26, 33. The second and third versions of the document reflect speech therapy twice per week and once per week, respectively. P18-20; P18-143. The three documents cannot be reconciled because they contain so many inconsistencies as to carry no weight at all. The fourth document is a Speech IEP containing goals and objectives to be operative during the 2013-2014 school year which is included in May 24, 2013 version of the documentation. P4-26.

The SuccessEd Forms Summary contains a log of all documents in the student's electronic file. As of June 17, 2013, the date this request for hearing was filed, the following documents were still in draft form: ARD Committee Report, Notice of Decision, Notice of ARD Committee Meeting, and Parent/Guardian Acknowledgment Form. P4-111; RR234-235. According to the Forms Summary, the FIE was locked and provided a date of May 28, 2013. RR235. Although the Success Ed Manager reflects that the document was

actually locked on June 7, 2013, the date set for the form when it was locked was May 28, 2013. According to the parent, the date assigned to the form can be manually entered even though it is locked at a different date. RR235.

The speech language pathologist and the parent testified that in an effort to complete the student's evaluation process quickly, she provided the parent with her password to the SuccessEd program and asked her to enter basic identifying information in order to set up the file. The parent admitted doing so, but was credible when she denied accessing the file after that date. RR254. There were accusations from both the District and the parent that the other party altered documents in this case. The allegation that the parent altered the documents fails because the changes to the documents are not consistent with changes that would inure to her benefit, such as changing the child's ESY to 6 weeks from 8, when she had asked for 8; and changing the child's impairment from moderate to mild, when she had a firm belief that student's speech impairment was in fact moderate. However, the allegation that District personnel engaged in a vast conspiracy to intentionally falsify documents also fails. A reasonable conclusion, based on the evidence, is that too many persons had access to the electronic file, the speech language pathologist had poor recordkeeping practices, efforts were made to create documents in advance of the meeting, such as pre-typed minutes (RR320) and pre-checked boxes, and subsequent efforts to recreate what happened in the meeting conflicted with information previously included in the form. This is an example of misusing a computerized IEP program to such an extent that it destroys the integrity of any ARD documents created. Given that school personnel could not determine which IEP documents to rely upon, a parent, ***, cannot be expected to do so. In fact, this hearing officer is unable to determine with any degree of certainty which IEP is operative and which version of the FIE forms the basis of the IEP. The procedural deficiencies in the development of the FIE and IEP resulted in a denial of the parent's right to meaningful participation and a denial of FAPE.

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 5th Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afforded the same weight. Rather, the factors are intended as a guide in the determining whether the student received a FAPE. *Richardson ISD v. Leah Z*, 580 F.3d 286 (5th Cir. 2009).

In applying the relevant factors to this case, it would appear that the student's program was not individualized based on student's assessment and performance. The IEP (or Service Plan) was developed in a meeting that was not a duly constituted ARD meeting and before the evaluation was completed. Goals appear to have been developed for the 2013-2014 school year. However, these goals are not tied to any identifiable present levels of achievement and academic functioning specific to the student's deficits in articulation. R4-26. Moreover, the District agreed to provide services to the student for the remainder of the school year and ESY services without goals and objectives at all. The speech therapist working with the student acknowledged that she had no FIE or IEP goals and objectives when she appeared on campus to provide services for the student. The services provided cannot be said to be based on the student's evaluation and performance. In fact, they appear to be based on nothing at all. In contrast, the parent sought private speech therapy through ***. The private speech goals are specific, reflect a baseline and a target goal, and are based on student's current articulation deficits. P14-23.The private provider also provided progress reports specific to the student's goals.

P14-23-24. Although the school's speech therapist testified that the student made progress, it is impossible to determine if that progress was due to the school's efforts or the private therapy, especially in light of the fact that the school provided no therapy for most of the summer.[5]

According to the school's evaluator, the multidisciplinary team determined the student had a mild speech impairment and recommended speech therapy one time per week for 30 minutes duration. RR553-555. According to the witness, 30 minutes per week was recommended in order for the student to receive services in the least restrictive environment. RR558. This testimony reflects a lack of understanding of the difference between services and placement. The amount and duration of services should be determined first. The least restrictive environment provisions of IDEIA relates to the placement in which the services are delivered, not the nature or amount of services. 34 CFR §115-120. Additionally, based on the testimony it is apparent that the District pre-determined the amount of services based on whether the student was characterized as having a mild or a moderate speech impairment. This approaches fails to adequately individualize services for the student. The parent's expert's testimony that the student requires 2 one-hour sessions per week is the more credible testimony.

Finally, the student's program was not provided in a collaborative and coordinated manner. The multiple versions of the IEP and FIE make it impossible to coordinate services that are identifiable and appropriate for the student.

The parent has met her burden. The District's program is both procedurally and substantively deficient and has resulted in a denial of FAPE.

RELIEF

For relief, Petitioner requests reimbursement for private placement at the *** School, reimbursement for private speech and audiological evaluations, private speech services, prospective relief and compensatory services.

Reimbursement for private placement is proper when the school fails to provide (or in this case make available) a FAPE, and the private placement is appropriate. *Alamo Heights Indep. Sch. Dist. vs. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); 34 CFR §300.148(c). The parent argues that she notified the District immediately following the ARD meeting of her intent to place the student in private school. However, the communication was in the context of an email recapping her understanding of the speech services that would be provided through the end of the school year and summer and notifying the District ***. She was not rejecting the school's program. P10-10. The parent had already enrolled both of her children in the private school prior to the District's assessment and testified that ***. Therefore, the parent's request for reimbursement for placement at the *** School is DENIED.

However, the District was under an obligation to offer appropriate speech services and evaluations for the student and it failed to do so. Therefore, the parent is entitled to reimbursement for her out-of-pocket costs for the evaluations from ***. She is also entitled to reimbursement for out-of-pocket costs associated with private speech services she obtained during the summer of 2013. The District shall reimburse her upon presentation of receipts to BISD.

Compensatory and prospective relief are available under IDEIA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA

[5] The District did not assert that the student was not entitled to ESY services and agreed to provide them. However, after agreeing, it failed to implement. Implementation of components of an IEP under *** is not the proper subject of a due process hearing. However, the substantive sufficiency of those components is properly the subject of a due process hearing. 19 TAC 89.1096(f).

requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3,* 21 IDELR 723 (9th Cir. 1994). Compensatory services are awarded in order to do equity. These services are not awarded as "damages." Rather, such equitable relief must be designed to ensure that the student is being properly educated within the meaning of IDEIA. The ultimate award must be fact-specific and reasonably calculated to provide the student with educational benefits which would have accrued from special education services the school district should have supplied in the first place *Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir. 2006). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a free appropriate public education in light of that denial.

The District denied the student a FAPE when it failed to timely initiate its evaluation. In this case, the amount of compensatory services should be measured by the length of time the student was unable to access educational benefit from an IEP due to the District's failure to timely evaluate and identify the student. The referral (and consent) should have been initiated on January 27, 2013, the date the District was on notice that the parent was requesting a referral and it documented that the referral was on hold until the student enrolled in the District. The ARD Committee meeting should have been held 90 days later on April 28, 2013, assuming a 60-day time period to complete the evaluation and 30 days to convene the ARD Committee meeting. 34 CFR §323(c); 19 Tex. Admin. Code §89.1050. The District convened an ARD that was not duly constituted on May 28, 2013, and the parent consented to services beginning on May 31, 2013, when there were no agreed IEP goals and objectives. Compensatory speech services for the remainder of the 2012-2013 school year should be measured from April 28, 2013 through the last school day of the academic year.

The private evaluator testified that the student requires 2 one-hour speech therapy sessions per week. Therefore, the District shall provide compensatory speech services for the student in an amount equal to 8 one-hour sessions to compensate for the missed services during the 2012-2013 school year. Additionally, the District shall calculate the number of speech hours owed the student for the 2013-2014 school year as of the date of the implementation of this Decision based on 2 one-hour sessions per week, subtract the number of hours actually provided, and provide the differential to the student as compensatory speech services.

The District shall provide the student with a Full Individual Evaluation, assessing the student in all areas, within 30 days of the ARD Committee meeting implementing this decision. The District shall adopt the parent's private speech evaluation and implement its recommendations in two one-hour speech therapy sessions per week pending the outcome of the FIE. The amount of speech therapy ordered is based on the credible evidence in the record regarding the student's needs at the time of the evaluation. This amount may be adjusted depending on the outcome of the FIE.

Upon completion of the FIE, the District shall convene an ARD Committee meeting to review the assessment(s) and develop an IEP. The District shall have an obligation to make a FAPE available to the student. However, the parent may either elect to enroll the student in BISD or ***.

Given the confusion that developed due the manner in which the SuccessEd program was utilized by the District, I am compelled to give guidance to the District on the manner in which it shall provide certainty to the parent and District personnel that there is one FIE and one IEP. District personnel shall not pre-type minutes in preparing for the ARD or pre-fill any sections of the FIE or IEP other than identifying information. In the case of the FIE, the District shall "lock" the FIE on the date that it is completed, print the log reflecting the date it was locked, and attach it to the FIE for the parent to initial. With regard to the IEP, the District shall complete the IEP during the ARD Committee meeting, lock the IEP, and provide a printed copy of the IEP and the SuccessEd record access log to the parent to document that the IEP has been locked at the conclusion of the ARD Committee meeting. The parent and all ARD Committee members shall sign the SuccessEd record access log and attach it to the IEP.

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Beaumont ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended as a student with Speech Impairment.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984) and must show more than a de minimis deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden with regard to the District's delay in completing the evaluation and the adequacy of the IEP developed in May, 2013.

3. The denial of FAPE in this case was more than de minimis. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Procedural errors in this case resulted in a denial of FAPE, impeded the student's access to a FAPE and impeded parental participation in the development of the student's educational program. 34 CFR §300.513(a)(2).

4. Petitioner is entitled to compensatory education services and prospective relief to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

5. Petitioner is not entitled to reimbursement for petitioner's private placement at the *** School, but is entitled to reimbursement for private speech services and petitioner's private evaluations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

6. Petitioner's request for a finding that this hearing request is neither frivolous, unreasonable, groundless, meritless, without foundation or pursued in bad faith for an improper purpose is GRANTED.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED, in part,** as follows:

1. Respondent shall provide the student with compensatory speech services in amount of 8 hours to compensate the student for lost opportunity for speech services from after April 28, 2013 through the end of the 2012-2013 school year. The Respondent shall provide these services during the 2013-2014 school year.

2. Respondent shall provide the student with compensatory speech services for the 2013-2014 school year through the date of implementation of this Decision in an amount of 2 hours per week minus the amount of services provided. The District shall provide the services during the 2013-2014 school year.

3. Respondent shall reimburse Petitioner for all out of pocket costs associated with private speech and audiological evaluations completed at ***, as well as speech services provided during the summer of 2013 no later than 10 days from the date of the ARD Committee meeting implementing this decision. The parent shall submit all receipts to the District at the ARD Committee meeting that is convened to implement this Decision.

4. Respondent shall provide the student with a Full Individual Evaluation, assessing the student in all areas, within 30 days of the date of the ARD Committee meeting implementing this decision. Respondent shall adopt the parent's private speech evaluation and implement its recommendations in two one-hour speech therapy sessions per week pending the outcome of the FIE. This amount may be adjusted depending on the outcome of the FIE.

5. Upon completion of the FIE, Respondent shall convene an ARD Committee meeting to review the assessment(s) and develop and IEP. The District shall make a FAPE available to the student. However, the parent may either elect to enroll the student in BISD or ***.

6. In drafting the FIE and the IEP, the Respondent shall take the following precautions. Respondent's personnel shall not pre-type minutes in preparing for the ARD or pre-fill any sections of the FIE or IEP other than identifying information. In the case of the FIE, the appropriate personnel shall "lock" the FIE on the date that it is completed, print the log reflecting the date it was locked, and attach it to the FIE for the parent to initial. With regard to the IEP, the appropriate personnel shall complete the IEP during the ARD Committee meeting, lock the IEP, and provide a printed copy of the IEP and the SuccessEd record access log to the parent to document that the IEP has been locked at the conclusion of the ARD Committee meeting. The parent and all ARD Committee members shall sign the SuccessEd record access log and attach it to the IEP.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

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

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of Federal and State Education Policy of the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 16th day of October, 2013.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue No. 1: Whether the District failed to timely evaluate the student as a student eligible for services under IDEIA.

Ruling: For the Parent. The District unreasonably delayed the evaluation from the date the parent requested the evaluation on January 27, 2013 to May 8, 2013, when it obtained the parent's consent. The procedural errors resulted in a denial of a FAPE.

Citation: 34 CFR §300.301(b).

Issue No. 4: Whether the District denied the parent meaningful participation in the development of the student's educational program by failing to provide her with copies of the student's FIE and IEP.

Ruling: For the Parent. The District failed to provide copies of the ARD documentation without intervention of the hearing officer, and then provided multiple, inconsistent versions of documentation of the FIE and IEP. The inconsistencies resulted in the parent not being able to determine which FIE the program is based upon and which IEP is operational. This significantly impeded the parent's ability to meaningfully participate in the development of the child's educational program.

Citation: 34 CFR §300.513(a)(2)

Issue No. 5: Whether the District failed to develop appropriate IEP goals and objectives to meet the student's academic and non-academic needs.

Ruling: For the Parent. Due to the inconsistencies in the various versions of the IEP, it is difficult to conclude if goals and objectives were created at all, and if they were, they were only created for the 2013-2014 school year, and not the 2012-2013 school year and ESY. The goals for the 2013-2014 school year are not based on the student's particularized levels of functioning and performance in the area of articulation.

Citation: 34 CFR §300.324.

Issue No. 6: Whether the District erred in providing the student a Service Plan rather than offering the student a FAPE ***.

Ruling: For the Parent. During the 2012-2013 school year, the student attended ***, which is not a private school. Therefore, the District should have offered the student a FAPE. For the 2013-2014 school year, the parent had already informed the school ***. However, the District offered a Service Plan when the parent had not rejected a FAPE or ***.

Citation: 34 CFR §300.130, 34 CFR §300.131; 19 TAC 89.1096.