

DOCKET NO. 365-SE-0719

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by next friend and parent (hereinafter “Petitioner” or “the student”), filed a request for hearing on May 24, 2019, and an amended request for hearing on July 26, 2019. Petitioner alleged that the Katy Independent School District (hereinafter “Respondent” or “the district”) violated the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, et seq., and related statutes and regulations by failing to:

1. Properly evaluate the student for IDEA eligibility;
2. Identify the student’s eligibility for special education and related services;
3. Implement an appropriate individual education plan (“IEP”);
4. Devise and implement an appropriate behavior intervention plan (“BIP”);
5. Provide necessary related services;
6. Collaborate with the student’s parent in devising the student’s educational program;
7. Educate the student in the least restrictive environment (“LRE”);
8. Receive and consider parental information provided to the district;
9. Provide extended school year services (“ESY”);
10. Comply with appropriate procedural safeguards; and
11. Provide a safe and non-hostile educational environment for the student.

Petitioner further made claims for violations of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (“ADA”), and Title IX of the Civil Rights Act. Petitioner’s

claims under Section 504, the ADA, and Title IX were dismissed for lack of jurisdiction.

As relief, Petitioner sought:

- an appropriate educational placement with related services for the student;
- the district's retention of outside consultants to develop and implement services for the district and the student;
- independent educational evaluations ("IEEs") in eleven different areas;
- private tutoring;
- a change of placement for the student to general education in all settings;
- a 1:1 dedicated paraprofessional aide for the student; and
- various accommodations.

Petitioner also sought:

- reimbursement for moving expenses to move into the district;
- reimbursement for applied behavioral analysis ("ABA") services; and
- reimbursement for private counseling and psychiatric services.

Respondent filed a response to the request for hearing, a plea to the jurisdiction, and a counterclaim. Petitioner's claims arising under statutes other than IDEA (that is, Section 504, ADA, and Title IX) were dismissed. Respondent sought in its counterclaim to prove that its evaluations of the student were appropriate and, consequently, that Petitioner was not entitled to independent educational evaluations at public expense.

The hearing proceeded on claims arising under the one-year statute of limitations 19 T.A.C. § 89.1151(c).

Petitioner was represented at the hearing by Holly Terrell, an attorney in Pearland, Texas. Patricia Freeze, a non-attorney advocate and paralegal of Dickinson, Texas, also appeared for Petitioner.

The district was represented by Alaina F. Smith, Justin R. Graham, and Kevin Christiansen, counsel for Katy Independent School District.

The matter was set and reset for hearing a number of times for good cause. The matter came on for hearing in the offices of the district on October 2 and 3, 2019. At the close of the hearing, the parties made a joint motion to continue the decision due date so that written closing arguments could be filed. The parties filed closing arguments and this decision is timely issued on November 15, 2019.

As the hearing began, Respondent objected to the introduction of any evidence by Petitioner pursuant to 34 C.F.R. § 300.512(a)(3) because Petitioner failed to timely disclose a list of witnesses to be called to testify and copies of exhibits to be introduced at the hearing. Though Petitioner later made disclosure, the disclosure was untimely. The hearing officer excluded all proposed exhibits of Petitioner and did not permit testimony from any witnesses listed by the Petitioner in its untimely disclosure with the exception of the student's parent. The parent was allowed to testify.

Findings of Fact

1. The student resides with the student's parent in the Katy Independent School District in Katy, Texas. [Joint Exhibits ("J.") 2, 3, 25; Transcript Pages ("T.") 56, 57]
2. The student qualifies for special education under IDEA based on criteria of Emotional Disturbance ("ED"), specific learning disabilities, and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). [J. 3, 6-9; T. 264-265]
3. The student attends *** in the district and began the 2019-2020 school year at the age of *** in the *** grade. [Respondent's Exhibit ("R.") 1; T. 56-59]
4. The student's parent and the student moved from *** Independent School District into the Katy Independent School District in the summer of 2018. The student's parent testified

that the parent was unhappy with the student's experience in the *** Independent School District's special education program and moved to the Katy Independent School District based upon Katy Independent School District's reputation for a good special education program. [J. 1; R. 1, 9; T. 58, 59]

5. While in the *** Independent School District, the student was restrained on a number of occasions because of behavioral problems. The student also was ***. [R. 2-5; T. 83, 84]

6. The student was placed in *** class within Katy ISD. The program *** a focus on social/emotional skills and a high level of reinforcement and feedback. The student performed well and showed growth in behavioral skills and did not exhibit the noncompliance and work avoidance noted in behavior reports from the *** ISD. Since being in Katy ISD, the student has not required behavioral restraints. In September 2019, the student's admission, review and dismissal ("ARD") committee proposed more time for the student in general education classes. [R. 1, 12; T. 97-98, 129-131, 143-145, 236, 302]

7. In November 2018 in Katy ISD, the student was involved in an incident ***. ***. ***. Another student in the *** class reported the incident to school personnel. Petitioner admitted to school personnel that the incident occurred and school personnel notified the student's parent. [J. 25; T. 59-67]

8. After the incident, the school investigated the circumstances of the incident, developed a safety plan for the student, and arranged to ***. Petitioner was transferred to another campus. School personnel monitored the student's progress and behavior and saw no indications of regression in the student's behavior or progress. [J. 25; T. 88-89, 119-121, 138, 215, 246]

9. As a part of the student's educational program, the student received dyslexia services. The student performed well in the program and advanced more than two instructional

grade levels during the 2018-2019 school year. [J. 1; T. 320, 327-328, 353]

10. The student has accessed the general education curriculum at school and has received grades consistently 80% or more in academic programming. The student's work has been consistent and the student's performance does not appear to have been adversely effected by events occurring outside the educational program. The student's parent believes the student has shown confidence and has demonstrated ability to perform well in *** class and in regular education settings. [J. 21; T. 96-97, 129-131, 143-145, 236]

11. The district provided educational strategies to address dyslexia and dysgraphia concerns for the student in implementing successful dyslexia services. The student had access to appropriate methodologies and assistive devices including a slant board, graphic organizers, flexible pencils and grips, and universal design tools. The student's related services in the occupational therapy have been successful and appropriate for the student's progress. As a result, the student's handwriting abilities have improved. [J. 13-19; R. 15; T. 243-245, 254-255, 299-301, 347]

12. The district conducted a full individual evaluation ("FIE") for the student. The student also received a psychological evaluation, an occupational therapy technical assistance evaluation, and an other health impairment evaluation. The evaluations included instruments designed for their specific assessments and evaluation purposes, scientifically based as appropriate, and were administered by trained and certified personnel with competence to conduct the evaluations. The student's performance does not indicate a need for further evaluation in additional areas requested by Petitioner. [J. 3, 5,6, 7, 9, 16; R. 1; T. 111-112, 124, 137, 236, 273-275, 368-375]

13. Data collected by the district demonstrates that the student's progress in both adaptive behavior settings and in general education are appropriately administered in the least

restrictive settings individualized for the student. The student's emotional and social skills needs are effectively met without pull-out psychological or counseling services. The student is successful and is making progress in social/behavioral/emotional issues in the student's current setting. [J. 13-19; R. 11, 12; T. 273-275, 375-378]

14. The ARD committee meetings convened for the student by the district have been duly constituted with appropriate district and professional staff and have included proper written notice to the student's parent. The committee worked in collaboration with the student's parent in designing, reviewing, and modifying the student's independent education plans. [J. 1-3, 11, 12, 20; T. 114, 147-148]

15. District personnel determined that the student's performance reflected progress. No evidence of possible regression was found and the district concluded ESY would not be appropriate for the student. [J. 13-19; T. 184-195]

16. The testimony at the hearing of all district personnel demonstrated clear understanding of the educational requirements for special education services and was consistently credible in all respects. [R. 1; T. 18-54, 109-196, 199-256, 262-278, 282-303, 317-362, 364-381]

Discussion

Students in public school in Texas who qualify for special education are entitled to a free appropriate public education ("FAPE") under the provisions of IDEA, 20 U.S.C. § 1400, *et seq.*, and related statutes and regulations. The U.S. Supreme Court has defined the standards of FAPE in Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) and Andrew F. v. Douglas County School District, 137 S.Ct. 988 (2017).

A student receives FAPE when a school district provides the student an educational program reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances. The student's progress must be something more than mere de minimis

progress. Andrew F., *supra*.

In Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), in considering elements in 34 C.F.R. § 300.300, and 19 T.A.C. § 89.1055, the Fifth Circuit established four indicators of whether an IEP is reasonably calculated to provide a meaningful education benefit under IDEA and has determined the standard to be consistent with Andrew F. [See C.G. v. Waller Independent School Dist., 697 Fed. Appx. 816 (5th Cir. 2017)] The factors are:

- whether the program is individualized on the basis of the student’s assessments and performance;
- whether the program is administered in the least restrictive environment;
- whether the services are provided in a coordinated collaborative manner by the “key” stakeholders in the student’s education; and
- whether positive academic and non-academic benefits are demonstrated.

The factors in Michael F., *supra*, are not accorded any particular weight to be applied in any particular way. Instead, they are merely indicators of an appropriate program 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 (5th Cir. 2009).

In considering the factors, the evidence at the hearing shows that the student’s program was properly individualized, was provided in a collaborative manner including all “key” stakeholders, was delivered in the least restrictive environment, and positive academic and non-academic benefits were delivered for the student.

The burden of proof in a due process hearing is on the party challenging the student’s IEP and placement. Schaffer v. Weast, 126 S.Ct. 528 (2005). Petitioner failed to meet its burden of proof to show that the district failed to provide FAPE to the student in any respect.

Additionally, the district’s evaluation provided for the student was appropriate and

comprehensive and considered the individual circumstances of the student. No additional evaluation is needed at this time and Petitioner is not entitled to independent evaluations at public expense. The district showed that its evaluation was appropriate under the standards of IDEA. While the parent can still obtain IEEs for the district to consider, the IEEs do not have to be at public expense. 34 C.F.R. § 300.502(b)(2).

Conclusions of Law

1. The student resides within the Katy Independent School District in Katy, Texas, and is eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.

2. The Katy Independent School District is responsible for providing FAPE for the student under the standards of Andrew F., supra, and Michael F., supra. 20 U.S.C. §1400, et seq., and related statutes and regulations, and 34 C.F.R. § 300.552.

3. Petitioner did not meet its burden of proof to show that the district's provision of special education to the student was inappropriate under the standards of Andrew F., supra, and Michael F., supra. 20 U.S.C. §1400, et seq., and related statutes and regulations, and 34 C.F.R. § 300.552.

4. Respondent's evaluation of the student was appropriate and the district prevails on its counterclaim. Petitioner is not entitled to IEEs at public expense. 20 U.S.C. § 1415(d)(2)(A); 34 C.F.R. §§ 300.301-305, 502(b)(3).

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all of Petitioner's requests for relief are DENIED. Respondent's counterclaim is GRANTED and Petitioner is not entitled to IEEs at public expense.

SIGNED this 15th day of November, 2019.

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

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this case is a final and appealable order. Any party aggrieved by the findings and decision 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. 19 Tex. Admin. Code § 89.1185(p); Tex. Gov't Code § 2001.144(a)(b).