

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION PARENT.,
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
FORT WORTH INDEPENDENT SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parent (“Petitioner” or “Student”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et seq.*, contending that for the one-year period prior to the date of petitioner’s Complaint, Respondent, Fort Worth Independent School District (“Respondent” or “FWISD” or “the District”), denied Student a free, appropriate, public education (“FAPE”) as follows:

1. Respondent failed to comply with transfer requirements by failing to provide Petitioner special education and related services when Petitioner transferred from another state;
2. Respondent failed to identify all of Petitioner’s disabilities and to recommend services for all of Petitioner’s disabilities;
3. Respondent failed to timely and comprehensively evaluate Petitioner in such areas as reading, communication, counseling, attention deficit, assistive technology, in-home training, and behavior;
4. Respondent failed to develop an appropriate program and placement for Petitioner that included services in reading, communication, counseling, behavior, assistive technology, speech, and occupational therapy;
5. Respondent failed to develop an individual education plan (“IEP”) with appropriate, measurable goals and objectives;
6. Respondent failed to provide Petitioner with an inclusion aide;
7. Respondent failed to devise an appropriate extended-school-year program (“ESY”) for Petitioner;
8. Respondent failed to appropriately train teachers and staff who were working with Petitioner;

9. Respondent deprived the parent of participating in the decision-making process by making decisions outside the admission, review, and dismissal committee ("ARDC") process and changing Petitioner's IEPs without parental consent;
10. Respondent changed Petitioner's grades and mastery levels of petitioner's goals and objectives;
11. Respondent falsified ARD documents;
12. Respondent failed to provide prior written notice to Petitioner's parent when denying parental requests;
13. Respondent failed to timely and appropriately respond to the Petitioner's request for a copy of Petitioner's speech evaluation, which was part of petitioner's full and individual evaluation ("FIE") conducted by Respondent on September 22, 2010; and
14. Respondent failed to timely secure the special education records from Petitioner's previous school, including evaluations, goals and objectives, and progress reports.

Petitioner seeks 1) one year of private schooling; and 2) reimbursement for costs of private evaluations and services in the areas of reading, behavior, speech therapy ("ST"), and occupational therapy ("OT"); and 3) reimbursement for associated transportation services.

II PROCEDURAL HISTORY

Student filed student's Complaint on July 20, 2011. On that same date, TEA assigned the case Docket No. 260-SE-0711 and assigned the matter to the undersigned Hearing Officer. On July 21, 2011, the undersigned sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on August 9, 2011, that the Due Process Hearing would take place on September 6, 2011, and that the Decision would issue by October 3, 2011. Due to conflicting schedules, the pre-hearing telephone conference was re-scheduled to August 12, 2011.

Under the Initial Scheduling Order, the parties were required to participate in a Resolution Session on, or before, August 4, 2011. Alternatively, the parties were free to agree to waive the Resolution Session or agree to mediation. The parties jointly waived the Resolution Session.

On August 12, 2011, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Ms. Susan Heiligenthal, Petitioner's counsel; 2) Ms. Dorene J. Philpot, Ms. Heiligenthal's co-counsel; 3) Ms. J., Petitioner's parent; 4) Ms. Gwendolyn Maez, Respondent's counsel; 5) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for September 12-16, 2011.

On August 29, 2011, Petitioner requested a second pre-hearing telephone conference to discuss discovery issues. The telephone conference was held that afternoon. In attendance were the following: 1) Ms. Heiligenthal and Ms. Philpot, Petitioner's counsel; 2) Ms. Maez, Respondent's counsel; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. During the telephone conference the parties discussed the discovery issues and Petitioner's oral request for a continuance of the Due Process Hearing scheduled for September 12-15, 2011. Noting

Respondent's objection to the continuance, the undersigned Hearing Officer found good cause to grant the continuance. Due to the parties' busy schedules, the earliest date for re-scheduling the hearing was December 5-8, 2011.

The Due Process Hearing convened on December 5, 2011, but had to adjourn on December 6, 2011, due to party illness. The parties agreed to reconvene the Due Process Hearing on February 7-9, 2012.

The Due Process Hearing reconvened as agreed on February 7, 2012, and concluded on February 9, 2012. Both parties introduced documentary evidence; Student called six (6) witnesses; FWISD called seven (7) witnesses. Both parties conducted cross-examination of the witnesses.

During the hearing, Student was represented by 1) Ms. Heiligenthal and Ms. Philpot, legal counsel, and 2) Ms. Melanie Watson, paralegal. Also in attendance throughout the hearing were 3) ***, Petitioner's mother, and 4) Petitioner's aunt.

During the hearing, Respondent was represented by 1) Ms. Maez and Ms. Matthews, legal counsel. Also in attendance throughout the hearing was ***, Respondent's Executive Director of Special Education. Student opened the hearing and observers were in attendance at various times.

At the conclusion of the hearing on February 9, 2012, the parties and Hearing Officer agreed to a post-hearing schedule: closing arguments would be due by March 14, 2012; and the Decision would be rendered by March 23, 2012. Petitioner requested a continuance of this deadline, which was granted. The undersigned notified the parties of the revised post-hearing briefing schedule: closing arguments would be due by March 21, 2012; reply briefs would be due by March 26, 2012; and the Decision deadline was extended to March 30, 2012.¹

III. FINDINGS OF FACT

1. FWISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is an ***-year-old *** grader who attended *** grade at *** School in FWISD. Student previously attended school in *** where student received special education services *** (P.19.2). Student was diagnosed with developmental delays at age *** and received ST several hours per week (R.1.52). At age ***, Student began services through the ***, which included ST, OT, and services for integration and expressive language skills (R.1.52). Student has not attended school in FWISD during school year 2011-12.
3. Student currently qualifies for special education and related services under the eligibility categories of speech impairment ("SI") and other health impairment ("OHI") based on a diagnosis of attention deficit hyperactivity disorder ("ADHD").
- 4 Student enrolled in FWISD in August 2010, and student's transfer ARDC met for the first time on August 23, 2010, which was the first day of school. Prior to this meeting Student's mother

¹ References to the Due Process Hearing Record are identified as follows: "T.#" refers to the Certified Court Reporter's Transcription of testimony made on December 5, 6, 2011, and February 7, 8, 9, 2012, and the numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page.

provided FWISD with copies of Student's current evaluations and IEPs from *** (R.1; T.4.675-76).

5. Student's August 23, 2010, ARDC convened after school to accommodate the parent's work schedule (T.4.674-675). The Committee developed an IEP to provide Student with the same services student had been receiving in *** until all requested information and evaluations could be gathered to develop Student's permanent IEPs (R.2.1-9; R.4.1). Student's transfer IEP provided that student would receive inclusion educational services in general education with the following related services and supports: a) ST, one hundred eighty (180) minutes per month; b) an inclusion teacher, thirty (30) minutes per week; c) OT thirty (30) minutes per week; and d) speech consult, sixty (60) minutes per month. The ARDC scheduled Student's permanent ARDC meeting for October 2010. This provided the educational professionals, the speech pathologist, occupational therapist, and educational diagnostician, time to review Student's assessments from *** and determine whether additional evaluations were needed (T.4.687-88; R.2.1-9). Student's parent did not request any additional assessments at the August 23, 2010, ARDC meeting. The transfer ARDC reached consensus and Student's parent signed in agreement (R.2.9).
6. The evidence was inconclusive as to whether copies of Student's *** goals and objectives were attached to the August 23, 2010, ARDC documents. The parent had provided these goals and objectives to the diagnostician prior to the transfer ARDC meeting. The diagnostician distributed these goals and objectives to Student's teachers and other providers (R.2A.10-14; T.4.679.684.686.689). Student's teachers and providers implemented these goals and objectives during the thirty-day transfer period and noted Student's progress on some of the goals prior to the reconvened ARDC meeting set for October 1, 2010 (R.2A.10-14; R.5.1-5; T.1.293-300;T.4.698-99.786.790.928).
7. On September 9, 2010, Student's parent sent the FWISD diagnostician an email summarizing her concerns with the implementation of Student's *** IEPs and stating that she was requesting that Student be assessed for dyslexia. Student's parent was aggressively trying to shorten the thirty-day transfer period to convene another ARDC meeting to discuss her concerns and attendant fear that Student was losing skills (R.6.44-45).
8. On September 15, 2010, *** tested Student for dyslexia. This was a private assessment obtained by the parent on the recommendation of the principal of a local private school. This assessment revealed that Student has dyslexia (P.19).
9. FWISD conducted an FIE on September 22, 2010 (R.3.1-14). The occupational therapist assessed Student in the areas of sensory and motor skills and provided recommendations for Student's OT IEP to address student's sensory, attention, and fine motor skills (R.3.13; T.4.922-26). The educational diagnostician and speech pathologist did not conduct further assessments because the evaluations from *** were current (T.4.787-88; 696-97). These professionals recommended that Student continue to receive ST, OT consultation, and monitoring of academic skills by student's general education teacher (R.3.9; T.4.926).
10. On October 1, 2010, Student's ARDC convened to review the data collected and to develop Student's permanent IEP. Prior to the ARDC meeting, the diagnostician provided Student's parent with a draft of the IEP (T.4.699; R.19.15-16). The ARDC continued the SI eligibility and recommended a) continuing Student's goals in ST with an added writing component to address Student's fine motor skills (R.6.19; T.4.788-89); b) assistive technology to include sensory items and *** (R.6.6; T.4.928-29); and c) forty-five (45) minutes per week direct ST, twenty (20)

minutes per semester speech consultation, and one hundred fifty (150) minutes per semester OT consultation (R.6.11-23; T.4.927).

11. Based upon teacher information, including updates on student's goals and objectives, Student's October 1, 2010, ARDC did not recommend academic goals and objectives in reading and math. Student was performing within normal limits in academic skills due to interventions and effective accommodations (T.4.700.792-93.858-59.928-29; T.5.964-65). Student's parent disagreed with this recommendation and provided the ARDC with a copy of Student's independent ***dyslexia evaluation (R.6.14; T.4.704).
12. In addition to disagreeing with the removal of academic IEPs, Student's parent objected to the reduced services in speech consultation and removal of direct OT services. The parent informed the ADRC that Student was displaying a) school avoidance behaviors, possibly due to the new school and unfamiliar peers, as well as b) food-related issues, *i.e.*, not eating and drinking enough and suffering an upset stomach. Student's teacher agreed to provide the parent with strategies to help Student's emotional development and adjustment to the new environment (R.6.14). The ARDC agreed to a ten-day recess (R.6.14; T.4.705).
13. On October 19, 2010, Student's ARDC reconvened. Although the ARDC believed the recommendations in the October 1, 2010, IEP were appropriate and likely to provide Student with an educational benefit, the ARDC acquiesced to the parent's request for additional services and agreed to the following: a) Student's IEP would reflect that student had apraxia of speech; b) Student's *** academic goals and objectives would be continued; c) Student would have unfettered access to water and ***; and d) Student would receive direct ST, sixty (60) minutes per week; direct OT, thirty (30) minutes per week; and inclusion support in reading and math, thirty (30) minutes per week (R.6.25.30.32; T.4.707.790-91).
14. During the October 19, 2010, reconvened ARDC meeting, Student's parent discussed concerns about Student's attention difficulties and possible auditory processing disorder. The Committee informed the parent that prior to conducting an evaluation for auditory processing disorder, ADHD had to be addressed because the characteristics of both disabilities are so similar (T.4.794-95). Student's parent agreed that FWISD would conduct a dyslexia evaluation and she would pursue the ADHD diagnosis with Student's doctor before proceeding with the auditory processing evaluation (R.6.38).
15. On October 26, 2010, the school nurse provided classroom rating scales to Student's teacher related to the ADHD diagnosis (R.19.19).
16. On November 11, 2010, FWISD's dyslexia consultant contacted Student's parent, informing her of the assessments to be administered during the dyslexia evaluation (R.9.32). The consultant provided the parent with four (4) dates on which to convene the ARDC to review the dyslexia assessment: December 2, 3, 9, or 10, 2010 (R.9.33). Student's parent responded with a list of additional questions that she requested to be answered before the ARDC would convene (R.9.31-32). Among the requested information was receipt of the dyslexia assessment ten (10) days prior to the ARDC meeting.
17. Student was timely evaluated for dyslexia on November 16, 2010, and the evaluators recommended that student be identified as a student with dyslexia and receive reading instruction consistent with the Dyslexia Handbook (R.8.7-8).
18. On November 17, 2010, the evaluation specialist informed the parent that pursuant to her

request, the ARDC meeting would convene on December 10, 2010. The specialist also provided the parent with some of the requested information as to who would attend the ARDC meeting (R.9.31).

19. On December 1, 2010, Student's parent notified the dyslexia consultant that in light of the fact that she had not received information related to the types of services Student would receive or the credentials of student's service providers, the parent would not attend the December 10, 2010, ARDC meeting (R.9.30).
20. In November 2010, Student's physician diagnosed student with ADHD and completed a private evaluation, which the parent failed to provide the ARDC. The physician's letter noted that Student was receiving medication for the ADHD (P.21.1).
21. Although FWISD completed the dyslexia assessment in mid-November, the ARDC could not convene, due to the parent's schedule, until after the winter holidays.
22. On January 13, 2011, Student's ARDC convened to review the dyslexia evaluation performed by FWISD as well as the dyslexia assessment performed by the *** (R.9.1-24). In light of Student's ADHD diagnosis, the ARDC recommended an auditory processing evaluation. The ARDC agreed to review the physician's diagnosis of ADHD for eligibility under the OHI eligibility category but the ARDC needed the physician's completion of the Physician's Information Report. The Committee added new reading goals, writing goals, dyslexia services, inclusion support in math, OT consultation, and school health services. The ARDC agreed on thirty (30) minutes per week inclusion time during reading/language arts, and thirty (30) minutes per week inclusion time during math. The parent noted concern about ESY services, and the ARDC informed her that ESY would be discussed near the end of the school year (R.9.23-24). The parent did not sign the ARDC report, stating that she wanted to review it more thoroughly (R.9.24).
23. Student's ARDC reconvened on January 28, 2010, to discuss areas of parental concern (R.9.25-26) and to hopefully reach consensus on the IEPs developed at the January 13, 2011, ARDC meeting. The District received the OHI physician report after the January 13, 2011, ARDC meeting and agreed to inform the teachers of Student's diagnosis. The Physician's Information Report shows a diagnosis of a moderate impairment, although the form does not specify the impairment. Reading the form with the physician's letter, it is clear that Student's physician diagnosed student with moderate ADHD (R.10.3-4). The ARDC requested a new FIE to incorporate the new evaluations completed since the September 2010 FIE, including the OHI diagnosis. Due to the parent's continuing concerns about Student's anxiety, the ARDC agreed that Student would receive support from the general education counselor upon receipt of parental consent. This ARDC reached consensus (R.9.15).
24. The counselor sent the parent a Consent for Counseling Services on two (2) occasions following the January 28, 2011, ARDC meeting. The counselor stated she never received the signed consent; the parent stated that she signed and transmitted the consent to the counselor (R.21.1-4). The only copy of a signed counseling consent bore no indication that the signed consent came from the District's file, indicating that the District never received the signed consent. The evidence was insufficient to prove that the parent actually signed the consent form and provided it to the general education counselor.
25. FWISD completed Student's FIE on April 14, 2011, which included an evaluation for auditory processing disorder and OHI eligibility (R.11). The auditory processing evaluation was

performed by FWISD and, at the parent's choosing, a private Speech-Language Pathologist ("SLP").

26. The auditory processing evaluation consists of a) the administration of assessments and gathering of data by the SLP; and b) the administration of an audiological evaluation by an audiologist, who completes a battery of tests to confirm normal hearing ability and assess auditory processing skills after establishing that hearing acuity and auditory attention skills are within the expected range (R.11.14). Step two (2) is not initiated if the assessments obtained by the SLPs do not indicate an auditory processing disorder. It is the audiologist who diagnoses an auditory processing disorder (R.11.14).
27. The private SLP administered the Clinical Evaluation of Language Fundamentals-4th Edition ("CELF-4"), the Language Processing Test-3 ("LPT-3"), and the Arizona Articulation Proficiency Scale-3 ("Arizona-3").

The CELF-4 is a standardized assessment that measures core language, receptive and expressive language, and language content and structure (P.27.7). It measures the student's performance on language tasks and compares the performance on tasks presented orally, orally with a visual component, and visually (R.11.18).

The LPT-3 assesses a student's ability to attach meaning to spoken language and express that meaning when no visual stimuli are presented to aid interpretation. It consists of eight (8) subtests that measure the student's ability to assign meaning to auditory stimuli.

The Arizona-3 is a standardized assessment of a student's articulation abilities.

The private SLP performed these assessments in February 2011 but did not issue the report until March 24, 2011 (P.27; R.11.18). The private SLP diagnosed Student with a language disorder and noted indicators for a finding of a moderate childhood apraxia of speech disorder (P.27.11).

28. The District SLP administered the Test of Auditory Processing Skills – 3rd Edition ("TAPS-3"). This assessment consists of multiple subtests designed to measure a student's phonologic, memory, and cohesion skills (R.11.17-18). Student attained an overall score of ***. The assessors noted that student had some attention difficulties during this assessment and concluded that such behaviors negatively impacted student's scores (R.11.14). The District's SLPs did not concur that there was an indication of apraxia of speech. These assessors found some processing difficulties that are characteristic of ADHD and dyslexia (T.4.887-891).
29. There was a significant delay in obtaining the results from the private SLP. As such, the District decided to proceed with step two (2) in the auditory processing analysis and scheduled the audiological portion of the evaluation (R.20.17). Although the District believed that Student's attention problems were being controlled by medication, the audiologist was unable to complete the audiological portion because Student could not demonstrate sustained attention on a formal assessment (R.11.38). Student was not taking medication at the time of this assessment. As such, no final determination of auditory processing disorder could be made until Student's attention issues were controlled.
30. There was difficulty scheduling the ARDC meeting to review Student's FIE. The parent was unavailable on dates proposed by the District; state-wide testing prevented scheduling. The ARDC was able to meet on May 11, 2011 (R.12).

31. The May 11, 2011, ARDC qualified Student for services as SI and OHI. The ARDC noted the problems with Student's inability to complete the audiological portion of the auditory processing evaluation. The Committee offered to conduct a second assessment when Student's attention issues were under control (R.12.58; T.4.893). The ARDC again acquiesced to the parent's requests for additional testing, although the Committee did not concur that Student demonstrated educational needs in the areas in which assessments were requested. The Committee agreed to conduct evaluations for anxiety, counseling, behavior, apraxia of speech, and a learning disability (R.12.4.23; T.4.3-15.729-30.859-62). However, the parent failed to provide written consent (T.4.730.797).
32. Student's providers presented data regarding Student's present level of performance and progress. Because Student mastered many of student's objectives, new goals and objectives were adopted in math and reading (R.12.23.26). The Committee added accommodations pursuant to the parent's request and increased Student's dyslexia support to forty (40) minutes per day. The Committee declined to provide ESY services because Student had manifested no regression in speech. The Committee offered a summer reading program to include a continuation of student's dyslexia program (R.12.25). The ARDC could not reach agreement; accordingly, the District offered the parent a ten-day recess. The parent declined this invitation. Likewise, the parent declined the offer of a summer reading program.
33. Student did not return to FWISD after May 2011. Student's parent enrolled student in *** School, a private school for students with learning disabilities (P.40.1). Student attended *** from August 2011 to December 16, 2011 (T.3.22-24).
34. FWISD did not fail to comply with transfer requirements.
35. FWISD did not fail to implement Student's *** IEP during the thirty-day transfer period.
36. FWISD did not fail to assess Student timely and appropriately in light of the scheduling problems with outside evaluators and the parent's scheduling issues.
37. FWISD did not fail to recommend and implement appropriate special education services and placement for Student.
38. Student's ARDC developed appropriate IEPs containing measurable goals and objectives.
39. FWISD provided Student with inclusion support in the general education classroom, which was sufficient to provide Student FAPE.
40. The summer 2011 reading program was appropriate for Student, who did not manifest severe or substantial regression that could not be recouped within a reasonable period of time.
41. FWISD did not fail to appropriately train the teachers and staff working with Student.
42. FWISD did not deprive the parent of participating in the decision-making process.
43. FWISD did not alter Student's grades or mastery reports.
44. FWISD did not falsified ARDC documents.

45. FWISD did not fail to provide prior written notice to Petitioner's parent when denying parental requests.
46. FWISD did not fail to provide Student's parent with copies of all assessments.
47. The evidence failed to prove that FWISD violated IDEIA when it did not obtain Student's cumulative record from ***. Student's ARDC had sufficient information, which was provided by Student's parent prior to student's enrollment, to develop student's transfer IEPs.
48. Student's teachers and services providers were qualified to provide Student the various services required under student's educational plan. Student's occupational therapist implemented Student's OT services and Student manifested progress in handwriting skills. Student's SLP implemented Student's ST services and Student manifested progress on student's speech and language goals and objectives. Student's dyslexia consultant worked with Student's teacher, who likewise implemented Student's dyslexia program, and Student manifested progress under the dyslexia program. Student's teacher implemented Student's academic goals and objectives in the general education classroom using inclusion support as well as dyslexia pull-out support. Student manifested progress on student's academic goals in reading, writing, and math.

IV. DISCUSSION

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 102 S.Ct. 3034 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." An educational benefit must be meaningful and provide the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four factors that aid in evaluating whether a student is receiving the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit" to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment ("LRE"); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

In the instant case, Petitioner, the party challenging the educational plan, bears the burden of proving that the Respondent failed to provide Petitioner FAPE by establishing that 1) Respondent

failed to comply with the procedural requirements of IDEIA, or 2) Respondent failed to design and implement a program that was reasonably calculated to enable Petitioner to receive educational benefits. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536-37 (2005); *Rowley*, 458 U.S. at 207-08, 102 S.Ct. at 3051.

Petitioner has alleged numerous procedural and substantive violations of IDEIA, which are analyzed under the *Michael F.* categories for ascertaining whether an educational program and placement are providing FAPE. Procedural violations that deny a student FAPE occur only if the error 1) impedes the student's right to FAPE; 2) significantly impeded the parent's opportunity to participate in the IEP process; or 3) caused a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(E)(ii).

A.

Student's IEPs Were Based Upon Current Assessments and Performance and Administered in the LRE.

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the school district must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARDC must consider all of the information gathered and make a recommendation based upon that information.

1. The August 23, 2010, IEP:

34 C.F.R. §300.323(f) provides that when a student with a disability, who has been receiving special education and related services, transfers to a new state and enrolls in a new school, the new district must provide the student comparable services to those in the former IEP until the new district 1) conducts an evaluation, if determined by the new district to be necessary; and 2) develops, adopts, and implements a new IEP that provides the student with FAPE. Under Texas law, the timeline for completing the requirements of §300.323 is thirty (30) school days from the date the student is verified as a student eligible to receive special education services. 19 TAC 89.1050(f)(3).

FWISD convened Student's transfer ARDC meeting on the first day of school year 2010-11: August 23, 2010. This ARDC reviewed Student's prior assessments and IEPs, which were provided in advance of the meeting by Student's parent. The ARDC immediately implemented the *** IEP, including the goals and objectives, to service Student during the thirty-day transfer period during which time the ARDC would determine if additional assessments were required. Student's parent did not request any additional assessments at that time. The assessments provided by Student's parent were substantial and current:

1. The October 19, 2009, evaluation indicated Student had an articulation deficit and low average expressive language skills, with no concerns in the area of auditory processing. Student manifested average skills in broad math, math calculations, and brief mathematics; low average skills in broad reading, brief reading, broad written language, written expression, and brief writing. Behaviorally, Student showed some hyperactivity and attention problems.
2. The October 30, 2009, private speech and language evaluation included assessments for receptive language, expressive language, social and pragmatic language, articulation, voice and fluency, and recommendations for Student's IEP.
3. An independent educational evaluation ("IEE") dated January 2010, included assessments in the areas of articulation, auditory comprehension, language processing, expressive language, oral mechanism, and voice and fluency.
4. A February 2, 2010, evaluation of Student's cognitive abilities showed normal limits.
5. A March 2010 OT evaluation included assessments in the areas of motor skills, sensory profile, fine motor, handwriting, visual process, sensory-motor, endurance, and work behaviors.
6. A June 2010 Speech and Language Progress Summary included present levels of performance regarding Student's articulation and language skills.

Based upon the analysis of these assessments during the thirty-day transfer period, Student's ARDC requested one (1) assessment only: occupational therapy. The occupational therapist conducted a formal evaluation of Student in the areas of sensory and motor skills, and provided recommendations for Student's IEP to address sensory and attention needs as well as fine motor skills.

2. The October 19, 2010, IEP:

Student's parent rejected the proposed services in the October 1, 2010, IEP and requested additional assessments. Student's parent provided FWISD with a copy of the private September 2010 dyslexia assessment by ***. The Committee acquiesced to the parent's concerns and agreed to provide all of the requested services while conducting its own dyslexia evaluation and having the parent comply with the requirements of obtaining a medical diagnoses of ADHD.

3. The January 28, 2011, IEP:

Student's ARDC convened on January 13, 2011, to review the results of Student's dyslexia assessment and the ADHD finding of Student's physician. Notwithstanding the fact that Student's parent had been informed by both the *** district and FWISD that no OHI impairment could be established without a Physician's Report, Student's parent failed to provide the Report at the January 13, 2011, ARDC meeting. Accordingly, the January 13, 2011, ARDC meeting was tabled until January 28, 2011.

Based upon the evaluations presented, Student's ARDC developed new reading goals, writing goals, and dyslexia services for Student's IEP. The parent and FWISD staff reported differing opinions on Student's level of school anxiety. The parent reported severe anxiety while the District reported that Student was happy and engaged at school. Notwithstanding this difference in opinion, Student's ARDC agreed that Student could receive counseling services through the general education

counselor. The ARDC requested a new FIE to incorporate the new evaluations completed since the September 2010 FIE, including the OHI diagnosis, and the proposed auditory processing evaluation.

4. The May 11, 2011, IEP:

Between the January 28, 2011, ARDC meeting and the May 11, 2011, meeting, FWISD conducted an auditory processing evaluation to ascertain whether Student had this impairment. The first portion of this assessment was actually conducted by the District's SLPs and a private SLP retained by Student's parent.

The auditory processing assessment is conducted in two (2) parts: 1) the administration of the assessments and gathering of assessment data by the SLPs, and 2) the audiological evaluation conducted by an audiologist. The audiologist is the only one who can diagnose an auditory processing disorder. The audiological evaluation can only be conducted when a student's attention is under control.

In this case, there was a significant delay in obtaining the results from the assessment because the private SLP performed the CELF-4, which the District SLPs were prepared to administer. The private SLP did not complete her portion of the assessment until two (2) months after the ARDC meeting: March 24, 2011. During the delay period, the District, believing that Student's attention problems were under control by medication, proceeded to obtain the audiological portion of the evaluation. Unfortunately, Student was not taking student's medication at this time so the audiologist was unable to complete the audiological portion due to Student's inability to sustain attention.

Additionally, there was difficulty scheduling the ARDC meeting to review Student's FIE. The parent was unavailable on dates proposed by the District and state-wide testing prevented scheduling. The ARDC was able to meet on May 11, 2011.

Based upon the current evaluations, the ARDC recommended that Student received services under the OHI category for ADHD. The ARDC added additional accommodations in response to parental concerns. The Committee offered to conduct another auditory processing evaluation when Student's attention was under control. The Committee also offered to conduct other assessments, although not necessary, to appease the parent. Despite the District's willingness to conduct these assessments, Student's parent refused.

Based upon the results of Student's assessments, and student's progress on student's goals and objectives, the ARDC increased Student's dyslexia support to forty (40) minutes per day and recommended a summer reading program tailored to Student's needs. Student's parent never agreed with these recommendations, and subsequently removed Student from FWISD and enrolled student in a private school.

B.

Student's Services Were Provided in a Coordinated and Collaborative Manner by the Key Stakeholders.

While there was the occasional breakdown of communication, by and large Student's parent and student's providers kept an open line of communication. The evidence established that the District tried very hard to address every concern espoused by the parent, even when the District did not believe the Student needed certain requested assessments or accommodations. When Student's parent declined to agree with the October 1, 2010, January 13, 2011, and May 11, 2011, ARDC recommendations, the Committee recessed and provided the parent and Committee members an

opportunity to evaluate the areas of disagreement. There was no assessment requested by the parent that the District failed to perform. Student's teachers and providers were in constant communication related to student's services. When Student's parent objected to Student's continued placement in a teacher's classroom, the District agreed to move Student to another teacher, even though the District had no doubt that Student's teacher was providing student with an appropriate education. When the parent demanded additional services, the District agreed to provide them, although there was no educational need.

The evidence simply fails to establish that Student's teachers and service providers were failing to implement any of Student's goals and objectives, no matter what IEP was in place. The delays that occurred related to testing and meeting were largely caused by factors beyond the control of the District. Student's OHI eligibility was delayed by the physician's failure to provide the correct Report and the length of time in the spring that it took to set the ARDC meeting to discuss Student's January FIE. Student's dyslexia diagnosis and IEP were delayed because the parent would not meet the ARDC until January 2011. Student's auditory processing assessment was delayed by the outside evaluator who did not prepare the report until March 24, 2011. Further, this assessment was basically rendered moot by Student's inability to maintain attention during the audiological portion of the assessment.

The evidence established that Student's special education teacher implemented student's academic goals and objectives in the general education classroom through inclusion support as well as dyslexia pull-out. The special education teacher collaborated with the general education teacher and the paraprofessionals who provided inclusion support. Student's occupational therapist maintained communication with the parent regarding services and progress. Student's SLP implemented Student's speech and language goals and objectives and provided the parent with updates.

The evidence established that Student's special education teachers were highly qualified and competent to provide Student with any of the requisite services, including those addressing dyslexia. Student's dyslexia consultant presented with an extensive background and expertise and worked with Student's teacher on lesson plans and strategies.

C.

Student Demonstrated Positive Benefits Academically and Non-Academically.

The perceptions of Student's progress during student's 2010-11 school year by student's FWISD service providers and student's parent are classic "polar opposites." The record presented at the hearing paints a picture of a wonderful young *** who, despite the several issues with which student must contend, is not a behavior problem in school, is easily directed, is well-accepted by student's peers and teachers.

The evidence established that Student made progress on student's goals and objectives. Based upon student's dyslexia instruction, by the end of the year Student was on track to catch up to grade level reading skills. Student's behavioral problems were minor, at most. The teachers and providers testified that student was easily directed. The District did not witness the anxiety level that the parent professed.

While it is true that Student's teacher recommended retention in spring 2011, this is not a declaration that Student made no academic progress or obtained no educational benefit from student's education at FWISD during school year 2010-11. Student's teacher recommended retention because Student had a gap in academic skills; student was somewhat immature for student's age;

and student was *** than most of student's peers. Further, Student had a history of frequent tardies and absences, which certainly could impact learning and behavior.

The record of this case does not present a situation in which a student was deprived of FAPE by a district's failure 1) to conduct timely, appropriate evaluations in all areas of suspected need; 2) to develop and implement appropriate IEPs that contain measurable goals and objectives and that place the student's LRE; 3) to provide the student with appropriately trained teachers and staff; or 4) to provide the student's parent of the opportunity to participate in the decision-making process related to the student's educational program.

D. Student's Request for Private Placement

Generally, school districts are not required to pay for the education of children enrolled in private schools without the consent of, or referral by, the public agency if that agency made FAPE available to the child and the parents elected to place the child in such private school or facility. However, a district may be required to reimburse parents for the expenses of a private placement if 1) the district did not make FAPE available to the student and 2) the private placement is appropriate. *Town of Burlington v. Dep't of Edu.*, 471 U.S. 359, 105 S.Ct.1996 (1985).

In the instant case, there is no need to analyze whether Student's unilateral placement at *** School is appropriate because the programs and placement provided to Student while enrolled in FWISD were appropriate and provided student educational benefit. Accordingly, Student is not entitled to reimbursement for any private school placement expenses.

V. CONCLUSIONS OF LAW

1. FWISD did not fail to timely and appropriately evaluate Student in all areas of suspected need. 34 C.F.R. §300.304.
2. FWISD did not fail to develop and implement measurable goals and objectives that were based upon Student's present levels of academic achievement and functional performance. 34 C.F.R. §300.320.
3. Student's 2010-2011 IEPs were appropriate and provided Student FAPE in the LRE. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998); *Houston Independent School District v. Bobby R.*, 200 F.3d 245 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).
4. FWISD did not commit procedural violations of IDEIA that rise to the level of a) impeding Student's right to FAPE; b) depriving Student's parent of the opportunity to participate in the IEP process; or c) depriving Student of educational benefits. 20 U.S.C. 1415(f)(3)(E)(ii).
5. FWISD has no obligation to reimburse Student's parent for Student's unilateral placement at *** School. 34 C.F.R. §300.148(c).

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Student is DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

SIGNED the 30th day of March 2012.

Deborah Heaton McElvaney
Special Education Hearing Officer

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