

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
KIPP TEXAS	§	
PUBLIC SCHOOLS	§	STATE OF TEXAS

**DECISION OF HEARING OFFICER**

Petitioner, \*\*\* (“Student”), by next friend, \*\*\* (“Parent”), filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The complaint was received by the Texas Education Agency (“TEA”) January 9, 2020 and re-assigned to this hearing officer June 11, 2020. The Respondent in the complaint is KIPP Texas Public Schools (“KIPP”).

**Procedural History**

Respondent moved for Motion for Partial Dismissal. Petitioner was given time to respond to the motion. Petitioner filed no response to the motion. On March 6, an Order of Partial Dismissal was entered that dismissed for want of jurisdiction Petitioner’s claims regarding a Texas Education Agency (“TEA”) Corrective Action Plan and a request for attorney’s fees.

After three continuances of the due process hearing, the due date was ultimately extended to August 6, 2020. On July 21, the parties appeared and offered exhibits into evidence. Parent appeared *pro se* on behalf of Petitioner. Holly Sherman and Alyssa Sandersen, attorneys, appeared on behalf of Respondent. \*\*\*, Managing Director of Special Populations, KIPP Texas Public Schools, appeared as party representative for Respondent.

On July 22, 2020, the parties reappeared and presented their respective cases. Parent testified on behalf of Petitioner. Parent called no other witnesses. Respondent called the following five witnesses: 1) Assistant Principal at \*\*\*, 2) Senior Manager of Special Populations, KIPP- Houston, 3) KIPP Texas-Houston’s lead Licensed Specialist in School Psychology (“LSSP”), 4) TEA Executive Director of School Programs (formerly serving in various positions for KIPP Texas), and 5) School Leader (synonymous for principal) KIPP \*\*\*.

### **Issues for Hearing**

Petitioner alleged a failure to provide counseling services “as documented in [Student’s] IEP....” and failure to provide requested records. As relief, Petitioner requested monetary compensation for provision of future tutoring services for Student.

### **Findings of Fact**

Based on the evidence before this hearing officer, the following are the findings of fact in the instant action. Citations to Petitioner’s Exhibits and Respondent’s Exhibits are designated with a notation of “P” or “R” respectively, followed by the exhibit number or letter and page number. Citations to the transcript are designated with a notation of “T” followed by the page number.

1. Student is \*\*\*-year-old child who attends KIPP. Student currently meets eligibility criteria for special education and related services as a child with other health impairment (“OHI”) for attention deficit hyperactivity disorder (“ADHD”) and \*\*\*. P-A; R-3, pg. 16
2. KIPP is responsible for the provision of special education and related services to those children enrolled in KIPP and who are eligible for such services.
3. At the time of hearing, Student had concluded Student’s \*\*\* grade year.
4. In March 2019, at Parent request, an independent educational evaluation (“IEE”) was conducted. The purpose of the IEE was due to concerns regarding autism spectrum disorder (“ASD”) and neuropsychological functioning. The independent evaluator determined that Student’s behaviors were more consistent with \*\*\*, rather than ASD. R-9, pg. 1-32
5. Although not a part of the formal evaluation, the evaluator indicated that Student also had ADHD. In addition to ADHD, ultimate diagnoses included \*\*\*. R-9, pg. 25
6. The independent evaluator recommended an occupational therapy (“OT”) evaluation if not previously conducted to determine if Student had a sensory processing disorder. The evaluator indicated that Student “might benefit from counseling as a related service.” R-9, pg. 1-32;
7. On April \*\*\*, 2019, the ARD committee met to review the results of the IEE. The committee added OHI due to ADHD as Student’s primary disability. P-C, pg. 37-45; R-2;
8. In \*\*\* grade (2018-2019), Student was provided services in the general education setting with in-class support in \*\*\*, and specialized instruction in English Language Arts (“ELA”), math and reading. \*\*\* instruction was provided in the special education setting. Transportation as a related/other service was provided. The individual education program (“IEP”) did not include counseling services. P-A, pg. 13; R-1, pg. 5
9. The ARD committee met for Student’s annual ARD May \*\*\*, 2019 and continued on May \*\*\*. The committee assigned the LSSP the task of completing consent forms to conduct a counseling

- evaluation. The LSSP was to communicate with Parent regarding a date on which to review the documents. The meeting ended in disagreement. P-A, pg. 16; R-3, pg. 16, 19
10. The LSSP did not communicate with Parent following the meeting. Parent made no contact with the LSSP about the status of the counseling consent form. Neither did the LSSP communicate with Parent again until the second half of the 2019-2020 school year. T-pg. 118, 135-136
  11. The May 2019 ARD committee developed four Adaptive Behavior goals. The committee also developed one ELA and Reading goal and one Mathematics goal. Multiple accommodations were recommended for adaptation of classroom instruction and management of behavior. Student's IEP did not include counseling as a related service. P-A, pg. 5-8; R-3
  12. The committee developed a behavior intervention plan ("BIP") that targeted the following behaviors: \*\*\*. P-A, pg. 24-25
  13. The ARD committee met September \*\*\*, 2019, Student's \*\*\* grade year. The meeting continued October \*\*\*, and October \*\*\*. One purpose of the meeting was to consider results of an independent occupational therapy ("OT") evaluation. Because the independent OT evaluation was a clinical based evaluation rather than school based, the KIPP committee members did not accept it. KIPP wanted to conduct its own OT evaluation of Student. Parent refused to give consent. The LSSP interpreted Parent's comments regarding refusal to give consent as a refusal to consent to any additional evaluations. Parent did not mention counseling as a related service evaluation at the meeting. The meeting ended in non-consensus. R-4, pg. 3-8; T-pg. 150-152
  14. Parent filed the instant action January 9, 2020. (See Notice of Filing of Request for A Special Education Due Process Hearing)
  15. On January \*\*\*, 2020, KIPP developed and obtained Parent's consent for a counseling evaluation. R-8, pg. 1-4; T-pg. 119-121
  16. KIPP closed from March 23, 2020 until the end of the academic school year due to the Covid-19 Pandemic, interrupting Student's counseling evaluation. R-5, pg. 21; T-pg. 120, 125-126
  17. At the April \*\*\*, 2020 annual review ARD meeting, KIPP staff informed the committee that the counseling assessment would be completed when school resumed because it is necessary to observe Student in the school setting. R-5, pg. 22
  18. Because the counseling evaluation was pending, to appease Parent's concerns, and due to the Covid -19 Pandemic, KIPP offered \*\*\* instruction by related services staff through its distance learning. T-pg. 122, 126
  19. The counseling as a related service evaluation was pending at the time of hearing. T-pg. 119-125

20. Student increased in Student's understanding of \*\*\* over the \*\*\* and \*\*\* grade years. Academic success increased in recall and understanding of information. Student spoke more respectfully with adults and was more mindful of what Student said. Student exhibited studious behavior in ELA class and completed assignments with zero pushback. Student continued to have difficulty in math, particularly struggling with \*\*\*. R-5-22-23; T-pg. 153-154, 170-177
21. Student made passing grades in the 2018-2019 and 2019-2020 school years. Student's final grades in \*\*\* grade ranged from \*\*\*. In \*\*\* grade, Student's first semester grade averages ranged from \*\*\*. R-11, pg. 1-2
22. In \*\*\* grade, teacher comments indicated that Student was frequently off task, \*\*\*. In \*\*\* grade, Student received only one comment on Student's report card-\*\*\*. R-11, pg. 1-2
23. Behaviorally, Student made significant improvements between the 2018-2019 and 2019 and 2020 school years. During the 2018-2019 school year, Student required intervention from Staff almost daily. During the past school year, Student took ownership of Student's behavior. T-pg. 88-89, 116
24. Student's disciplinary incidents decreased from the 2018-2019 school year to the 2019-2020 school year. From January to April, 2019, Student had \*\*\* disciplinary reports. Student's behaviors included \*\*\*. Prior to KIPP's closure due to the Pandemic, Student had one disciplinary report for \*\*\*. R-2, pg. 3; R-12, pg. 1-4; T-pg. 174-177
25. Parent requested Student records from KIPP in August, 2018, April, 2019, October, 2019, and November, 2019. Respondent complied with each request. R-14, pg. 8-381
26. KIPP complied with Parent's August 2018 request on August \*\*\*, 2018. R-14, pg. 34-35; T. pg. 69-71
27. At the conclusion of an April \*\*\*, 2019 ARD meeting, Parent requested records. KIPP staff discussed the request with Parent and Parent's advocate on April \*\*\*. The only document that was pending was sent certified mail on April \*\*\*. R-14, pg. 57-59; T- pg. 71-74
28. Parent requested Student's service logs November \*\*\*, 2019. KIPP provided the logs to Parent November \*\*\*. R-14, pg. 8, 68; T- pg. 78-30
29. On November \*\*\*, 2019, Parent requested documents used in the review of existing evaluation data, specifically evaluations, consultation for occupational therapy and counseling services, every consult Student had with KIPP, Student's outside psychological evaluation, consent forms for services, testing protocol used to conduct Student's evaluations and response to interventions. P-B, pg. 45; R-14, pg. 284; R-16, pg. 1
30. On November \*\*\*, 2019, KIPP sent service logs, ELA and math work samples from Student's compensatory services. R-14, pg. 285-286-301, 308; R-4, pg. 6;

31. On November \*\*\*, 2019, KIPP emailed Parent and confirmed the timeframe within which the law requires production of requested records. The records were to be made available by January \*\*\*, 2020. The email explained that testing protocols must be reviewed in person and KIPP's protocols would be available for Parent's review by December \*\*\*. KIPP indicated that Parent could schedule a time for the review. KIPP also explained that protocols from the IEE were not in its possession, but in the possession of the independent evaluator. R-14, pg. 302; R-17, pg. 1-4; T-pg. 82-83
32. KIPP responded with requested documents January \*\*\*, 2020. R-17; T-pg. 83-84

### **Discussion**

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. In the instant action, Petitioner failed to carry the burden of proof in all allegations.

Every child with a disability eligible under the IDEA is entitled to a free, appropriate public education ("FAPE"). 34 C. F. R. §300.301. *Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303 (5<sup>th</sup> Cir. 1997). The Fifth Circuit defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks*, 118 F.3d at 253.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 C. F. R. § 300.513(a)(2).

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. Counseling is a related service. 34 C. F. R. §300.34 (a). A child must receive counseling where those services are required for the student to receive an educational benefit. *Cerra v. Pawling Cent. Sch. Dist.*, 44 IDELR 89 (2d Cir. 2005); *Forest Grove Sch. Dist. v. Student*, 69 IDELR 27 (9<sup>th</sup> Cir. 2016, unpublished).

### **Issue: Failure to Provide Requested Records**

Parents have the right to inspect and review any education records relating to their children that are collected, maintained, or used by the child's school or district. A school or district must comply with a parental request without unnecessary delay and before any meeting regarding an IEP, or any due process hearing, manifestations review procedures or resolution session, and in no case more than 45 days after the request has been made. 34 C. F. R. §300.613.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies —

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit. 34 C. F. R. §300.513(a).

During the relevant time period in this matter, Parent made several requests for records. The record is replete with evidence that KIPP responded to Petitioner's requests. Although Petitioner contended that KIPP failed to produce everything that was requested, Parent failed to specify which records were not made available for review. Additionally, Parent presented no evidence that her opportunity to participate in the decision-making process was significantly impeded or that Student was denied a FAPE due to the alleged failure to make records available. Petitioner failed to carry the burden of proof of a violation of the IDEA's requirement to make records available in a timely manner to Parent.

**Issue: Failure to Provide Counseling Services “as documented in [Student's] IEP....”**

Petitioner brought forth no evidence to support that Student needed or should have received counseling services during Student's \*\*\* and \*\*\* grade years. Student's IEPs contained no provision for counseling services. While the independent evaluator suggested that Student might benefit from counseling, the record shows that none of the KIPP witnesses saw a need for this related service.

Parent requested counseling services following receipt of the IEE recommendation that Student might benefit from such services. Student's May 2019 ARD committee met and directed a specific staff person to prepare the consent documents and communicate with Parent regarding consent for a counseling evaluation. The staff person failed to do so. At the fall 2019 ARD committee meeting, the members reviewed and considered an occupational therapy IEE; the KIPP committee members wanted KIPP to do its own OT evaluation and did not accept the IEE. Parent disagreed and indicated that she would not give consent. The staff person responsible for obtaining consent for the counseling evaluation was present at the meeting. She interpreted Parent's refusal to give consent to include a counseling evaluation, as well. Nothing further occurred regarding obtaining consent for a counseling evaluation until after Petitioner filed the instant action. KIPP then obtained Parent's consent. Parent did not plead or argue an unreasonable

delay in obtaining consent. This hearing officer makes no ruling on an issue not presented by the pleadings or the parties. 20 U.S.C. § 1415(f)(3)(B); *Lago Vista Indep. Sch. Dist. v. S. F. b/n/f Steven and Carol F.*, 50 IDELR 104 (W. D. Tex., 2007).

### **Student's Progress**

The evidence supports a finding that the ARD committee considered Student's strengths and weaknesses shown in Student's current assessments and on Student's performance. The committee considered Student's behavioral needs. Student's BIP addressed Student's targeted behaviors. Student received \*\*\* instruction in the special education setting. Student received Student's remaining instruction in the general education setting with in-class supports.

Students with disabilities must be educated with students without disabilities to the fullest extent possible, and consideration of a student's least restrictive environment includes an examination of the degree of benefit the student will obtain from an inclusive education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). Student's placement was not in dispute.

Parent attended Student's ARD meetings, asked questions, made requests, and was an active participant in the decision-making. The ARD committee considered Parent's input. KIPP took time to explain subjects that were confusing such as the difference between a clinical evaluation and a school-based evaluation. KIPP explained Parent's rights to request an IEE following a disagreement with an evaluation done by KIPP. When Parent expressed concern about ensuring additional services to help Student take the STAAR, KIPP staff offered to send home a weekly work product to demonstrate focus of instruction and progress. Following an internal audit of Student's \*\*\* services, KIPP determined that Student was owed \*\*\* minutes of ELA instruction. KIPP proposed compensatory services to make up for the missed time. When Parent requested Student's records, KIPP responded to the requests in a timely manner. Parent actively advocated for her child.

The record reflects that Student's grades improved from \*\*\* grade to \*\*\* grade. The testimony indicated a significant improvement in both behavior and academics. Parent did not dispute the evidence regarding Student's progress. The overall evidence reflected that Student made meaningful progress appropriate in light of Student's circumstances. *Andrew F. v. Douglas County School Dist.*, 137 S. Ct. 988 (2017).

### **Conclusions of Law**

1. Petitioner did not meet Petitioner's burden of proof as the party challenging provision of counseling as a related service. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. The District did not violate parental procedural rights under the IDEA as to making available Parent's records requests. 34 C.F.R. § 300.513(a); 34 C.F.R. § 300.320(a).

3. Student was provided a FAPE during the relevant time period. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).

### **Orders**

Based upon the foregoing findings of fact and conclusions of law, IT IS ORDERED that Petitioner's requests for relief are **DENIED**.

**SIGNED** on August 4, 2020.

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Brenda Rudd  
Special Education Hearing Officer  
For the State of Texas

### **Notice to Parties**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code Sec. 89.1185(n).