

**DOCKET NO. 229-SE-0419**

<b>STUDENT</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>B/N/F PARENT &amp; PARENT</b>	§	
<i>Petitioner</i>	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER FOR THE</b>
	§	
<b>WIMBERLEY INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	
<i>Respondent</i>	§	<b>STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**Statement of the Case**

Petitioner, Student (“the student”) b/n/f Parent & Parent (“the parents”) 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 on April 1, 2019. The Respondent in the complaint is WIMBERLEY INDEPENDENT SCHOOL DISTRICT, (“the district,” “WISD,” or “Wimberley ISD”). On April 1, 2019, Petitioner filed an *Amended Request for an Impartial Due Process Hearing*. On August 19, 2019, Petitioner filed a *Request for Expedited Special Education Hearing* in Student b/n/f Parent v. Wimberley Independent School District, Docket Number, 397-SE-0819. On August 21, 2019, Respondent filed a *Motion for Consolidation of Actions* requesting that the hearing officer consolidate and merge Docket No. 229-SE-0419 with Docket No. 397-SE-0819. Petitioner filed a Response on August 23, 2019 requesting that Respondent’s *Motion for Consolidation of Actions* be denied. This hearing officer denied Respondent’s *Motion for Consolidation of Actions* on August 29, 2019.

The case came on for hearing in the offices of the district in Wimberley, Texas on September 11, and 16-18, 2019.

Petitioner was represented by Meera Krishnan and Elizabeth Angelone, attorneys with Cuddy Law Firm PLLC in Austin, Texas. Respondent was represented by Jamie Turner and Kelly Janes, attorneys with Walsh Gallegos Trevino Russo & Kyle P.C. in Austin, Texas. The hearing was recorded and transcribed by Ann Berry, a duly certified court reporter,

At the close of the hearing, and on the record, the parties requested a continuance and extension of the decision due date to receive the transcripts of the hearing and file written closing arguments. The requests were granted by the hearing officer. Both parties timely filed their closing arguments.

### **Issues for the Hearing**

1. Whether the district failed to provide the student with an IEP that included appropriate special education and related services and failed to provide the student with a placement individualized to the student's needs?
2. Whether the district failed to timely and comprehensively evaluate the student in all areas of suspected disability and need?
3. Whether the district failed to provide an appropriate \*\*\* plan for \*\*\* services for the student?

### **Petitioner's Requested Relief**

Petitioner requested the following relief:

1. That the hearing officer order the district to provide the student with an appropriate placement that meets the student's unique educational and behavioral needs and provides academic instruction and related services to the student in the student's Least Restrictive Environment ("LRE").
2. That the hearing officer order the district to fund an Independent Educational Evaluation ("IEE") of the student in all areas of suspected disability and need, including, but not limited to, an age-appropriate \*\*\* assessment and including adequate observation and data collection in the school environment as necessary.

3. That the hearing officer order the district to convene an Admission, Review, and Dismissal Committee (“ARDC”) meeting for the student on receipt of the IEE(s) and develop a new Individualized Education Program (“IEP”) for the student which:
  - a. Accurately reflects the student’s present levels of performance of academic achievement and functional performance;
  - b. Includes appropriate related services, including, but not limited, to transportation, special education counseling or cognitive behavioral therapy, social skills, \*\*\* or \*\*\* services, psychological services, behavioral supports, and family counseling as necessary to implement the student’s IEP;
  - c. Identifies appropriate teaching methodologies that will be employed to address the student’s academic needs;
  - d. Identifies the student’s \*\*\*, \*\*\* needs and includes appropriate \*\*\* goals and services to assist the student in addressing those needs;
  - e. Identifies appropriate behavior and academic methodologies for the student and includes a plan to implement the behavior methodologies;
  - f. Includes parent training so that parents have the skills to support the implementation of the IEP; and
  - g. Provides services in the student’s appropriate LRE.
4. That the hearing officer order the district to provide or fund compensatory services, including for services to which the student was entitled but did not receive.

### **Respondent’s Issues and Requested Relief**

1. On August 25, 2019, Respondent filed its counterclaim in support of its full and individual evaluation (“FIE”). Respondent requested a finding that its August \*\*\*, 2019 FIE was appropriate under the requirements of the IDEA.
2. On September 16 and 18, 2019, Respondent filed pleadings and briefing requesting sanctions against Petitioner’s attorneys. Respondent alleged that Petitioner’s attorneys had abused the discovery and hearing process by obstructing Respondent’s attempts to secure the student’s testimony and by making false representations to Respondent and to this hearing officer concerning the student’s availability to testify at hearing and whether the Cuddy Law Firm

represented the student. Respondent requested various sanctions, including the striking of Petitioner's pleadings and an award of attorney fees and costs allegedly incurred by Respondent because of conduct of the Petitioner's attorneys.

### **Findings of Fact**

1. Petitioner, \*\*\*, is a \*\*\* student who resides with Student's father within the geographical boundaries of the district. The student currently attends \*\*\*. At the time of the due process hearing the student was eligible for special education as a the student with a specific learning disability ("SLD") in reading fluency, written expression, and math calculation, and Other Health Impaired ("OHI") due to Attention Deficit Disorder ("ADHD"). (Tr. 1008-1010 P.2:23).
2. The student has diagnoses from private psychiatrists and psychologists of \*\*\* and an Emotional Disturbance. (P.12:3, 17).
3. The student is currently \*\*\*. (P. 2:23; R. 44:10).
4. On August \*\*\*, 2017, the district sent a notice to the parents of the student requesting the parents' attendance at a conference on September \*\*\*, 2017, because the student had accumulated five (5) absences for the school year. (R. 2:1).
5. At the student's annual ARDC meeting on March \*\*\*, 2018, the student was eligible for special education services as Other Health Impaired ("OHI") due to ADHD and Specific Learning Disabilities in the areas of reading fluency, written expression, and math calculation. (P. 2:1-2; R. 4:1-2). The student's placement was in the general education setting at \*\*\* with resource support, counseling services, and appropriate accommodations to allow the student to meet Student's annual goals. A behavior improvement plan and a \*\*\* plan were included as in the IEP. (P. 2:29-30; R. 4:29-30) All members of the ARDC, including the parents, signed the document indicating their agreement with the IEP. (P. 2:1-2:25; R. 4:251-2).
6. A Manifestation Determination Review ("MDR") ARDC was convened on April \*\*\*, 2018, to change the student's placement from \*\*\* to the DAEP because of the student's involvement in numerous fights and multiple occasions of non-compliance with the directives of teachers since the student's return to the \*\*\* campus from DAEP on February \*\*\*, 2018. Multiple attempts were made to contact the parents to schedule the meeting. Emails and phone calls were not returned. The parents did not attend the MDR ARDC. (P. 4; R. 7).
7. The MDR ARDC determined that the fighting and non-compliant behaviors in which the student engaged were not a manifestation of Student's disability or a failure of the district to implement Student's IEP. The student was placed in DAEP for a period of 45 days. The ARDC noted that the student owed \*\*\* hours of attendance recovery due to absences. (P. 4; R. 7).

8. The student was \*\*\* that occurred on May \*\*\*, 2018 outside of school and not at a school related activity. (R. 11).
9. On May \*\*\*, 2018, the student's DAEP teacher spoke with the student's father by phone. The father told the DAEP teacher that the student would not be back at the district school. (R. 8).
10. A MDR ARDC meeting was held on August \*\*\*, 2018 to address the student's \*\*\* outside of school and not at a school related activity. The student's father attended the meeting. The MDR ARDC, including the student's father, agreed that the conduct was not related to the student's disability and was not a result of the district's failure to implement the student's IEP. (R. 11).
11. The MDR ARDC determined that the student would be placed at the DAEP. The ADRC document states that, "when placement from previous MDR is completed the student will begin the placement for which this MDR is being held." No dates or timeframe are given for completion of either the previous or the current DAEP assignment. (R. 11).
12. The district's DAEP is located in a classroom on the \*\*\* campus. (Tr. 112).
13. When placed in DAEP, the student received academic instruction through \*\*\*. \*\*\* is a computer-based program aligned with the Texas Essential Knowledge and Skills ("TEKS") which allows the students to cover the same curriculum in DAEP that would be taught in the student's class were they not assigned to the DAEP. (Tr. 110-115). \*\*\* is a self-paced program which tracks the percent of coursework completed, the overall grade for the each course, the grade for the work completed for each course, the number of activities completed in a day, and the amount of time that the student is not working on \*\*\* during the day. (Tr. 115-116, 133-134).
14. Teachers \*\*\* provide course work for the students to complete while in DAEP. (Tr. 116).
15. At the DAEP, the student received individualized support to implement Student's IEP, to assure that Student received Student's IEP accommodations, social skills training, individual counseling, and the services in Student's \*\*\* services plan. (Tr. 118-124).
16. The student's Behavior Intervention Plan ("BIP") was implemented during the times Student was assigned to the DAEP. (Tr. 125-127).
17. The student and Student's mother were present at the March \*\*\*, 2018 Annual ARDC. The \*\*\* piece of the student's IEP was developed from a variety of \*\*\* assessments, parent information, teacher information, and student information. Present levels of performance related to the student's \*\*\* were discussed and \*\*\* were developed. The student's strengths and needs \*\*\* were identified. The student's IEP would be utilized as the student's \*\*\* plan and included a proposed plan \*\*\*. (P. 2; R. 4).

18. On November \*\*\*, 2018, the parents requested a re-evaluation of the student to determine if Student qualified for special education eligibility as a student with an Emotional Disturbance. (R. 21). The parents failed to return parent information forms and refused consent for the district to access medical information from the student's doctors. The district's partial FIE, lacking sufficient information to determine emotional/behavioral disability, was reported on January \*\*\*, 2019. (R. 29).
19. The student's annual ARDC convened on March \*\*\*, 2019. The incomplete January \*\*\*, 2019 FIE was reviewed as well as the district's proposed IEP for the student for the 2019-2020 school year. \*\*\*. The parent disagreed with the incomplete FIE and with the proposed IEP. The ARD dismissed and was scheduled to reconvene on April \*\*\*, 2019. (R. 32).
20. On April \*\*\*, 2019, the parents filed a request for due process hearing. The parents did not notify the district of the litigation. (Tr. 1146).
21. On April \*\*\*, 2019, the annual ARDC was reconvened to try to come to consensus on the areas of disagreement. The parent continued to disagree with the incomplete FIE and proposed IEP. The parents did not inform the district of the pending due process hearing. The parents requested an IEE and requested residential placement for the student. The student did not attend the ARDC meeting. (R. 32: 22-25).
22. On May \*\*\*, 2019, the district proposed completing the partial January \*\*\*, 2019 FIE to determine whether evidence of other disability existed and if in-home training was needed. The parents had at this time returned parent information forms given them for completion by the district on November \*\*\*, 2018, had agreed to be interviewed, and had given consent for the release of medical information to the district. (R. 38).
23. On August \*\*\*, 2019, the district completed the partial January \*\*\*, 2019 FIE by adding an Addendum to the FIE of January \*\*\*, 2019. The Addendum determined that the student did not meet eligibility criteria as a student with an Emotional Disturbance. The district's completed FIE determined that the student qualified for special education and related services as a student with an Other Health Impairment due to Student's ADHD. (R. 44).
24. An IEE of the student, arranged and paid for by Petitioner's attorneys, was conducted by Dr. \*\*\*, Ph. D. on June \*\*\*, June \*\*\*, and August \*\*\*, 2019. (P: 12; 12-1).
25. An independent \*\*\* evaluation of the student, arranged and paid for by Petitioner's attorneys, was conducted by Dr. \*\*\* on May \*\*\* and May \*\*\*, 2019. (P. 10).
27. At an ARDC meeting on August \*\*\*, 2019, the parents disagreed with the eligibility determinations of the August \*\*\*, 2019 Addendum to the January \*\*\*, 2019 FIE. (R. 51:2).
28. The IEE conducted by Dr. \*\*\* was reviewed in the ARDC meeting on August \*\*\*, 2019. The district reviewed and considered the IEE conducted by Dr. \*\*\* which diagnosed the student with an emotional disturbance ("ED"). (R. 52:5)
29. The student qualifies for special education and related services as a student with a Specific Learning disability ("SLD") in math calculation and Other Health Impaired ("OHI") due to ADHD.

30. The \*\*\* assessment conducted by Dr. \*\*\* was reviewed and considered in the August \*\*\*, 2019 ARDC. (R. 52:5).

## DISCUSSION

### I. The Governing Legal Standards

#### A. Burden of Proof

Petitioner has the burden of proof to establish the inappropriateness of the educational plan proposed by the district. As the Supreme Court has explained, “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Applying this principle, the Fifth Circuit held that “the IDEA creates a presumption in favor of a school system’s educational plan, placing the burden of proof on the party challenging it.” *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003). Consequently, Petitioner bears the burden of proof to overcome the presumption that the plan proposed by the district was appropriate. *See id.* This includes the burden of proof with regard to harm or deprivation of educational benefit. *The Student v. Conroe ISD*, TEA Dkt. 016-SE-0908 (January 12, 2009).

#### B. FAPE

The IDEA requires that all children with disabilities who are in need of special education and related services are identified, located, and evaluated and that a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services. Nothing in IDEA requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of the IDEA and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 20 U.S.C. §1414(a)(3)(a)(B).

The purpose of the IDEA is to ensure all children with disabilities have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, \*\*\*. 20 U.S.C. § 1400(d). A school district is responsible for providing a student with specially designed personalized instruction with sufficient support services to meet the student’s unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport

with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

Even when a student is not performing at grade level, a denial of FAPE is not presumed as long as the student is making some progress commensurate with abilities and considering the impact of outside factors. A school district is not required to remedy all symptoms of a student's disability or circumstances. *El Paso ISD v. Robert W.*, 898 F.Supp. 442 (W.D. Tex. 1995).

### **C. Standards of IEP Appropriateness**

The Fifth Circuit has addressed the meaning of the *Rowley* standard in light of the Supreme Court's recent decision in *Andrew F. v. Douglas Cnty. Sch. Dist. Re-1.*, 137 S. Ct. 988 (2017). While *Rowley* sets the floor of opportunity for an eligible student, the Fifth Circuit concluded in *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5<sup>th</sup> Cir. 2018) that the *Andrew F.* decision does not displace or differ from the Fifth Circuit's own standard set forth in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). This case therefore must be analyzed in accordance with *Michael F.*

The Court in *Michael F.* determined that a student's IEP is reasonably calculated to provide meaningful educational benefit when:

1. The program is individualized on the basis of the student's assessment and performance;
2. The services are provided in a coordinated and collaborative manner by the key stakeholders;
3. The program is administered in the least restrictive environment; and
4. Positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are simply indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

## **II. Petitioner Failed to Prove That the Student's IEP Was Not Appropriate.**

Application of the *Michael F.* factors to the evidence in this case supports the conclusion that the school district's program was appropriate. Although the student did not make the progress that either the school or family desired, that was not the result of an inappropriate IEP.

The student's IEPs in place during the 2017-2018 and 2018-2019 school years adequately addressed Student's needs. (R. 4).

- The student's IEP was based on evaluation data.
- The student was provided the accommodations to address academic difficulties and target behaviors.
- The student was evaluated to determine the function of Student's behaviors.
- The student's ARD committees developed and implemented a Behavior Intervention Plan ("BIP").
- The student was offered and provided counseling as a related service.
- The student was offered and provided tutorials to catch up on assignments and \*\*\*.
- The student was offered and provided summer school, specifically to address \*\*\*. (Tr. 1156:1-25; 1157:3-5).
- The student provided input to the ARD committee regarding Student's \*\*\* goals and plan.
- The district offered interventions to address \*\*\* special transportation and in-home and parent training needs assessment. The student's parents declined both the offer of transportation and not until the pendency of this hearing did the parents agree to an in-home needs assessment.

Further, when the district attempted to modify or change the student's IEP to address Student's ever-evolving needs, the student's parents did not agree. Then on April 1, 2019, the parents filed a request for a due process hearing and invoked stay-put, which prevented any further unagreed to changes to the student's IEP.

In this case, the student was provided with a FAPE in accordance with the controlling legal standards. Student's IEPs were reasonably calculated for Student to receive an educational benefit, and Student made some meaningful amount of educational progress, more than *de minimus*, during the time when Student attended school and agreed to engage in Student's education. In March 2019, when the student informed Student's teachers that Student wanted to \*\*\*, Student actively sought support, completed assignments, and completed grade-level coursework in Student's area of disability.

The student's father testified that he could not make the student go to school if Student did not want to go. (Tr. 725). And the record shows that the student was frequently absent from school. (R. 15). The student's teachers and counselors testified that when Student did attend, the student would often \*\*\* and refuse to do Student's assignments or \*\*\*. (Tr. 140, 460, 447, 501, 503). The student reported \*\*\*. (R. 12:15; Tr. 220, 1013, 1065).

Even Petitioner's own expert witness, Dr. \*\*\*, testified she could not begin her evaluation as scheduled because the student \*\*\* demonstrated symptoms of \*\*\* when Student finally arrived for the evaluation. (Tr. 1014:14-22). The student's teachers responded \*\*\* by frequently checking on Student, offering verbal encouragement, and presenting incentives and positive behavioral supports as outlined in the student's IEP.

During the summer of 2019, the student was offered summer school in a small group setting \*\*\*. Although students are typically required to pay for summer school, the student in this case was offered this service at no charge. (R. 37). The student demonstrated the ability to stay on task and complete grade-level work when observed the independent evaluator for one hour in a summer school classroom with two other students. (Tr. 264; P. 12:6-7).

The student attended six days of the summer school session, then quit coming to summer school and went to \*\*\* instead. (Tr. 1033-1036). The parents drove the student to \*\*\* and picked Student up instead of requiring the student to attend summer school. (Tr. 1034-1036). Although it was possible for the student to catch up \*\*\* by attending summer school, Student chose not to attend. (Tr. 1032).

## **Behavior Intervention Plan**

The student's Behavior Intervention Plan ("BIP") accurately identified target behaviors, preventive/antecedent strategies, coping skills to be taught to the student, consequences for negative behaviors, and data collection procedures. (R. 4:29-30). The positive behavioral strategies promoted on-task and pro-social behaviors. At times, the student stated Student did not want to work and simply refused to comply with teacher instructions. The student's unexcused absences and leaving school allowed Student to escape educational demands and avoid work. A BIP cannot ameliorate all of a child's circumstances. It is meant to provide strategies for teachers to use when students demonstrate negative behaviors. Teachers testified that the BIP was implemented. However, despite all best efforts, school staff cannot force a student to complete assignments \*\*\*, and they cannot \*\*\*. (Tr.1184:9-25; 1185:15; 172:6-22).

Multiple outside factors have likely had a negative impact on the student's educational progress: poor attendance, instability in the family home, including \*\*\*. (Tr. 967:3-16, Tr. 966:3-16). Petitioner has failed to prove that the district has denied student a FAPE. Instead, the record affirmatively demonstrates a good faith effort on the part of the district to assist the student to meet the goals of Student's IEPs and a BIP that has been frustrated by the student's poor attendance.

## **Placement**

In addition, contrary to Petitioner's allegation that the district failed to provide the student with a placement individualized to the student's needs, the district went to great lengths to reach the student on an individual level. The ARD committees discussed many potential strategies and placement options over the course of the past two school years. (R: 1, 4, 5, 14, 24, 25, 31, 32, 37).

The student was taught in the general education setting with special education supports, provided instruction in a behavioral support classroom (\*\*\*), and offered tutoring, counseling, and summer school.

\*\*\*

Petitioner alleges that the student's IEP \*\*\* for the majority of the 2018-2019 school year did not contain appropriate \*\*\* goals or services, thus denying the student FAPE. This allegation fails because the \*\*\* goals and \*\*\* services in \*\*\* the student's 2018-2019 IEP met the FAPE standard.

The IDEA requires that "\*\*\*. The \*\*\* evaluation used to assess the student was the \*\*\* and was

administered by the district's \*\*\*. (Tr. 463). The \*\*\* goals are based on the student's \*\*\* and the services needed to assist the student in reaching the goals meet the requirements set forth in the IDEA \*\*\*. Petitioner failed to meet Student's burden of proving that the student's \*\*\* for the 2018-2019 school year did not contain appropriate \*\*\* goals or services.

### **Residential Placement at School District Expense**

At the April \*\*\*, 2019 Reconvened ARDC the parents requested residential placement for the student. (R. 31:24). The father also testified during the due process hearing that he wanted a residential placement for the student. (Tr. 715) The district responded by offering an in-home needs assessment, moving the student to a more restrictive environment \*\*\*, and more behavioral support for the student. (R. 31:24). The parents refused the district's offers. Because the student's IEP and placement are appropriate and meet the requirements of IDEA, it is not necessary to address the appropriateness of residential placement.

### **III. Petitioner Did Not Prove That the District's Evaluation of the Student Was Inappropriate.**

#### **A. Evaluations**

Petitioner's allegations that the district failed to timely and comprehensively evaluate the student fail to acknowledge the lack of participation and input from the parents, in particular as related to the evaluation of an Emotional Disturbance. It was not until the discovery portion of this due process hearing that the district was finally able to obtain, through third-party subpoena, the student's medical records. When the district requested consent to collaborate and consult with the student's private service providers, the parents refused. (Tr. 1137:7-18). Further, when the parent was given parent information forms to complete and return to the district, the forms were not returned until seven months later and not until after the pending due process hearing was filed.

A district's evaluation is determined appropriate when it complies with the evaluation requirements outlined in 34 CFR §300.304. As the district's LSSP testified, the district's January \*\*\*, 2019 partial FIE fulfilled all requirements, including: a variety of assessment tools was used; no single measure was used to determine eligibility; and the school district evaluators used technically sound instruments that consider both cognitive and behavioral factors. Further testimony from the LSSP

confirmed that the FIE was based upon assessments and evaluations that were not discriminatory or biased; were administered in the child's native language; were used for the purpose for which the assessments are valid and reliable; were administered by trained and knowledgeable personnel; and were administered consistent with testing instructions. (Tr. 911-931; R. 26). The district's evaluation was tailored to assess specific areas of educational need. The assessments were chosen as to accurately reflect the student's aptitude, regardless of communication or physical difficulties. The district's evaluation identified the student's special education and related services needs. However, the district was not able to fully explore all areas of eligibility until summer 2019 when the parents finally returned information forms, consented to the release of medical information, and participated in the evaluation. Therefore, the district's FIE of the student was not completed until August \*\*\*, 2019. The evidence indicates that the district's completed FIE complies with the evaluation requirements of IDEA. Therefore, Petitioner failed to meet Student's burden of proving that the district's evaluation of the student was inappropriate.

Regardless of the student's disability eligibility, the student's IEPs for the relevant time period addressed Student's needs. As required under IDEA, the student's IEPs were created in response to need, not eligibility area. (Tr. 1136, 1-7). For example, although the student did not have an updated physician statement regarding OHI ADHD until June 2019, the relevant IEP addressed the need for the student to have accommodations for Student's ADHD symptoms.

The district provided individual counseling services as well as positive behavioral supports to address the student's behavioral and relational struggles with peers and adults. (Tr. 1049:10-25). The student's counselor testified that she had a comfortable rapport with the student when Student attended counseling sessions. (Tr. 1050:8-10). Although the student did not always attend or participate in counseling, the sessions were available to Student during the relevant time period.

#### **IV. Petitioner Is Not Entitled to an IEE Paid For By the District.**

A parent has a right to an Independent Educational Evaluation ("IEE") at the district's expense if the parent disagrees with the results or recommendations of the district's own evaluation. 34 C.F.R. §300.502(b)(1).

In this case, at the parent's request, the district conducted an incomplete FIE of the student, which was reported on January \*\*\*, 2019. However, the district was not able to complete the evaluation for

all areas of eligibility until August \*\*\*, 2019. The parents were the main cause of the delay because until June 2019, they refused to return completed parent information forms and refused to consent to the release of medical information from private physicians and psychologists treating the student, all of which were necessary for the district to complete its evaluation.

On April \*\*\*, 2019, the day after Petitioner filed for a due process hearing, the parents requested an IEE challenging the district's January \*\*\* 2019 report of its incomplete FIE of the student. (R. 31:25). The district did not agree to the parents' request. Petitioner's attorneys arranged and paid for an IEE of the student by Dr. \*\*\*, Ph.D. The IEE by Dr. \*\*\* was conducted on June \*\*\* and \*\*\* and August \*\*\*, 2019. (P. 12). The information in Dr. \*\*\*'s IEE was reviewed and considered at an ARDC meeting on August \*\*\*, 2019. (R. 52:4).

The evidence shows that the district had not completed its own FIE of the student at the time of the parents' request for an IEE. For this reason, the parents' request was premature. As a result, there was no completed district FIE with which the parents could disagree. The parents therefore are not entitled to reimbursement for the costs of the IEE conducted by Dr. \*\*\*.

The independent \*\*\* evaluation conducted by Dr. \*\*\* was reviewed and considered in accordance with 34 C.F.R. § 300.305 at a meeting on August \*\*\*, 2019. (R. 48, 52). Dr. \*\*\*'s report may provide helpful information that the district may choose to make use of in developing services for the student.

However, even if the parents were entitled to an IEE, an independent \*\*\* evaluation is not an independent educational evaluation. In *Letter to Olex*, 119 LRP 8445 (OSEP 02/22/19), OSEP observed that \*\*\* assessments are not considered evaluations or reevaluations because their purpose is not to determine whether a child has or continues to have a disability, and the nature and extent of the special education and related services that the student needs. Under IDEA, a parent has no right to an evaluation at public expense other than the “*independent educational evaluation*” at 34 C.F.R. § 300.502. Therefore, the parents are not entitled to reimbursement for the costs of an independent \*\*\* evaluation of the student.

### **The District's Motion for Sanctions**

During the due process hearing, the district sought sanctions against Petitioner's attorneys (hereafter “the Cuddy attorneys”). The district alleged that the Cuddy attorneys had abused the

discovery and the hearing process by engaging in various improper tactics, including misrepresentations to the district and to the hearing officer that obstructed the district's efforts to obtain testimony from the student. The district requested an award of attorney fees and costs allegedly incurred as a result of the misconduct of the Cuddy attorneys.

### **Authority of Special Education Hearing Officers to Impose Sanctions**

In Texas, special education officers are authorized to “make any . . . orders as justice requires, including the application of sanctions as necessary to maintain an orderly hearing process.” 19 TAC 89.1170(e). The Cuddy attorneys have not disputed that the hearing officer has the authority to impose sanctions on attorneys for discovery abuse or for abuse of the hearing process.

### **Relevant Facts and Analysis**

Respondent's Motion for Sanctions, filed on September 18, 2019, pp. 1-5, is substantially accurate in its description of the hearing record on key relevant facts supporting the district's argument that the Cuddy attorneys did willfully abuse the discovery and hearing process. Beginning in April 2019, the Cuddy attorneys filed multiple pleadings in this case as “Attorneys for Petitioners” without any statement that they did not represent the student whom they listed as a party bringing this action. Their filings consistently were made in the name of the student, who was referred to as “Petitioner \*\*\*,” represented “by next friends” \*\*\* and \*\*\*, Student's parents.

Moreover, the Cuddy attorneys have acknowledged that the parents brought this action on the student's behalf and that the Cuddy attorneys represent the parents. (See, e.g., Exhibit 3, p. 9, to Respondent's Motion). Given these admissions and the pleadings they filed, the Cuddy attorneys appear from the record to have presented themselves as attorneys for the student.

The first time the Cuddy attorneys argued to this hearing officer that they do not represent the student was at a prehearing conference on August 13<sup>th</sup>, after the hearing officer had indicated that the district would be allowed to obtain Student's testimony. But the same Cuddy attorney who denied representing the student in the prehearing conference on August 13<sup>th</sup> then sent an email *the next day* to a third party stating that she and her firm do represent Student. Moreover, before August 13<sup>th</sup>, the same attorney sent other emails stating that the student was her client.

The Cuddy attorneys were required to accept service of a subpoena directed to any party they represent. *See* Rule 176.5(a). By denying that they represent the student, they clearly sought to avoid

accepting such service on the student, which made it much more difficult for the district to secure the student's testimony, which the hearing officer had authorized the district to take. The record therefore supports the conclusion that the Cuddy attorneys first disavowed their representation of the student at a time when it assisted their tactical goal of preventing the district from taking the student's testimony. Such conduct constitutes abuse of the hearing process and arguably also abuse of discovery.

However, the conduct of the Cuddy attorneys did not materially delay the hearing. It also did not affect the outcome. Even without the student's testimony, the district prevailed on all of Petitioner's claims. Although the district alleges that the conduct of the Cuddy attorneys caused them to incur additional attorney fees and costs, it provided no supporting evidence. As a result, the district has not shown that it is entitled to an award of fees or costs. Accordingly, the district's motion for sanctions must be denied.

#### **CONCLUSIONS OF LAW**

1. The student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. § 1400, et.seq., 34 C.F.R. § 300.301 and related statutes and regulations, and the Wimberley Independent School District is obligated to provide it to Student.
2. Petitioner failed to meet Student's burden of proof to establish that the student's 2017-2018 and 2018-2019 IEPs denied the student a FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Petitioner failed to meet Student's burden of proof to establish that the district's evaluation of the student was inappropriate or improper.
4. Petitioner is not entitled to reimbursement for the cost of Dr. \*\*\*\*'s Independent Educational Evaluation.
5. Petitioner is not entitled to reimbursement for the cost of Dr. \*\*\*\*'s independent \*\*\* evaluation.
6. Respondent has shown that its completed FIE of the student was appropriate.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that all relief sought by Petitioner is **DENIED** and that all Petitioners' claims are **DISMISSED** with Prejudice. Respondent's Counterclaim is **GRANTED**, and the district's completed August 7, 2019 FIE of the student, including the incomplete January 30, 2019 FIE, is hereby declared to be appropriate

SIGNED on November \_\_\_\_\_, 2019

---

Sandy Lowe  
Special Education Hearing Officer  
For the State of Texas

## NOTICE TO THE PARTIES

The Decision of the Hearing Officer 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 district court of the United States. 20 U.S.C. §§1415(i)(2) and (3)(A); 19 Tex. Admin. Code § 89.1185(n).