DOCKET NO. 016-SE-0916

STUDENT, b/n/f PARENT,	§	**BEFORE A SPECIAL EDUCATION**
Petitioner	§	
	§	
v.	§	**HEARING OFFICER FOR**
	§	
ABILENE INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	**THE STATE OF TEXASR(S)]T 0 Tc 0 Tw6.3**

The parties agreed to mediation in lie
to mediation on November 1, 2016, reaching
Individual Evaluation (FIE) to be completed.
out additional issues as this matter proceed
resolving all issues in dispute.

II. PETITIONER'S ISSUES AND REQUESTED RELIEF

A. Issues

Petitioner filed a Request for a Due Process Hearing (the Complaint) on September 21, 2016. Petitioner raised numerous issues relating to the IDEA, as noted below. The statute of limitations (SOL) date was not at issue. The Hearing Officer's determinations follow in parenthesis.

1. Did Abilene ISD fail to provide Student with a FAPE designed to meet Student's unique

D. Post-

subject to TEA's approval and requesting that *** be approved as quickly as possible. *** is the only RTF supported by this record. Information filed after the evidentiary hearing, other than that regarding ***, was not considered and is not properly in the record.

The record remained open for additional information on whether *** was approved and TEA's approval of *** was received on March 13, 2017. Additional information was also filed with the Hearing Officer on March 13, 2017, indicating that Student was ***. Order No. 18 issued on March 13, 2017, requiring an ARDC meeting by March 17, 2017, and Student's placement at *** by March 20, 2017.

Student's grade level by years and the statute of limitations beginning date are:

*** Grade: September 2013 – May 2014
*** Grade: September 2014 – May 2015
*** Grade: September 2015 – May 2016 (September 21, 2015, starts SOL)
*** Grade: September 2016 – Date

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

1. Student, a ***-year-old *** grader, resides with Student's *** within the geographical boundaries of the District.

2. Student was initially identified as a child with speech impairment (SI) in *** while in *** and received speech therapy services through the *** grade.[9]

3. Student was *** grade. On ***, Student retained eligibility as a student who qualified for speech services, and Student was also deemed eligible for special educational service for emotional disturbance (ED), other health impairment (OHI).[10]

[9] Ex. R-105 at 2.

[10] *Id* at 5.

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12. Student was *** on the following dates:

***	***	***	***
***	***	***	***[38]
***	***	***	***[39]
***	***	***	***[40]
***	***	***	***[41]
***	***	***	***[42]
***	***	***	***[43]

c. ***;
d. escalated Student's poor behavior, ***.

23. An FBA was not performed until Student's *** grade year but was necessary at least by September 2015.

24. The August 2015 ARDC reasonably found that Student required self-contained special education support to be successful in the general education curriculum and Student was placed ***. By this time, Student's behavior and lack of educational progress triggered or should have triggered the ARDC's understanding that placement in general education with the present BIP and certain supports would not provide Student with an opportunity for an education.

41. ***.[71] ***. Most of Student's *** stemmed from difficulties with school, poor grades, and attention difficulties.[72]

42. On April ***, 2016, an ARDC meeting was held and it was noted that Student:[73]

    a. was failing ***

education ***, starting Student's *** grade year, September 2016. This placement was unsupported by Student's demonstrated educational, ***, behavioral, and social needs. The general education placement in *** (*** grade) exacerbated Student's already compromised ability to receive an opportunity for education.

49. On September ***, 2016, Student was ***.

50. In September and October 2016, Student was unengaged with classroom activities, *** and was non-responsive to presented tasks. At times Student became ***.[77]

51. The November ***, 2016 ARDC reported that Student was able to ***.[78] ***. Student struggled with ***. These deficits impacted Student's performance in the general education setting. Student continued to have difficulty responding to teachers and authority figures.

52. Student demonstrated needs in receptive, expressive and pragmatic language as indicated in the 2016 FIE meets the criteria for SI:[79]

    a. showed a below average Core Language Score;
    b. demonstrated receptive language difficulty with understanding syntactic and morphological components of language;
    c. has vocabulary skills below average and that interfere with Student's expressive language and comprehension;
    d. has difficulty providing verbal definitions and explaining how words go together; and
    e. is limited in the academic setting by Student's low oral language skills.

53. Student's OHIk(s)1(a)6bkiitHicr56oke Student's

55. The District's BIP and implementation of behavior supports and interventions were inappropriate for Student's behavior needs and they negatively reinforced Student's ***, noncompliance, and ***.[81]

56. Student has learning challenges and these must be addressed through direct instruction and accommodations and modifications in the educational setting.[82]

57. Student's *** and ability to *** must be evaluated at the RTF and then addressed pursuant to those findings.

58. Student continues to meet the educational disability classification of ED.[83]

59. Student does not meet the 0 8.04 425.64 631.92 Tm [(8)0.5(2)]TTD (5952 -0 0 12 465.96 558.36 Tm

f.

V. ISSUES AND ANALYSIS

A. The IDEA and Its Implementing Regulations

Und

negatively reinforced Student's behavior.[99] As Student escalated Student's noncompliance (***), Student was "rewarded" with task demands removed, instructions removed, or *** (***). Over time, this misplaced effort to address Student's behavior actually shaped Student's reliance on noncompliance, and the escalation thereof when lower forms of noncompliance were unsuccessful, in order to achieve Student's ***.

In order to formulate a meaningful and effective BIP, Student's individual needs necessitate an FBA. This was highlighted by the BCBA's assertion in the FBA that the provision of *** was a form of negative reinforcement. According to the BCBA, Student's three target behaviors of non-compliance, ***, and *** share *** function and continued because the behavior was reinforced through the policy of allowing Student to ***, etc. [100] The failure to conduct an FBA resulted in the District developing an inappropriate BIP and was at least partly responsible for the inappropriate placements.[101]

As Student missed school and the academic instructions provided, Student began to fall behind academically. As the subject matters became more difficult and complex, Student lacked the skill developments needed to be successful. Thus, Student was increasingly unsuccessful in

the IEPs prepared were ineffective and could not address Student's unique needs. Thus, by this failing, the District again did not provide Student with a FAPE.

The evidence establishes that both the FBA and FIE were untimely. Student demonstrated patterns of ***, and academic failure years before the District recognized these issues and took action. Moreover, Student ***. Thus, the District was on notice of Student's behavioral, ***, and educational needs well prior to December 2016, certainly by the start of the SOL in September 2015.

The Hearing Officer concludes that the District failed to timely refer Student for an FIE and FBA when required to do so. Student's demonstrated needs for additional educational and related services, including improved academic achievement and functional performance, warranted a FBA and additional FIE, at least by September 2015.

b. Student's IEP was not reasonably calculated for Student to receive a meaningful educational benefit.

The provision of FAPE includes special education, support and related services, and specially designed personalized instruction that meet the unique needs of the child in order to provide a meaningful educational benefit.[104] The evidence demonstrates the ARDC failed to adequately recognize or address the severity of Student's disabilities and unique needs. This failure resulted in Student lacking a FAPE.

Student's *** grade was unsuccessful, both behaviorally and educationally. Student's educational setting changed four times. Student ***, pursuant to a referral to DAEP for behavior concerns ***. However, ***, Student was returned to a general education ***.[105] Within ***, Student

A REED was conducted towards the end of Student's *** grade year, in April 2014. It was noted that Student was ***.[106] Thus, even at the beginning of Student's *** grade year, the ARDC had extensive evidence of Student's multiple disabilities.

The 2015 REED revealed to the ARDC that Student exhibited significant behavioral and social concerns. These included reacting to Student's environment with ***, and noncompliance with instructions.[107] Moreover, Student was ***, ADHD, ***. Also by this time, Student had been ***. ***, ADHD, and a learning disorder during the April 2015 *** alone. Student was further diagnosed by ***.

Educationally, Student was not faring any better. Student was failing every class, except ***, and had failed every state standard since *** grade.[108] Student was noted to ***. Thus, Student was failing educationally, emotionally, and behaviorally. Yet, the ARDC meeting held on October 2015 did not find that additional information was necessary.[109] Rather, the ARDC found that with classroom accommodations, Student was able to successfully participate in the general education setting.[110] The record in this case establishes otherwise.

None of the "reinforcers" or consequences applied over the prior years was effective, but most tended to make the behavior increase or made no difference at all.[111] The special education supports offered were in general education classes with core instructional interventions, tutoring, an accelerated program of instruction, accommodations, and counseling.[112] In *** grade, these supports proved to be ineffective and they were proven ineffective again during Student's *** grade year, as demonstrated by Student's lack of success behaviorally and educationally. Thus, the IEPs

they were not sufficiently individualized, as additional evaluation was needed.

While extensive efforts were made to help Student succeed in the general education setting, particularly with behavioral issues, the efforts were misplaced.[113] As noted above, the behavioral interventions developed and implemented prior to the FBA were, to great extent, more hurtful than helpful. Moreover, Student was not afforded an opportunity to succeed in the general education setting. Student needed a more restrictive, less complex setting, with goals and objectives that adequately addressed Student's behavioral and emotional issues. More extensive educational supports and better student-to-teacher ratios in all subjects were necessary. And while Student was intellectually capable, Student had fallen behind academically. Student needed to recover academically before Student could take on the grade-level challenges, particularly in core subjects. These shortcomings in Student's *** grade IEPs resulted in the District failing to provide Student a FAPE.

Perhaps even more troubling, is the ARDC's decision to promote Student into *** grade and into the general education *** setting, despite Student's failing of every core subject in *** grade. Student was known to be ***. Placing Student in the general education, *** setting when Student was academically unprepared and emotionally fragile certainly contributed to Student's ***. One ARDC member feared putting Student on a pedestal above other students. But the evidence establishes that there was no pedestal; rather, Student was sinking in the general education academic setting. Student was not on equal footing with Student's peers and needed greater interventions.[114]

The total of *** minutes of counseling per *** weeks, included in Student's IEP, was wholly insufficient.[115] The record demonstrates that the ARDC did not understand the extent of Student's disabilities, despite all the evidence it was presented of Student's multiple ***, numerous and severe disabilities, and lack of any educational advancement in general education. Rather, some

[113] Tr. at 366-375.

[114] Ex. R-188 at 24.

[115] Ex. R-189 at 30.

of the ARDC members continued to believe that Student's failure was due simply to a lack of effort. The end result was that Student received no educational benefit when in the general education setting during Student's *** and *** grade years. The District failed to provide Student with a FAPE from September 2015 to the hearing date.

c. The IEP was not administered in the LRE

i. Applicable Law

The IDEA's LRE provision requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the student's nondisabled peers and community.[116] To remove a child from a regular education environment, the ARDC must consider whether the nature and severity of the child's disability is such that education in a regular classroom setting cannot be satisfactorily achieved, regardless of the use of supplemental aids or services; whether placement in the regular classroom will potentially be harmful to the child; and whether the IEP must include positive behavioral interventions and supports in the case of a child whose behavior impedes the child's

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academically, and particularly with Student's growing ***. These behaviors were fully evidenced while Student was in *** grade, so the District was on notice and was required to take action but did not.

Nor did the District take action after another year of complete failure academically, socially, and behaviorally in *** grade. Instead,

***, on ***, 2016, ***. ***. ***.[123] ***. ***. ***. ***.

Finally, on December ***, 2016, Student's ARDC concluded that placement in the general education setting prohibits Student from achieving Student's IEP goals and objectives, even with supplementary services; that the Texas Essential Knowledge and Skills (TEKS) assigned to Student's grade level exceeded Student's present level of educational performance, and that Student required instruction based on present competencies which were significantly below Student's grade placement. At this time, the ARDC found that the modifications necessary for Student to achieve Student's IEP goals and objectives could not be provided in the general education setting, and Student was placed ***.[124]

While *** was an improvement, particularly in protecting other students and teachers, a FAPE was still not provided. The teachers *** were not shown Student's IEP and they were unknowledgeable about Student's disabilities. Again, the strategies attempted to engage Student were insufficient, even hurtful given the information gained through the December ***, 2016 FBA. Moreover, Student failed to receive speech therapy and adequate counseling, as detailed and found necessary in the December ***, 2016 FIE.

For the entire time at issue in this proceeding, the ARDC failed to place student in a setting that provided an appropriate educational environment, given the extent of Students' disabilities. Thus, Student was denied a FAPE.

d. Key stakeholders provided the services in a coordinated and collaborative manner

integral part of the IEP development process and, as such, are key stakeholders in the provision of services to their child, as are a student's teachers and a school district's administrators.[126]

Petitioner offered insufficient evidence of a lack of coordination or collaboration in the development or implementation of Student's IEP.[127] The evidence shows Mother fully participated in the ARDC meetings, sometimes with the assistance of an advocate or an attorney; regularly communicated with Student's teachers and District staff. In addition, Student's teachers fully participated in the IEP development process, writing draft goals, preparing PLAAFPs, and participating in ARDC meetings. School administrators also were directly involved in implementing Student's IEP and BIP, either through direct contact with Student and Mother, consulting with Student's teachers, or attending ARDC meetings.

Petitioner also urged that Student's IEP was not implemented as written. After an IEP is written and an appropriate placement determined, the local education agency is obligated to provide the student with special education and related services as listed in the IEP.[128] The local education agency must implement a student's IEP with all required components.[129] The evidence does not support a finding that the District failed to implement Student's IEPs and BIPs as written.[130] However, for the reasons noted above, the District implemented an IEP that was not developed to address Student's unique needs. Thus, the District, even when implementing the IEP appropriately, failed to provide Student with a FAPE.

e. Positive academic and non-academic benefits were not demonstrated.

No meaningful positive academic or non-academic benefits were demonstrated at any

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[126] 34 C.F.R. § 300.321(a).

([(30)-7.2(0.)3(3)] [127] The (most significant evidence supporting Petitioner's claim with the EMC.tr 22 <</MCID 13>>BDC -0.48 0 0 12.48 -224.176 59

point during Student's *** and *** grade year.[131] Once Student's placement was ***, some academic progress was made but it was no more than *de minimus*.

Student was promoted from *** grade to *** grade

It may be argued that Student received an educational benefit once Student's placement was ***. Here, Student had a much more restrictive setting and the curriculum was presented in subject modules that corresponded to Student's academic level, not the grade-level academics of Student's peers. Student began making up a little of the ground lost in ***. However, Student remained unable to focus on academics in such a way that Student could receive an education comparable to that of students without RTF placement. But, the IDEA requires that Student's benefit from the educational program be meaningful and more than simply *de minimis*.[133] The educational program must be likely to produce progress and not be merely trivial. Even when ***, this standard was not met.

2. Other Issues

a. Whether the District "socially" promoted Student despite Student's lack of academic and nonacademic progress.

The District's Executive Director for Special Education (SPED) testified as to why Student was promoted into *** grade after showing no academic success in *** grade, noting that the ARDC considered several factors, including:[134]

i. ***;[135]

ii. ***; and [136]

iii. ***.[137]

The District's SPED testified that Student's failure in classes was a result of absenteeism, noncompliance, and behavioral issues that interfered with Student's ability to learn.[138] It should

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[133] *Polk v. Cent. Susquehanna Int. Unit 16*, 853 F. 2d 171, 180, 182 (3d Cir. 1988).

[134] Tr. at 472.

[135] Tr. at 473.

[136] Tr. at 473-474.

[137] Tr. at 474.

[138] Tr. at 535

be noted that all three of these factors were later found to be a manifestation of Student's disabilities.[139] It should also be noted that Mother expressed concern for Student ***. At the ARDC meeting considering this issue, much of the faculty ARDC

in fact, need support in this area. Mother testified that *** were needed. The RTF should evaluate and provide services as necessary.

d. Whether the District failed to properly consider the evaluation from the *.**

The *** performed an evaluation in February 2016, finding that Student was borderline intellectually impaired, a person with Autism, and in need of speech/language assistance. The independent expert and lead author of the 2016 FIE testified that the *** evaluation was not comprehensive. On a scale from 1 to 5, with 1 being least confident, she stated that her level of confidence in the *** evaluation was "1."[141] The District appropriately considered the *** evaluation as indicative of a need for a comprehensive evaluation, which was completed in the December 2016 FIE. The evidence establishes that the *** evaluation was based on only three tests, did not include at least two settings, and was otherwise unsupported.[142]

e. Whether the District unreasonably protracted the final resolution of

The District was at least partially responsible for the 4-month delay, from late August 2016 to December 2016 while the FIE was prepared. However, a particularly qualified evaluator was requested to address this complex case, and she made herself available in August to perform the assessments. She found that Student was unable to accurately take more than a few assessments with each meeting. Also, Student failed to show up for 1 day of assessments.

After August, the evaluator was not available until December. She *** and testified that work commitments would not allow her to return to Abilene until December 2016. Mother agreed to this delay. The District's notation that Student's absenteeism led to the delay was partially accurate. It was initially expected that the assessments would be completed in August. They were not. However, in its reason for delay, the District failed to note the evaluator's scheduling difficulties which also was a major factor in the delay.

The Hearing Officer finds the delays were understandable and did not unreasonably protract the final resolution of the issues in controversy in the hearing.

C. Conclusion

After considering the evidence and parties' closing arguments, the Hearing Officer finds Petitioner met Student's burden of proof in this matter, proving that the District failed to provide Student a FAPE in accordance with the IDEA and relevant case law. Accordingly, Petitioner is entitled to the requested relief, in part.

D. Relief Including Placement and Compensatory Time

Specific evidence supporting Petitioner's requests for relief, and in particular for compensatory relief, was barely presented during the hearing. And, this was despite the Hearing Officer's instruction that evidence related to the requested relief was needed.

However, the District agreed—and is now ordered—to place Student at *** in accordance with the ARDC's decisions and the individual plan developed by ***'s

required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq*.

2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-300.513.

3. Petitioner bears the burden of proof on all issues raised in the proceeding. *Schaffer ex*

11. The District failed to comply with the IDEA provisions related to *** when evaluating Student and devising Student's 2016-2017 IEP. 34 C.F.R. §§ 300.304(c)(6); 300.320(b); Tex. Educ. Code §§ 29.011, 29.0111, and 19 Tex. Admin. Code § 89.1055(h)(i).

12. The December 2016 FIE was conducted in accordance with IDEA requirements at 34 C.F.R. §§ 300.301, 300.303 through 300.311.

13. The District failed to provide Student's *** teachers with information about Student's 2016-2017 IEP, in accordance with the requirements of 19 Tex. Admin. Code § 89.1075(c).

14. As a form of compensatory education, Student's placement at *** at the District's expense is appropriate. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).

15. Student's placement at *** meets the LRE requirements of the IDEA. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.116; *Daniel R.R.*, 874 F.2d 1036, 1039, 1046-1047.

16. The District did not unreasonably protract the final resolution of the issues in controversy

Math is passing grade level test; and *** for Language Arts for *** minutes per week, or until Student's academic testing in Language Arts is at grade level.

4. Services provided at the *** should be deducted on an hour per hour basis for each of the above.
5. Should *** determine that Student is qualified as a student with ID, and the ARDC adopts this determination, additional tutoring be provided on academics and the academic levels of expectation may be changed as per ARDC determination.

SIGNED March 14, 2017.

NOTICE TO THE PARTIES

This Decision of Hearing Officer 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.[144]

[144] 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).