

STUDENT, B/N/F PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
VS.	§	HEARING OFFICER
	§	
LEWISVILLE INDEPENDENT SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

STUDENT, by next friends and parents \*\*\* and \*\*\* (hereinafter “Petitioner” or “the student”) brought a complaint pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, et seq., complaining of Lewisville Independent School District (hereinafter “Respondent” or “the district”).

Petitioner’s request for hearing was filed on April 14, 2014. In addition to Petitioner’s IDEA claims, Petitioner also sought relief under Section 504 of the Rehabilitation Act of 1973 (20 U.S.C. Section 794), the American with Disabilities Act (42 U.S.C. Section 12.101, et seq.), the Civil Rights Act (42 U.S.C. Section 1983), and the Family Educational Rights and Privacy Act (20 U.S.C. Section 1232g(b)(6)). The hearing officer has no jurisdiction under these statutes and all claims other than IDEA claims were dismissed.

The hearing was originally set for two days but counsel for Petitioner asked for additional time and the hearing was reset for four days. By order of the hearing officer, the matter came on for hearing in the offices of the district in Lewisville, Texas, on March 23, 24, 25, and 26, 2015.

Petitioner was represented by Yvonnilda Muñiz, an attorney in Austin, Texas. Olivia Ruiz, also an attorney in Austin, appeared for Petitioner on March 23 and 24, 2015. Respondent was represented by Nona Matthews and Gwendolyn (Gigi) Maez with the Irving office of Walsh, Anderson, Gallegos, Green & Treviño.

At the close of the hearing, the parties jointly moved for an extension of the decision deadline to provide an opportunity to file written closing arguments. The deadline was again extended on the motion of Petitioner to provide additional time to file a closing argument. By agreement of the parties and order of the hearing officer, the decision deadline in this matter is May 22, 2015.

In the request for hearing, Petitioner alleged that the district by the actions of its admission, review, and dismissal (“ARD”) committees has failed to provide – and offer – a free appropriate public education (“FAPE”) for the student with appropriate goals and objectives and related services based upon current accurate evaluation. Specifically, in Petitioner’s request for hearing, Petitioner complained that the district failed to provide the student with FAPE “...for the following reasons:

- A. Failing to provide/propose an appropriate educational program individualized to meet [the student’s] communication needs during the 2013-2014 school year and 2014-15 school year;
- B. Restricting [the student’s] least restrictive environment placement by failing to address [the student’s] vocal communication needs;
- C. Failing to propose appropriate levels of speech therapy;
- D. Failing to provide [the student] with appropriate level (sic) of direct speech therapy services (direct versus small group);
- E. Failing to provide [the student] with speech goals and objectives that are measurable and individualized to meet [the student’s] unique needs;
- F. Failing to provide [the student] goals and objectives that are uniquely tailored to meet [the student’s] individualized needs;
- G. Failing to allow [the student’s] parents equal collaboration and access to the ARD process; and
- H. Making decisions outside of the ARD committee.”

As relief, Petitioner’s request – in its entirety – proposed “...that the District be ordered to:

1. Provide [the student] with an educational program in [the student's] least restrictive environment;
2. Restoring articulation IEP (individualized educational plan) goals and objectives in direct therapy setting;
3. Restoring \*\*\* to the 200 minutes per day;
4. Providing [the student] placement in Student's least restrictive environment;
5. Consideration of IEE (independent educational evaluation) recommendations within 10 school days of receipt of evaluation;
6. Follow ASHA guidelines [technical support and position statement] (2007) regarding students with \*\*\*, including but not limited to level of training and experience of speech therapist, number of sessions, length of sessions, and collaboration with private therapist;
7. Allow [the student's] parents full access to all campus providers during ARD proceedings;
8. A finding that the District denied [the student] a free appropriate public education;
9. A finding that [the student] and [the student's] parents are prevailing parties; and
10. Any other compensation the Hearing Officer sees fit to award.

Finally, [Petitioner] will be seeking reimbursement for attorney fees and costs from the District in this matter.”

A prehearing conference was conducted on May 21, 2014, to discuss the issues for hearing and the relief requested. Counsel for Petitioner stated that placement is not an issue for the hearing but instead the nature and amount of additional services for the student. The hearing officer followed up on the prehearing conference with a letter dated May 21, 2014, summarizing the discussions in the prehearing. The letter stated: “Petitioner’s IDEA claims are as stated in the pleadings. Petitioner is not seeking a change in placement but wants more speech services.”

Petitioner did not amend the request for hearing and the matter went to hearing on the original pleadings.

Dispute About Notice, Sufficiency of Pleadings, and  
Relevancy of Request for Reimbursement

On March 24, 2015, the second day of the hearing, Petitioner sought to present evidence for a claim of reimbursement for services privately provided to the student. Respondent objected on the basis of relevancy. A lengthy discussion was conducted on the record about whether or not the district was on notice of a claim for reimbursement to be addressed at the hearing. (Transcript Pages 289-383) Respondent claimed that Petitioner failed to plead for reimbursement. Petitioner averred that a letter from the parents to the district put the district on notice of the claim because it cited 34 C.F.R. Section 300.48(d). (Petitioner's Exhibit 66). The letter reads:

“Dear Dr. \*\*\*:

Although we provided notice at the most recent ARD committee meeting held this day which satisfies the requirements of 34 CFR §300.148(d), we want to provide written notice of our intention to place \*\*\* in a private placement within 10 business days.

We expect the confidentiality of the ARD meeting and this notice will be adhered to.

Respectfully,...”

The district contends that the parents of the student did not advise the district that they wanted the private placement to be at public expense. Recordings of the ARD committee meeting on December 11, 2014, include discussion of a private placement but no notice of a request for reimbursement at public expense for the placement. (Respondent's Exhibit 31)

34 C.F.R. Section 300.148 reads in part:

- (a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§300.131 through 300.144.

- (b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§300.504 through 300.520.
- (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.
- (d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—
- (1) If—
- (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Because Petitioner did not notify the district that they intended their private placement of the student to be at public expense, subparagraph (d)'s limitation on the cost of reimbursement could limit Petitioner's ability to obtain reimbursement as relief.

As discussed by counsel and the hearing officer on the record, though the issue for reimbursement will only be addressed if there is a finding that the district failed to provide – or offer – a free appropriate public education to the student.

Counsel for Petitioner asked for a continuance to provide timely notice of a reimbursement claim to the district. The district objected. The continuance was denied. Petitioner was allowed to present claims for reimbursement over a running objection as to relevancy from the district.

On March 26, 2015, the last day of the hearing, counsel for Petitioner filed another request for hearing in behalf of the student and the student's parents alleging the same allegations made in this hearing request but specifically seeking reimbursement for private placement and private services for the student. (Docket No. 206-SE-0315) The matter is pending.

If Petitioner cannot prove that what the district is offering the student is not FAPE, then the issue of reimbursement is moot under the provisions of 34 C.F.R. §300.148 and the standards of School Committee of the Town of Burlington vs. Department of Education, 471 U.S. 359, 105 S.Ct. 1996 (1985).

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

### Findings of Fact

1. Petitioner is a student residing with the student's parents in the Lewisville Independent School District. [Petitioner's Exhibit 1]

2. The student was born \*\*\*. [Petitioner's Exhibit 1]

3. When Petitioner's request for hearing was filed in April 2014, the student was attending \*\*\* grade at \*\*\* school in the district. [Petitioner's Exhibits 5 & 6; Transcript Page 53]

4. A full individual evaluation ("FIE") for the student was completed in April 2011 after the student and the student's parents moved into the district. The student was receiving special education services based upon eligibility criteria of autism ("AU") and speech impairment ("SI"). The evaluation noted that the student exhibits difficulty with \*\*\* and noted that the student was \*\*\*. The FIE recommended a highly structured placement for the student with small group instruction, social skills training, as well as physical therapy ("PT"), occupational therapy ("OT"), and speech therapy ("ST"). [Respondent's Exhibit 1; Transcript Page 150]

5. An ARD committee met for the student in November 2012 and the meeting continued on other dates and concluded in January 2013. The meeting ended in agreement. The committee determined that the student was eligible for special education based upon criteria of autism, a speech impairment, and \*\*\*. The student's educational performance is significantly affected by the student's \*\*\*. Measurable goals and objectives for the student were developed for the student and the student's parents agreed with the IEP written at the ARD. [Respondent's Exhibit 2; Transcript 150]

6. The student's parents consulted with providers of private services for the student during the periods between meetings of the ARD committee. The private providers offered revisions for the student's IEP goals. The parents provided the suggestions to the ARD committee, and the committee revised the student's goals in accordance with those suggestions. [Respondent's Exhibit 2; Transcript Pages 466-467]

7. The student's difficulties in \*\*\* were addressed by private providers and by the district. An \*\*\* was successfully used by the student for \*\*\*. [Respondent's Exhibit 2; Transcript Pages 466-467, 580 & 759-760]

8. The ARD noted that the student \*\*\* for private services provided by \*\*\* at \*\*\*. Ms. \*\*\* provided input to the ARD committee, and the student's goals and objectives in reading were revised in consideration of that input. (Respondent's Exhibit 2; Transcript Pages 185 & 511-513]

9. Another ARD committee for the student was convened in May 2013. The committee added extended school year ("ESY") services for the student, adjusted the student's reading goals, added speech therapy for the period of ESY, and agreed that the district's speech language pathologist ("SLP") would confer with the student's private SLP at the beginning of the new school year. The committee agreed to add the support of \*\*\* during ESY at the request of the parents. The committee considered data that showed very little progress in the student's speech articulation since 2011 and noted that the student's limited ability to \*\*\* undermines any ability in developing \*\*\*. [Respondent's Exhibit 4; Transcript Pages 760-761]

10. In September 2013, an ARD committee for the student convened and requested another FIE to include consideration of speech/language issues, autism, PT, OT, adaptive PE, behavior, AT, \*\*\* and cognitive and achievement functioning. [Respondent's Exhibit 6; Transcript Pages 74 & 107-108]

11. The district completed an FIE of the student in November 2013 which included extensive assessment. The student's assessment showed complex medical and educational disabilities including autism, \*\*\*. [Respondent's Exhibit 8; Transcript Pages 111-113 & 763-769]

12. The student's communication abilities are impacted by the student's autism, cognitive ability, \*\*\*, and \*\*\*. The student is essentially \*\*\* and \*\*\*. Because of the level of cognition, the student's \*\*\* is not \*\*\* and cannot be addressed with typical strategies for \*\*\*. [Respondent's Exhibit 8; Transcript Pages 764-765]

13. The district evaluation in the fall of 2013 noted that the student had been receiving speech therapy for articulation since 2011 but because of the student's disabilities the student's articulation



accuracy was not proficient and showed little – if any – progress. The student’s potential for intelligible speech is limited; the student’s receptive and expressive language is limited; and the student’s cognitive ability is limited and affects all speech ability. [Respondent’s Exhibit 8, 9 & 17; Transcript Pages 748-801]

14. The student’s response to extensive work with the district’s SLP demonstrated that the student could not master \*\*\* student demonstrated prior to the speech therapy. [Petitioner’s Exhibits 49 & 59; Respondent’s Exhibits 11, 14, 34, 36, 38-39, 49 & 59; Transcript Pages 79, 116-141 & 786-787]

15. The student’s parents want \*\*\* to be utilized as a means of communication for the student, but the student’s \*\*\*. The student rarely uses \*\*\* to communicate with peers. [Respondent’s Exhibit 8; Transcript Pages 140, 504 & 841-880]

16. Outside evaluation by \*\*\* in February 2013 showed the student’s use of \*\*\* was more likely to provide functional language for the student than further work on articulation. The evaluation recommended the use of \*\*\* for the student during ST – as the district had recommended. [Respondent’s Exhibit 22; Transcript Pages 141, 950 & 982)

17. The student has also used \*\*\*, and \*\*\* for communication. The student used \*\*\* after the request for hearing was filed because of the provisions of stay-put. The district continues to recommend a total communication approach – including \*\*\* – for the student. The student’s use of \*\*\* enabled the student to \*\*\* communicate with others. [Transcript Pages 464, 476, 484, 502, 606, 841 & 880]

18. An ARD committee for the student met in November 2013 for an annual ARD meeting. The meeting continued over a number of dates until its conclusion in April 2014. School personnel met with the student’s parents on many occasions to review data, discuss and revise draft goals and objectives, and make recommendations for an IEP for the student. The committee recommended discontinuing \*\*\*. The committee also considered information from a private speech language evaluator which recommended the use of \*\*\* for \*\*\* because the student successfully used \*\*\* for communication. The evaluator – pursuant to requests from the student’s parents – also recommended \*\*\* for the student. [Respondent’s Exhibits 9 & 23; Transcript Pages 466 & 816-817]

19. SLP personnel for the district believed that continuing a focus on articulation for the student was not an efficient way to increase the student's communication skills. The student showed very little progress in working on articulation. [Respondent's Exhibit 9; Transcript Pages 120-121 & 771-774]

20. At the ARD, the district proposed two thirty minute sessions of speech therapy along with twenty minutes a week in consult with the SLP for the student's classroom teacher. The district recommended a total communication approach for the student and the use of \*\*\* with the\*\*\* for the student. Because of stay-put, the district could not utilize this assistance for the student though it cooperated with the parents in using a similar \*\*\*. [Respondent's Exhibits 9 & 37; Transcript Pages 588-593]

21. The ARD committee revised many provisions in the proposed IEP in consideration of input from the student's parents and private providers. The district also agreed to provide additional training for district personnel in \*\*\*. [Respondent's Exhibit 9; Transcript Page 120]

22. The student's parents requested an independent educational evaluation. The district granted their request. The evaluator diagnosed a neurological weakness for the student known as \*\*\*. \*\*\* involves abilities to execute effective speech movements and patterns. The evaluator could not administer standardized assessment for the student because of the student's limited articulation. The evaluator did not recommend continued direct speech services to acquire new articulation sounds but rather a goal of producing word approximations with sounds already within the abilities of the student. The evaluator also recommended continued training with \*\*\*. [Respondent's 16; Transcript Pages 209-215, 261, 842-843, 866-867 & 879]

23. An SLP for the district testified credibly that the student may develop a core vocabulary of \*\*\* words but that such acquisition of vocabulary could take as much as \*\*\* years. [Respondent's Exhibit 16; Transcript Page 780]

24. The ARD committee included the private evaluator at the meeting at district expense. The evaluator recommended total communication for the student with assistive technology and \*\*\*. The evaluator also recommended that use of \*\*\*, but the evaluator believed that \*\*\* was a primary mode of

communication for the student. This conclusion was not credible because the district established with credible testimony that \*\*\* was not the student's primary mode of communication. [Respondent's Exhibit 16; Transcript Pages 936-937]

25. But, based on some recommendations of the evaluator, the district agreed to include some goals for producing \*\*\* with the use of \*\*\*. [Respondent's Exhibits 16 & 17; Transcript Pages 123-125, 237, 265, 783-784 & 940]

26. The district's recommendations were based on the credible opinions of expert personnel within the district. [Respondent's Exhibit 17; Transcript Pages 102-105 & 783]

27. The student's parents did not agree to the proposed educational program offered by the district and declined to meet again with the ARD committee after a ten day recess. [Respondent's Exhibits 17 & 28; Transcript Pages 125-126]

28. The district then proposed an IEP amendment to include additional goals in articulation of developing articulation of \*\*\* and the use of \*\*\*. The student's parents did not agree to the amendment. [Respondent's Exhibit 18; Transcript Pages 126-127]

29. An ARD committee for the student met again on two days in November 2014 after providing the parents draft goals prior to the meeting. District personnel testified credibly that the drafted goals were appropriate for the student. The goals included additional speech therapy. The student's parents did not reach consensus with the ARD committee and notified the district that they would enroll the student in a private placement. The parents notified the district by letter of their intentions. The parents did not notify the district – at the ARD committee meeting – or in their letter – that they would seek reimbursement for the private placement. [Respondent's Exhibits 30-32; Transcript Page 721]

30. While attending school in the district, the student made educational progress in reading, spelling, listening comprehension, math, and fine motor skills. In formal speech evaluation, the student showed progress and developed abilities in the use of assistive technology in speech augmentation. The student developed socially in interaction with peers from 2012 to 2014. In considering cognitive scores in

the student's FIE, the evaluation indicated the student performed academically above the student's cognitive abilities. [Respondent's Exhibits 8, 11 & 29-20; Transcript Pages 477, 503, 511-523, 802-803, 837-838 & 909]

31. A private speech provider for the student began providing services and gives direct instruction three hours each week in speech articulation. The provider testified that the district did not provide an appropriate program for the student and that the student functions well in the student articulation instruction privately. Analysis of the provider's data, however, as well as video tapes of the student's performance does not credibly support the conclusions of the private provider. [Petitioner's Exhibits 49 & 59; Respondent's Exhibit 9; Transcript Pages 139-140, 395, 423-426, 495, 656, 777-779, 813 & 973-975]

32. The student's parents placed the student privately at \*\*\*. The \*\*\* teaches only children with disabilities. The student receives private OT services. The student receives speech services but \*\*\* has no SLP on staff. [Transcript Pages 16-18, 442, 532 & 676-679]

33. When the student attended the district, the student's parents took the student from the school for private applied behavioral analysis ("ABA") therapy for six hours every week. The student's behavior within the district was not an issue interfering with the student's educational progress. The \*\*\* privately provides now twenty hours per week. [Petitioner's Exhibit 1; Transcript Pages 62-63, 132-133, 157, 255, 271, 642-643, & 694-695]

### Discussion

The student presents with a number of severe and complicated medical and educational disabilities. Because of the medical disabilities of the student, accurate assessment of educational abilities and educational progress in some areas is difficult. The student's parents and the district cannot agree substantially on appropriate speech services and goals for the student. The student has been served in district and served by private providers as well. In private placement, the focus of the student's speech services is not consistent with a service plan offered by the district.

Expert testimony about what is appropriate for the student is conflicting. The credible testimony of experts for the district supports the district's proposed plans for the student. The testimony at the hearing demonstrated that the student made educational progress while at school, the district conducted appropriate evaluations for the student, the district provided independent evaluation of the student, district personnel conferred with the parents and private evaluators and providers for the student, and the district provided and now offers a free appropriate public education for the student.

Petitioner's pleadings and representations in prehearing matters all constitute a claim for more services not a change in placement.

Evidence presented for consideration by the hearing officer included many thousands of pages of evidence and hours of audio and videotapes. The crucial conclusions here are based on credibility of expert witnesses.

#### Conclusions of Law

1. The Lewisville Independent School District is responsible for providing special education and related services for the student under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.

2. The student is eligible for special education under the provisions of the law cited above.

3. Petitioner failed to meet its burden of proof to demonstrate a violation of IDEA under the standard of Schaffer v. Weast, 126 S.Ct. 528 (2005), 34 C.F.R. §300.523(a), or prove the district's proposed educational placement did not comply with the standard of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 34 C.F.R. §300.552, and 19 T.A.C. §89.1055.

4. The IEP for the student is reasonably calculated to provide a meaningful educational benefit because: (i) the program is individualized on the basis of the student's assessments and performance; (ii) the program is administered in the least restrictive environment; (iii) the services are provided in a coordinated collaborative manner by the key stakeholders in the student's education; and (iv) positive academic and

non-academic benefits are demonstrated. Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), 34 CFR 300.300, and 19 T.A.C. §89.1055.

5. Because the district offered FAPE for the student, Petitioner has no claim for reimbursement under the standards of School Committee of the Town of Burlington vs. Department of Education, 471 U.S. 359, 105 S.Ct. 1996 (1985).

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and all claims are DISMISSED with prejudice.

SIGNED this 22<sup>nd</sup> day of May, 2015.

/s/ Lucius D. Bunton  
Lucius D. Bunton  
Special Education Hearing Officer

DOCKET NO. 209-SE-0414

STUDENT, B/N/F PARENTS	§ § §	BEFORE A SPECIAL EDUCATION
VS.	§ §	HEARING OFFICER
LEWISVILLE INDEPENDENT SCHOOL DISTRICT	§ §	FOR THE STATE OF TEXAS

SYNOPSIS

**ISSUE:** Whether Petitioner met its burden of proof to demonstrate that the proposed placement of the student was appropriate.

**CFR CITATIONS:** 34 C.F.R. §§ 300.513(a) and 300.552

**TEXAS CITATION:** 19 T.A.C. §89.1055

**HELD:** For Respondent.