

DOCKET NO. 354-SE-0812

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

DECISION OF HEARING OFFICER

*** (hereinafter “the student”) through student’s next friend ***, 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 Dallas Independent School District.

PROCEDURAL HISTORY

Petitioner filed a Request for Due Process Hearing on August 31, 2012, alleging that the Dallas Independent School District denied the student a FAPE during the 2011-2012 school year through the date of hearing,

The parties first appeared for the due process hearing on November 8, 2013. Petitioner was accompanied by Carolyn Morris, a lay advocate. Respondent was represented by Dianna Bowen. Respondent filed a motion to disqualify the lay advocate, which was granted. Petitioner asked for a continuance to obtain an attorney and the matter was continued to January 10, 2013, in order for Petitioner to secure counsel. The parties reconvened the hearing on January 10-11, 2013. Petitioner was represented by attorneys, Tiffany Pratt and Betsy Thomas. Respondent was represented by attorney of record, Dianna Bowen. Also appearing were *** and ***, the District’s representatives.

Both parties requested an opportunity to submit written arguments. The decision was timely rendered on March 7, 2013 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. Whether the District failed to timely evaluate the student as a student eligible for services under IDEIA;
2. Whether the District failed to consider the parent’s outside evaluation;
3. Whether the District accurately identified the student in all appropriate disability categories, including Intellectual Disability¹;

¹ IDEIA and applicable federal and state regulations use the term Mental Retardation to define this eligibility category. 20 U.S.C. §1401(3); 34 CFR §300.8(c)(6); 19 Tex. Admin. Code §89.1040(5). However, The Texas Education Code at §7.063 requires the use the terms and phrases listed as preferred under the person first respective language initiative in Chapter 392 of the Texas Government Code . TEX.

4. Whether the District denied the parent meaningful participation in the development of the student's educational program by failing to adequately explain the FIE and procedural safeguards and by failing to explain to the parent which staff and teachers would be responsible for implementing the IEP and BIP;
5. Whether the District failed to develop appropriate IEP goals and objectives to meet the student's academic and non-academic needs;
6. Whether the District's denial of credits is a denial of a FAPE.

Petitioner requested the following relief under IDEA:

1. Placement in the appropriate grade;
2. A one-to-one aide in all core classes;
3. Counseling;
4. An order that the District inform the parent of school staff responsible for carrying out the student's IEP;
5. An IEE a public expense;
6. Compensatory education, including private tutoring.

DISMISSAL OF CLAIMS NON-IDEA 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 entered DISD as a *** student during the *** school year and continued as a student during the *** and a portion of the 2009-2010 school years. The student withdrew from DISD in *** 2010 and enrolled in *** ISD, where student remained until the end of the 2010-2011 school year. R6 The student returned to DISD as a *** grade student during the 2011-2012 school year and is currently enrolled as a *** grade student.

2. While in *** ISD, that district conducted a Full Independent Education Evaluation (FIE) which was completed in January 2011, evaluating the student for a specific learning disability and intellectual disability. P24; R4. Although the student exhibited sub-average intellectual functioning, student did not demonstrate significant concurrent deficits in adaptive behavior. Consequently, student did not meet the eligibility criteria for a student with an intellectual disability. R4-9. Testing also reflected that student did not demonstrate a specific learning disability. R4-4. The ARD Committee determined that the student did not qualify for special education and related services. R5; P24. *** ISD did not evaluate the student in any other disability categories.

GOV'T CODE §392.002; TEX. EDUC. CODE §7.063. Consequently, the terminology "Intellectual Disability" will be used in place of "Mental Retardation" in deference to the person first respective language initiative.

3. In June, 2011, *** conducted an evaluation to determine eligibility for developmental disability services. R7. According to the historical background, the student demonstrated stereotypical behaviors consistent with Autism, such as ***, excessive and inappropriate fears, and difficulty in relating to peers. R7-3. *** administered the Wechsler Adult Intelligence Scale – 4th Edition (WAIS-IV), which yielded a full scale IQ of ***, or within the mild to moderately impaired range, with adaptive behavior in the moderate range of impairment. R7-7.

4. *** also evaluated the student utilizing the Gilliam Autism Rating Scale 2nd Edition (GARS-2), which reflected a high probability of Autism. R7-6.

5. *** diagnosed the student with Major Depressive Disorder, an Intellectual Disability, and Pervasive Developmental Disorder – NOS. The student met the eligibility criteria for Developmental Disability Services as a person with an intellectual disability. R7-7.

6. The student returned to DISD during the 2011-2012 school year as a *** grade student after *** grade in *** ISD. R8; R6-4.

7. The parent requested a special education evaluation on September 29, 2011 by delivering a handwritten note to the attendance clerk. P1; RR-107.

8. On October 6, 2011, the parent signed a consent form for DISD Psychological and Social Services, authorizing academic, emotional or behavioral screening and intervention, counseling services and consultation with ***. R13-3

9. District personnel referred the student to the 504 Committee in early September 2011. The Committee requested information from the student’s teachers and scheduled a meeting for September 27, 2011, that was cancelled due to construction. On October 18, 2011, the student’s physician submitted a Section 504 Disability Report noting the student’s Major Depressive Disorder, PDD-NOS and intellectual disability diagnoses and recommended further “psychoeducational testing to assure proper classroom placement.” R10-76. The Committee reviewed this as well as the *** evaluation in determining that the student qualified for Section 504 accommodations. RR186. The initial 504 meeting was not convened until November 2, 2011, due to campus construction and training conflicts. At the conclusion of the November 2, 2011 meeting, the 504 Committee recommended that accommodations should be implemented for 2 weeks prior to initiating a Full Individual Evaluation. R10-99. *** representatives attended the 504 meeting. R10-98.

10. According to the testimony of District personnel, it is the practice of the district to implement 504 accommodations prior to initiating a special education referral.

11. The school counselor and chairperson of the 504 Committee made the referral for a Full Individual Evaluation two weeks following the November 2, 2011 meeting, although she was aware that the parent had requested the evaluation prior to that date. RR2-243-244

12. The District utilizes a software program for the initiation and referral of a special education evaluation. The information is entered into the system and then the referral is “locked” by the individual entering the referral. No evaluation commences until the referral is “locked.” Once the referral is locked, a computer generated notice of evaluation is created for the student with the student’s personally identifiable information. The Diagnostician testified that she cannot manually complete a consent form and does not have access to blank consent forms and claimed to be unable to initiate the referral until another staff person “locked” the referral by making a data entry into the computer. R-14; RR483-485, 515-516. I find based on a preponderance of the evidence that Special Education personnel were aware that the student had been referred for a Full Individual Evaluation but that did not timely obtain consent. I further find that the delay under these

circumstances was not justified because she was waiting on other campus personnel to “lock” the referral.

13. The student exhibited emotional difficulties throughout the school year, reporting varying instances of bullying, and *** at school.

14. The student reported that student was being bullied in class on a daily basis and *** on February ***, 2012. R12. The school counselor, with the assistance of ***, LSSP, developed a campus safety plan for the student. R12-4, R13-6-12.

15. On February ***, 2012, the student again *** while at school. The student risk assessment indicated the student was a high risk for ***. The school counselor referred the student and student’s parent to *** for a psychiatric evaluation. R13-7-19.

16. The District obtained parental consent for the student’s FIE following the student’s *** on February ***, 2012. R14-8; R16.

17. The District completed the FIE on April 8, 2012. R-18.

18. The District evaluated the student for suspected intellectual disability, specific learning disability, emotional disturbance and autism. R18.

19. The District administered the Autism Diagnostic Observation Schedule, Module 4 (ADOS), the Autism Spectrum Rating Scale (ASRS), a Social Communication Questionnaire (SCQ), the Behavior Assessment System for Children, Second Edition (BASC-2) as well as observations of the student, and determined that the student meets the eligibility criteria for Autism and Emotional Disturbance. R18-9; R18-10; 10; RR 570.

20. The student experiences disruptions in communication, reciprocal social interaction, and sensory modalities typical of children with Autism. R18-21.

21. The student also demonstrates characteristics of an Emotional Disturbance that adversely affects educational performance. Student demonstrates a general pervasive mood of unhappiness or depression, as evidenced by student’s diagnosis of Major Depressive Disorder by ***. The District’s evaluation was consistent with the *** evaluation, but the evaluator concluded that student’s Autism impacts student’s ability to have emotional insight, which in turn causes student to misinterpret student’s feelings of depression as anger. Additionally, the student develops physical symptoms or fears associated with personal or school problems. According to the report, student experiences anxiety both at home and in school to such a degree that it interferes with student’s everyday life, including student’s school performance. R18-22.

22. The District also administered the following assessments in the areas of cognitive and academic functioning: Woodcock-Johnson Cognitive Abilities Assessment (WJ III-Cog); Woodcock-Johnson DS – Diagnostic Supplement to the Test of Cognitive Abilities; Woodcock-Johnson Achievement Assessment (WJ-III Ach), Adaptive Behavior Assessment System-Teacher Form (ABAS II), and the Gray Oral Reading Test (GORT-IV).

23. According to the evaluation the student’s Full Scale IQ is ***, but student does not have concurrent significant deficits in at least two areas of adaptive behavior. Student obtained an overall General Adaptive Behavior Composite score of ***. With the exception of the area of use of community resources, all of the student’s adaptive behavior skills are within the average to borderline range. R18-15.

24. Although the *** evaluation reflected a Full Scale IQ of ***, *** administered the Wechsler

Adult Intelligence Scale. The use of the adult test may have depressed student's scores, according to the DISD educational diagnostician. RR-567. The assessments by ***, ***, ISD and DISD were consistent regarding the student's adaptive behavior composite. RR473, RR478, RR570; R18, R6. Based on a preponderance of the evidence, I find that while the student does have sub-average intellectual functioning at least two standard deviations below the mean, student does not concurrently exhibit significant deficits in at least two areas of adaptive behavior as required under applicable state regulations.

25. According to the DISD and the *** ISD evaluations, the student's academic achievement scores were depressed, but student did not meet the criteria for specific learning disability. R6, R18, RR473. The testing reflected that student's achievement scores were consistent with student's intellectual functioning and that student is best characterized as a "slow learner." RR474, 570. Neither District found that the student has a specific learning disability.

26. According to the District's educational diagnostician, the student's depressed academic and achievement scores are best explained by student's emotional disturbance and autism and its impact on student's efforts during the testing. RR572. *** ISD noted in its evaluation that the student's depressed intellectual functioning and academic performance scores should be interpreted with caution due to the student's inconsistent efforts in completing tasks during the assessment. R6-30.

27. Upon completion of the FIE, the ARD Committee convened on April 20, 2012, and determined the student to be eligible for special education and related services under the categories of Autism and Emotional Disturbance. The ARD Committee determined that the student should receive modified instruction in the general education classroom as well as inclusion support. The Committee approved goals and objectives in all core classes, as well as transition, social skills and counseling goals. R20. The District assigned a Case Manager for the student and introduced the case manager to the parent. The ARD Committee also developed a Behavior Intervention Plan, targeting problematic behaviors identified in the FIE, specifically, student's withdrawal from peers and ***. R20-14. Although the ARD Committee recommended counseling as a related service, it only recommended 180 minutes per year, which given the student's history and difficulty in remaining in school, would appear to be inadequate. Additionally, the counseling goals and objectives were vague and not sufficiently measurable when compared to goals and objectives developed during the Fall of 2012.

28. During the 2011-2012 school year, the student was absent for all or part of *** school days. R3-4. The parent submitted documentation that many of the student's absences were related to student's anxiety and depression. P25. The parent's report that the student's absences were related to student's disability is consistent with the findings in the FIE that the student withdraws to escape interaction with others and unwanted attention and experiences anxiety at school to a degree that it interferes with student's everyday life. R18-22-23. Some of those absences occurred following ***.

29. The student reported instances of being bullied while at school, including one incident leading to ***. R12; R 13. Although the District investigated the bullying allegations and did not substantiate that bullying did in fact occur, the student's perception that student was being bullied created anxiety at school to a degree that it interfered with student's ability to remain in school. The student's reports of what student perceived as bullying are equally consistent with the conclusion reached by the evaluator that due to student's Autism, student has difficulty interpreting student's own feelings as well as the actions of others. *See* R18-22.

30. At the beginning of the 2012-2013 school year, the parent requested a transfer to a different *** school, but did not enroll student there. R21. Rather, the parent requested that the District provide services to the student in a *** placement and submitted a physician's referral. R26. The ARD Committee convened on September 28, 2012 to discuss the placement, compensatory services, an IEE request and grade placement issues. The parent had an advocate as well as other family members participate in the ARD Committee meeting

with student. R27-44. The ARD Committee approved the *** placement, compensatory services, and the parent request for an IEE and OT Evaluation. R27-45-46 The District explained the FIE to the parent and the parent's advocate.

31. The parent also requested that the ARD Committee place the student in the *** grade due to student's depression. The District disagreed with the parent's request because the student lacked the necessary credits. However, the student was promoted to the *** grade after having recovered credits. R27-46; R23; testimony of ***.

32. During the September 28, 2012, meeting, the ARD Committee increased the student's counseling time to 60 minutes monthly and developed new counseling goals that addressed student's symptoms of depression and the impact those symptoms have on student's participation in school. R27-16. The ARD Committee also adopted new goals for the student's core academic subjects and transition goals. R27-17-22. The ARD Committee approved the student's *** placement.

33. The District agreed to provide 2400 minutes compensatory educational services in all core academic areas to be provided one-on-one by a special education teacher and 360 minutes compensatory counseling services. The ARD Committee determined these were the services necessary to compensate the student for educational services lost during the Spring, 2011 semester due to the delay in the evaluation and development of the IEP. R27-45.

34. At the time of the hearing the *** teacher was providing instructional services (with modifications to the curriculum) for the student pursuant to student's IEP as well as compensatory educational services. RR248-257

35. The District has not provided current or compensatory counseling services for the student because the parent has refused the services while the student is ***. RR534-536; R30. The parent informed the school's counseling provider that the student was receiving counseling services through ***, but would not provide consent for the school to communicate with ***. R539. According to the *** records, there has been a delay in the delivery of behavioral therapy due to staffing issues, but *** provides case management and medication management services for the student. R37. At the time of the hearing, it was not clear from the records whether or not *** had begun to provide behavioral therapy for the student. R37.

Discussion

Issue 1 - Whether the District failed to timely evaluate the student as a student eligible for services under IDIEA.

The parent requested that the District evaluate the student's educational needs at the beginning of the 2011-2012 school year. On September 29, 2011, she delivered a written request to the District by providing a handwritten note to the Attendance Clerk. P1. Additionally, the school counselor acknowledged that she was aware that the parent had requested an evaluation

prior to the Section 504 Committee meeting on October 18, 2011. RR224. The student's physician recommended an evaluation on October 18, 2011.

The District contends that it was justified in delaying the evaluation because it relied on testing from another district. However, the previous District only evaluated the student for a specific learning disability or intellectual disability. R4. The *** evaluation completed subsequent to the *** FIE and provided to the District at the beginning of the 2011-2012 school contained additional data reflecting the diagnoses of PDD-NOS and Major Depressive Disorder, placing the District on notice that the student should be evaluated for the suspected disabilities of Emotional Disturbance and Autism. At a minimum the District was on notice that this evaluation was needed on October 18, 2011, the date of the Section 504 report.

The District also contends that there was nothing about the student's previous performance while enrolled in DISD that raised concerns about the student's need for an evaluation. However, a review of the student's educational records demonstrates difficulties during student's *** school years. The student repeated *** grade. After failing the TAKS test in the *** grade, student was promoted to the *** grade by the Grade Placement Committee. P22-251. Student left DISD during the *** school year as an *** grade student and returned to DISD as a *** grade student *** years later, having repeated the *** grade. R1. While none of these events standing alone would necessarily require a referral for special education, when considered in light of student's difficulties during the 2011-2012 school year, student's *** evaluation, the parent request, and teacher reports that student was unable to complete assignments or interact with peers (see e.g., P9), school personnel had sufficient information to initiate the evaluation at the beginning of the school year.

The District also contends that it justifiably delayed the evaluation while attempting to implement less restrictive accommodations. However, IDEIA and its implementing regulations require the initiation of an evaluation at the request of a parent and prior written notice to the parent when it refuses to initiate the evaluation. 34 CFR §300.301(b); 34 C.F.R. §300.503(a)(2). Additionally, the implementation of pre-referral interventions cannot be used to unreasonably delay an evaluation. *Student v. Houston ISD*, Docket No. 009-SE-0108 (Tex. Hrg. Officer 2008). The parent requested an evaluation as early as September 29, 2011. The school's "referral" for the evaluation did not occur until late November, 2011. Then, even though the special education evaluation staff was aware of the referral, there was a delay in obtaining parental consent because of a failure to properly generate the referral via the computer and the District's failure to obtain consent manually when efforts to generate the referral through the software program were unsuccessful. No one attempted to obtain parental consent for the evaluation until the day following the student's *** in February of 2012. The District's delays in beginning the student's evaluation are not excusable. These delays resulted in the student not having access to a FAPE for most of the 2011-2012 school year and a denial of FAPE.

IDEIA imposes a mandatory timeline for the completion of an evaluation within 60 days of receiving parental consent for the evaluation. 34 CFR § 300.301. In this case, the District completed the evaluation within 60 days of the date it obtained parental consent. However, the District did not make efforts to obtain parental consent in a timely fashion, and the delay resulted in a failure to provide special education and related services to the student for the better part of the 2011-2012 school year. DISD relies on this provision in defending an approximate six-month delay in completing the evaluation. On September 29, 2011, the parent provided a written notice requesting an evaluation to District personnel. P1 Although schools should consider other supportive services as a part of its overall referral process, the referral for a full and individual evaluation may be initiated by school personnel *or the parent*. 34 C.F.R. §300.301(b). In this case, the parent initiated the referral on September 29, 2011. Although the request was made by delivering a written note to the attendance clerk, other school professionals and evaluation personnel were aware of the request as early as October 2011 when the District was experiencing delays in scheduling the Section 504 Committee meeting. Additionally, the District relied on a software program to initiate the proper consent forms even though the educational diagnostician was aware that the parent and the Section 504 Committee had requested the evaluation, when common sense would dictate manually completing the form and delivering it to the parent for completion. This is an example of unreasonable reliance on technology that results in a denial of a FAPE. When a school is so tied to the use of a software program, including the use of computer generated consent forms, and that reliance results in a delay in evaluation and services, then the procedures used to initiate the evaluation impede the

student's right to a FAPE, significantly impede the parent's ability to be a meaningful participant in the development of the IEP, and cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2)(ii). *See also Student v. Ennis ISD*, Dkt. NO. 157-SE-0310 (Tex. Hrg. Officer 2010). The District's procedural errors in failing to timely initiate and complete the evaluation resulted in a denial of a FAPE. The parent prevails on this issue.

Issue 2 - Whether the District failed to consider the parent's outside evaluation

Issue 3 - Whether the District accurately identified the student in all appropriate disability categories, including Intellectual Disability

The second and third issues must be considered together because ultimately, the parent's complaint is that the District failed to identify the student with an intellectual disability, as reflected in the *** evaluation. The testimony is undisputed that the District reviewed and considered the *** evaluation. However, *** evaluation was not conducted to determine IDEIA eligibility based on applicable federal and state regulations. Although the student qualified as a student with an intellectual disability based on student's IQ scores alone for *** services, IDEA provides that a student does not meet the criteria for intellectual disability unless the student exhibits substandard intellectual functioning (IQ below 70) *and concurrent significant deficits in two or more specified areas of adaptive behavior*. DISD's evaluation is consistent with all other testing for the student in that it reflects the student does not have significant deficits in adaptive behavior.

According to Petitioner, the student's eligibility classification, standing alone, determines whether the student has received a Free Appropriate Public Education. Petitioner's position is inconsistent with IDEIA and the underlying purposes of the Act - the provision of appropriate educational services, *individualized to address the student's educational needs*. IDEIA provides as follows

“Nothing in this chapter requires that children be classified by their disability so long as each child who has disability listed in section 1401 of this title and who, by reason of that disability needs special education and related services is regarded as a child with a disability under this subchapter.”

20 U.S.C. §1412(a)(3)(B).

Schools are charged with the responsibility of developing and providing an eligible student with an appropriate program. The United States Supreme Court established a two-prong test for determining whether a school's program provides a free appropriate public education. The first inquiry is whether the school district complied with IDEA 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).

If the inquiry into a student's educational program begins and ends with the eligibility “label” then the mandates of the Act are not being met. IDEIA requires that a student's educational plan be individualized for the student, based on student's needs, not the student's eligibility classification. A bright line statement that special education must somehow look different for a student based solely on the student's eligibility classification is just as incorrect a premise as the statement that all children with a particular eligibility must require the same educational program. Both statements ignore the individual needs of the child and the reality of the school's mandate – to provide an education that is individualized to meet the student's needs.

So, then, the analysis in this case begins with determining the nature of eligibility classification under

IDEIA. Is the process of “labeling” the student for eligibility purposes a procedural requirement or is it substantive? As stated above, the focus of IDEA is the provision of appropriate educational services to *eligible* students. Nothing in IDEA requires a particular disability classification so long as the student who is eligible for special education and related services receives those services. 20 USC §1412(A)(3)(B).

The case is similar to *Pohorecki v. Anthony Wayne Local School District*, 637 F.Supp.2d 547 (N.D. Ohio 2009). In that case, a parent argued that the school improperly characterized the student as eligible for services under the category of emotional disturbance rather than autism. The student had multiple diagnoses, including ADD, ADHD and seizures. The IEP team determined on the basis of its evaluation that the student was eligible to receive services under the eligibility category of emotional disturbance rather than Autism and developed an IEP for the student specific to the needs identified in the parent’s and the school’s evaluations. At the due process hearing level, although the hearing officer held that the district correctly classified the student, he concluded that the classification of a particular disability is not critical in evaluating a FAPE. Rather, the important issue is whether the goals and objectives are appropriate for the student. *Id.* The Court agreed and recognized that the student’s disability was not easily categorized and that reasonable minds could differ as to what his disability should be called. The Court affirmed the hearing officer’s decision that the student received a FAPE. In addressing the eligibility issue, the Court reasoned that “[t]he very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.” *Id.* In other words, the focus is ultimately on whether the student received appropriate individualized educational services, not the definition of his disability. *See also Student v. Banquette ISD*, Dkt. No. 048-SE-1010 (Tex. Hrg. Officer 2011).

The U.S. District Court for the Western District of Texas has also held that eligibility classification is a procedural component of the development of the student’s IEP. In *Eric H. v. Judson ISD*, 2002 U.S. Dist. Lexis 20646 (W. Dist. Tex. 2002), a parent complained of a district’s removal of the student’s Autism disability classification, even though the District continued to provide services to the student under another disability category. In that case, there was conflicting evidence regarding the nature of the student’s disability and evidence that the student did not exhibit characteristics of Autism at school. The Court noted that the District’s eligibility classification of the student was based on his assessment and review of data from a variety of sources, where the student’s physician’s testimony did not take into consideration the student’s educational performance, and held that the District’s evaluation was appropriate. Moreover, the Court characterized the parent’s dispute over the student’s eligibility label as a procedural matter, and held that it was the parent’s burden to prove that the change in eligibility status resulted in cognizable harm to the student. The parent did not contest the issue of whether the IEP provided a FAPE to the student. Rather, the parent’s position, as in this case, was that the failure to identify the student in a particular disability category in and of itself amounted to a denial of FAPE. The Court disagreed and held that the change in disability classification did not deny the student a FAPE.

In this case, reasonable minds may differ with regard to the label to place on the student’s precise disability. It is undisputed that the student has Autism, and according to the evaluators who testified and the evaluations admitted in evidence, the student’s symptoms arising from student’s Emotional Disturbance and Autism depress student’s IQ scores and academic functioning. The District administered an appropriate evaluation (albeit untimely) and used a variety of assessment tools in identifying the student’s eligibility for special education and related services. The ARD Committee reviewed all available data, including the parent’s outside evaluation and an evaluation from another District, and concluded that the student is eligible for special education and related services under the categories of Emotional Disturbance and Autism. The ARD Committee then developed an IEP that addresses the student’s emotional, intellectual, academic and behavioral needs.

It is important to note that Texas law specifically defines the eligibility criteria for an intellectual disability under IDEIA as a student who . . .

- (A) has been determined to have significantly sub-average intellectual functioning as measured by standardized, individually administered test of cognitive ability in which the overall test score is at least two standard deviations below the mean, when taking into consideration the standard error of measurement of the test; *and*
- (B) concurrently exhibits deficits in at least two of the following areas of adaptive behavior: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

19 Tex. Admin. Code §89.1040(c)(5) (emphasis added).

In this case, the totality of the evidence support the District’s finding as to the student’s eligibility, given the lack of adaptive behavior deficits as defined above. Further, even assuming, *arguendo*, that the student should be eligible under the classification of intellectual disability, the failure to so classify student is a procedural error that has not resulted in cognizant harm² to the student because the District has begun to provide special education and related services to the student that are appropriate for student. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. It is only procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the development of the IEP that result in the denial of a free appropriate public education.” *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003); 20 USC §1415(f)(3)(E). Petitioner presented no evidence of such in this case. The district’s educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that it is not appropriate or that the District has not complied with the procedural requirements under the IDEA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has wholly failed to meet his burden with regard to whether the student was inappropriately classified for IDEIA purposes and whether such classification denied student a FAPE.

Issue 4 - Whether the District denied the parent meaningful participation in the development of the student’s educational program by failing to adequately explain the FIE and procedural safeguards and by failing to explain to the parent which staff and teachers would be responsible for implementing the IEP and BIP.

The parent appears to have limited ability to process and understand information, and student’s difficulties in problem solving parenting, and communication were noted by ***. R37-11. Additionally, the parent’s demeanor and testimony during the hearing demonstrated her limited understanding. Although the hearing convened on November 9, 2012, the parent had obvious difficulties in understanding the proceedings and, in fact, stated that she has a “learning problem” and a “disability.” She also stated that she has difficulties in comprehension. RR34. However, the parent sought the assistance of an educational advocate and was accompanied to ARD Committee meetings by the advocate and relatives who pursued explanations regarding the student’s services. Prior to seeking the assistance of an advocate, she invited providers from *** to participate in the student’s Section 504 meeting, and ultimately, student’s ARD meetings. To the extent the parent had difficulty in participating in the development of the student’s program personally, she augmented her ability by seeking the assistance of advocates to and others. The District included the parent’s family members, service providers and the advocate in its discussions with the parent regarding the student’s evaluation and IEP. Based on a preponderance of the evidence, I find that the District did not deny the parent a meaningful opportunity to participate in the development of the student’s educational program once it convened the student’s ARD Committee meeting (although the delay in evaluating the student did). The parent does not prevail on this issue.

Issue 5 - Whether the District failed to develop appropriate IEP goals and objectives to meet the student’s academic and non-academic needs.

² The District’s failure to timely evaluate the student did, however, result in cognizant harm as discussed herein.

The ARD Committee convened following the completion of the student's FIE and developed an IEP which addressed the student's academic and non-academic needs. The IEP contains goals and objectives in the student's core academic areas, authorizing modified instruction with inclusion support in the general education classroom. The goals and objectives are based on data derived from the student's then current levels of performance and student's assessment.

The ARD Committee initially developed counseling goals in April of 2012, which were vague and did not specifically address student's emotional functioning and its impact on student's participation in the classroom and with student's peers. However, the District modified those goals at the beginning of the 2012-2013 school year. The current IEP counseling goals and objectives specifically address the student's ability to identify student's feelings, social stressors, conflict, peer relationships, anxiety in the classroom, and self esteem. R27-16. The social skills IEP addresses classroom participation with peers, and the student's ability to seek assistance in response to negative peer interactions and stressful situations. R27-15. The Behavior Intervention Plan identifies target behaviors and provides specific, positive interventions designed to increase positive peer interactions and reduce anger, anxiety and depression. R27-34

Both the April and September 2012 IEP's provide that the student can receive instruction in the general education setting, with modified curriculum appropriate to meet student's intellectual and academic needs. Although the evidence is sufficient to find that the April IEP social skills and behavioral goals are not adequate to address the student's needs, the District developed a new IEP at the beginning of the 2012-2013 school year which is appropriate. The parent has failed to present any evidence that the current IEP is not appropriate to meet student's academic needs.

Issue No 6 - Whether the District's denial of credits is a denial of a FAPE.

The student entered DISD in the 2011-2012 school year in the *** grade. Student repeated the *** grade while in *** ISD and was retained while in DISD.³ Although student missed credits due to excessive absences, student was provided an opportunity to recover those credits and in fact did so. R25. The student is currently in the *** grade, but does not have sufficient credits *** to be placed in the *** grade. Petitioner contends that promotion to the 12th grade is necessary because of the student's depression. The student participates in the general education curriculum with inclusion support. Petitioner has failed to provide any evidence that placement in the *** grade is necessary for the student to receive a FAPE. In fact, placement of the student in the *** grade would result in a denial of a FAPE under the facts in this case. Petitioner does not prevail on this issue.

RELIEF

For relief, Petitioner requests prospective relief and compensatory services that can be categorized in the areas of assessment, IEP implementation and support, grade placement and compensatory education.

Compensatory relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). 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. 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.

³ Any complaints regarding DISD's provision of a FAPE during school years prior to 2011-2012 are outside the one year statute of limitations.

The District denied the student a FAPE when it failed to timely initiate its evaluation. According to the District, compensatory education should only be calculated from the Spring of 2012 because it was under no duty to provide a FAPE until the evaluation was completed and the ARD Committee convened to develop the IEP. The District mischaracterizes the delay in evaluation as “slight” and contends the referral (and consent) should have been initiated on November 16, 2011 (two weeks following the adoption of Section 504 accommodations) with the ARD Committee meeting 90 days later on February 14, 2012, assuming a 60-day time period to complete the evaluation and 30 days to convene the ARD Committee meeting. 20 U.S.C. §1414(a)(1)(C)(i)(I); 19 Tex. Admin. Code §89.1050. As the ARD Committee convened to review the evaluation on April 20, 2012, the District contends there was only a two month gap in services to the student. The District further contends that even if the evaluation should have been initiated on September 29, 2011, compensatory services should only be measured from 90 days after the date of the request for evaluation.

The District appears to claim it was justified in the delay because it (a) relied on another District’s evaluation that denied eligibility and (b) implemented other interventions prior to the referral. As previously discussed, the District’s argument fails for two reasons. First, the District had notice that the student had not been evaluated for Autism or Emotional Disturbance as reflected in the evaluation that occurred after the other District’s evaluation. Second, the District’s argument ignores the fact that the 2011-2012 school year was not the student’s first year in the District, student had struggled in previous years, and the nature of student’s disability, i.e., Autism, is a developmental disability, and not of a nature that it suddenly occurred during the 2011-2012 school year.⁴

The District’s argument that the delay was also justified because it attempted to implement other interventions is misplaced as well. The District’s position ignores the fact that the *parent* initiated the referral and it had an obligation to begin the evaluation at that time. Additionally, what followed the parent’s request were numerous efforts to cancel Section 504 meetings, delay referral to implement accommodations for a 2 week period, and then failing to use common sense to obtain parental consent for an evaluation it knew was needed because of a computer error and the claim that the District does not have the ability to print blank consent forms and manually complete them to begin the evaluation process. Rather, the District delayed initiating the evaluation until the student ***. The District’s delays under the circumstances justify an award of compensatory education for the entire Fall semester from the date of the parent’s request, in addition to the compensatory services approved by the ARD Committee for the entire Spring semester.

The District is currently providing the student 2400 minutes of compensatory education, in a one-to-one setting by a special education teacher, in all core academic areas, as well as 360 minutes of compensatory counseling services. According to the District, the number of minutes provided are specific to the Spring semester, based the ARD Committee’s determination that the student should receive 240 minutes of inclusion support each week. RR321. A school year (two semesters) is 180 days. Tex. Educ. Code §25.081. Therefore, based on a 90-day semester, the District is currently providing the student approximately 27 minutes compensatory education services for each day the student was denied special education services. The District’s rationale for the amount of compensatory time provided is based on the student’s current needs and assessment, the fact that student’s current instructional placement is the general education classroom with inclusion support, and the fact that the compensatory services are being provided in a more intense setting, i.e., one-on-one with a special education teacher.

There is no legal requirement that compensatory services be provided hour for hour or day for day.

⁴ Autism is defined as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects educational performance. 34 CFR §300.8(c)(1). In Texas, students with pervasive developmental disorders are included in this category. 19 Tex. Admin. Code §89.1040(c)(1).

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). The District’s calculation of compensatory services appears to be reasonable under all the circumstances in this case.

However, the District must also compensate the student for the lost educational opportunity for the Fall semester as well, beginning with the date the parent requested the evaluation. Therefore, to compensate the student for the lost educational opportunity during the Fall semester, the District shall provide 30 minutes⁵ compensatory education services for each school day of the Fall semester, beginning September 29, 2011, and ending the last school day of the Fall Semester. The additional compensatory education services must address the student’s needs in all core academic areas and shall be provided in a one-on-one setting by a special education teacher. The District shall provide these services during the summer of 2013.

The District previously agreed to provide 360 minutes compensatory counseling services for the student’s losses during the Spring semester. However, the District should compensate the student for the lost educational opportunity during the Fall semester as well by providing an additional 360 minutes in compensatory counseling services. The District has not yet provided any compensatory counseling services, partially due to resistance from the parent while the student ***. Although parent conduct in some cases justifies a reduction in compensatory awards, given the nature of the student’s emotional difficulties during the 2011-2012 school year, the District’s failure to adequately respond, the parent’s own difficulties, and the student’s current *** placement, I am ordering the District to provide 720 compensatory counseling minutes for student to compensate student for the entire 2011-2012 school year.⁶ The District and the parent may elect, with ARD Committee approval, to provide some or all of the compensatory counseling services through a summer program provided by the District or an outside agency during the Summer of 2013. The program must be designed to address the student’s current deficits s in the areas identified in student’s social skills and counseling IEP’s. In the event, the ARD Committee elects to provide these services through a summer camp or other group program that is not one-on-one, the program shall be for a minimum of 4 hours per day, 4 days per week for 2 weeks.

With regard to the parent’s request for an IEE at public expense, the District agreed to provide it and submitted an IEE request form to the parent on October 28, 2012 which has not been completed. The District is ordered to resubmit the request form to the parent no later than 10 school days from the date of this Decision. If the parent is currently requesting an IEE, the parent shall complete the form and return it to the District within 30 days. If the parent fails to timely complete and return the form, the District is under no further obligation to provide an IEE at public expense based on the April 2012 evaluation.

As of the date of the hearing, the parent has denied the District an opportunity to provide current or compensatory counseling for the student while student is ***. The parent and district are cautioned that under IDEIA, parental consent to special education and related services includes all services that are appropriate for the student. 34 CFR §300.300(b). Special education counseling in this case is appropriate for the student and necessary for the student to receive a Free Appropriate Public Education. The District has an obligation to provide counseling as a related service. Further, the counseling goals are specifically related to the student’s participation in school and peer relations. The District is ordered, therefore, to develop an IEP that transitions

⁵ For ease of calculation, I am ordering that the District provide 30 minutes compensatory services (rather than 27 minutes) for each missed day.

⁶ The issue of compensatory time for missed counseling services while the student has been *** during the 2012-2013 school year is not before me. However, the parent’s refusal to allow access to the student for these services may justify a reduction in compensatory time for the current school year, based on an ARD Committee determination of the student’s needs upon student’s return to the campus.

the student's *** to the campus so student's entire IEP, including student's counseling goals, can be implemented. The transition to the campus may be gradual, based on the student's needs, but should commence upon the completion of the ARD Committee meeting implementing this Order. The District must invite *** staff as well as any other relevant care providers to the ARD Committee meeting to develop a transition plan based on the student's current needs.

The parent's request for an order directing the placement of the student in the *** grade is denied based on the evidence presented. However, upon completion of the compensatory services ordered herein, the ARD Committee should convene to revisit the appropriateness of a change in grade at that time.

The parent's request for an Order requiring the District to inform her of all staff responsible for carrying out the student's IEP is reflective of the parent's difficulty in communicating with District personnel. However, the District has addressed this by providing the parent with a case manager and it should continue this assignment.

The parent failed to present any evidence that one-to-one instruction in all core academic areas is necessary for the student to receive a FAPE. In fact, such a restrictive placement would be inconsistent with implementing the student's social skills and counseling goals. Although the District has provided ***, the District's plan to provide inclusion support in the general education classroom is appropriate and the least restrictive educational environment for the student upon student's ***. The parent's requested relief is denied.

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Dallas 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 an Emotional Disturbance and Autism.

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 April, 2012. However, Petitioner has failed to meet petitioner's burden with regard to petitioner's allegations that the current IEP is inappropriate and that the District denied petitioner the ability to participate in the development of the student's program when it failed to adequately explain the IEP to petitioner. The parent also failed to meet her burden that the District denied the student a FAPE based on improper identification and improper grade placement.

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).

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 education services in all core academic areas in amount equal to 30 minutes per day for each day of the Fall semester from September 29, 2011, through the end of the Fall Semester. These hours are in addition to the compensatory services currently being provided for the Spring semester of the 2011-2012 school year. The District shall provide these services during the summer of 2013.

2. Respondent shall provide the student with compensatory counseling services in an amount 720 minutes to compensate for the loss of services during the entire 2011-2012 school year. The ARD Committee shall provide these services during a summer program designed to address the student's current needs identified in student's social skills and counseling IEP's, keeping in mind that the calculation is based on services being provided in a one-on-one setting. In the event, the ARD Committee elects to provide these services through a summer camp or other group program that is not one-on-one, the program shall be for a minimum of 4 hours per day, 4 days per week for 2 weeks.

3. Respondent shall resubmit the IEE request form to the parent no later than 10 school days from the date of this Decision. If the parent is currently requesting an IEE, the parent shall complete the form and return it to the District within 30 days. If the parent fails to timely complete and return the form, the District is under no further obligation to provide an IEE at public expense based on the April 2012 evaluation.

4. Respondent shall convene an ARD Committee meeting to develop an IEP that transitions the student's *** to the campus so student's entire IEP, including student's counseling goals, can be implemented. The transition to the campus may be gradual, based on the student's needs, but should commence upon the completion of the ARD Committee meeting implementing this Order. It is further ordered that the District shall invite *** staff as well as any other relevant care providers to the ARD Committee meeting to develop the transition plan.

5. Respondent shall convene an ARD Committee meeting at the completion of the compensatory education services to discuss whether there should be a change in grade placement. This is not an Order for the District to make the change in grade placement, however; it is merely an Order that the District should evaluate whether a change in grade placement would be appropriate at that time based on the student's current progress.

6. Respondent shall continue its current practice of providing the parent and student a case manager.

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 7th day of March, 2013.

/s/Sharon M. Ramage
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 September 29, 2011 to April 8, 2012, when it obtained the parent's consent. The District should not have delayed the evaluation to implement Section 504 accommodations because the parent had initiated the referral. Additionally, the District's failure to timely obtain the consent is not excused by difficulty in creating a computer generated form. The procedural errors resulted in a denial of a FAPE.

Citation: 34 CFR §300.301(b); 34 CFR §300.503(a)(2); 34 CFR §300.513(a)(2)(ii).

Issue No. 2: Whether the District failed to consider the parent's outside evaluation.

Ruling: For the District. The District considered outside evaluations provided by the parent.

Citation: 34 CFR §300.305(a)(1)(i).

Issue No. 3: Whether the District failed to properly identify the student in the eligibility category of intellectual disability.

Ruling: For the District. The District properly identified the student in the categories of Autism and Emotional Disturbance. The student does not meet the eligibility criteria for intellectual disability because student does not have significant deficits in adaptive behavior. Additionally, failure to identify the student in a particular category is a procedural error that did not result in a denial of a FAPE.

Citation: 19 Tex. Admin. Code §89.1040(c)(5); 20 U.S.C. §1412(A)(3)(B); 34 CFR §513(a)(2).

Issue No. 4: Whether the District denied the parent meaningful participation in the development of the student's educational program by failing to adequately explain the FIE and procedural safeguards to her and by failing to explain which staff and teachers would implement the student's IEP.

Ruling: For the District. Although the parent has difficulties in understanding the student's program and communicating with the District, the District took steps to communicate with her and include other family members, outside agency representatives, and an advocate, all of whom are persons with special knowledge and expertise regarding the child.

Citation: 34 CFR §300.321(a)(6).

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 in part; for the District in part. The April 2012 IEP contained goals and objectives to meet the student's academic needs. However, the counseling goals were vague and not appropriate. The District corrected the issues with the goals and objectives at the beginning of the 2012-2013 school year.

Citation: 34 CFR §300.320(a)(2)(i).

Issue No. 6: Whether the District's denial of credits is a denial of FAPE.

Ruling: For the District. The student failed to present evidence that a change in grade placement is necessary for student to receive a FAPE. The student's placement is appropriate based on the student's current needs

Citation: 34 CFR §300.320.