DOCKET NO. 062-SE-1116

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| STUDENT, b/n/f PARENT and PARENT,<br>Petitioner | §<br>§ | BEFORE A SPECIAL EDUCATION |
| v. | § | HEARING OFFICER FOR |
| GEORGETOWN INDEPENDENT SCHOOL DISTRICT,<br>Respondent | §<br>§ | THE STATE OF TEXAS |

DECISION OF THE HEARING OFFICER

## I. PROCEDURAL HISTORY

Petitioner, STUDENT bnf PARENT and PARENT (

throughout this litigation by its legal counsel Denise Hand and her co-counsel Kelly Shook with Walsh, Gallegos, Trevino, Russo & Kyle.

B. Resolution Session and Mediation

The parties agreed to attempt mediation in lieu of a Resolution Session. The parties proceeded to mediation on January 4, 2017 but were not successful. Notice of the outcome of mediation was submitted by Petitioner on January 10, 2017.

C. Continuances

A single continuance of the due process hearing was granted in this case at Respondent's request. Respondent also requested an extension of the decision due date. Petitioner opposed the requests. Both parties filed cross motions on the issue. Order No. 4 granted Respondent's requests. The due process hearing was reset to January 26, 2017 and the decision due date extended to April 12, 2017 on a finding of good cause.

D. Preliminary Motions

Several preliminary motions were resolved by written orders issued prior to the due process hearing including confirming Petitioner's itemized list of reimbursement requests and resolving Student's interim educational placement while the due process hearing was pending. Hearing Officer

represented by Student's legal counsel Elizabeth Angelone assisted by her co-counsels Idris Motiwala and Sonja Kerr with The Cuddy Law Firm. In addition, Student's parents, *** and *** also attended the hearing.

Respondent continued to be represented by its legal counsel Denise Hays and her co-counsels Kelly Shook and Ann Mewhinney of Walsh, Gallegos, Trevino, Russo & Kyle. In addition, ***, Executive Director of Federal and Special Programs, attended the hearing as the school district's party representative.

The hearing was recorded and transcribed by a certified court reporter. Both parties filed written closing arguments by the March 3, 3017 deadline. The Decision in this case is due April 12, 2017.

## II. ISSUES

A. Petitioner's Issues

Petitioner identified the following issues for decision in this case:

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d. Whether the school district failed to provide necessary behavioral supports, social skills training, home parent training, and extended school year services (ESY).

2. IDENTIFICATION: Whether the school district failed to properly identify Student as a student with autism and dysgraphia, and therefore failed to provide appropriate services to meet Student's needs as a student with autism and dysgraphia[1].

3. PROCEDURAL:

a. Whether the school district predetermined the IEP proposed for the 2016-2017 school year without parental input and outside of the Admission, Review & Dismissal Committee (ARD) process;

b. Whether the school district failed to provide Student's parents with the requisite Prior Written Notice and, if so, whether that failure significantly impeded parental participation in the educational decision-making process and deprived student of the requisite educational benefit; and,

c. Whether the school district failed to provide Student's parents with IEP progress reports in a timely manner.

B. Petitioner's Requested Relief

Petitioner requests the following items of relief from the school district

1. Reimbursement to Student's parents in the amount of $2,200 for the cost of a privately obtained Individual Educational Evaluation (IEE);

2. Compensatory dyslexia instructions services provided by a Certified Academic Language Therapist (CALT) 4 hours per week at an average cost of $60/hour;

3. Reimbursement to Student's parents for the cost of placement at *** for the fall semester of 2016 including both a registration fee of $1,000 and fall semester tuition in the amount of $18,500;

4. Fund Student's placement at *** for the spring semester of 2017 at a cost of $18,500;

[1] Student withdrew the issue of whether

5. Reimbursement to Student's parents for the cost of independent physical education (PE) in the form of *** at *** in the amount of $600 for the cost of PE from October 2016 - January 2017;

6. Fund Student's independent PE at *** for the spring semester of 2017 at an additional cost of $600; and

7. Reimbursement to Student's parents for the cost of mileage to and from *** (from Student's parent's place of employment in ***) for the 2016-2017 school year for 150 days of school a total of two round trips/ day at *** miles/trip – *** miles/day; as of the date of the due process hearing Student attended for *** .

Petitioner's request for attorneys' fees was previously dismissed by Hearing Officer Bergeron December 13, 2016[2].

C. Respondent's Issues and Legal Position

Respondent requested resolution of the following additional issues for decision in this case:

1. Whether the hearing officer has jurisdiction to resolve Petitioner's non-IDEA claims; and,

2. Whether Petitioner should be limited by the 1 year statute of limitations (SOL) to those issues that arose after the mediated settlement agreement of April 7, 2016; i.e. whether Student's IDEA claims are limited to those that accrued on or after April 8, 2016[3].

The school district contends it provided Student with FAPE during the 2016 spring semester and that its recommendation for placement in a therapeutic day treatment or residential treatment center is reasonably calculated to provide Student with FAPE in the setting Student needs. Tthe S.aos Tthh* ( Tt<</MCID 47 >>BDC th)(e)6tud222 ampvn

## III. FINDINGS OF FACT

1. Student is a *** year old *** grader who resides within the jurisdictional boundaries of the school district. Student lives with Student's parents, ***, ***, *** .[5]

2. Student attended school in the *** Independent School District (*** ISD) from *** through ***. [6] Student exhibited behavioral difficulties beginning in *** and continuing throughout Student's enrollment in *** ISD. Student was physically aggressive towards peers and was generally disruptive in class.[7]

3.

read. ADHD or symptoms of anxiety, anger, depression or low self-esteem may lower student motivation and engagement in learning.[13]

6. Other evaluations over the years confirm Student's eligibility for special education services as a student with ED and/or OHI. A recent school district evaluation also suggests Student exhibits characteristics of (****) and a possible ***/ ***. Student presents a complex case exhibiting difficulties in several areas and many behaviors that can be associated with various classifications.[14]

7. Between *** and *** grade Student demonstrated a significantly high level of problem behaviors both at home and at school.[15] Student's behaviors negatively impacted Student's ability to function in either setting.[16] Over the years Student's maladaptive behaviors at school included ***, ***, *** , ***, ***, ***, *** , and ***.[17] Student has a history of difficulties with ***.[18]

8. However, at times, Student can also be respectful and polite, sweet and appropriate, and a very typical child in every respect. Student has been described by teachers and support

11. *** provided services for *** and then some consultation services thereafter.[24] Student made progress in meeting ABA therapy goals over the *** course of treatment. *** ABA services ended on ***.[25] Student's parents learned effective ways to respond to Student's behaviors.[26]

12. Student enrolled in the school district as a *** grader in

16. Student's BIP was reviewed at the April ***, 2015 ARD before the FBA was completed. Student's behaviors included *** and off-task behaviors. These behaviors impeded Student's ability to complete academic work. Student needed continued counseling to regulate verbalizations, learn self-advocacy, and identify strategies when faced with non-preferred tasks or answers. An *** IEten fe(e)4( a)41(w)2((l)-2vl)-2 (e)4(l)-2( ne)4oe nc(t)-2(r)3(a)4

21. Student had difficulty adjusting to ***. An ARD meeting was held on October ***, 2015 to address parental concerns over Student's classroom behavior and homework.[43] Student began Student's day with ***, ***, *** and did well but began to have difficulty as the day wore on. Student was unable to complete assignments, displayed off-task behavior, and ***. The ARD decided to re-implement a BIP.[44] ***, ***, ***, and *** were all concerns.[45]

22. Student was *** and very sensitive to teaching and discipline styles.[46] Student remained on task and did Student's work when the *** principal popped into the classroom but Student resumed off-task behaviors once the principal left.[47] Student responded well to Student's ***. She established a rapport with Student who produced work for her with consistent prompting.[48] Student also responded appropriately to the campus licensed specialist in school psychology (LSSP) who provided therapeutic counseling and behavioral support.[49] Student's maladaptive behaviors continued to escalate as the school year wore on.[50] Student was *** in January 2016 for ***.[51]

23. In *** 2016 Student's mother contacted the *** principal over concerns that Student was being bullied by peers. Student was *** on ***, 2016 due to the concerns over bullying.[52] The school district investigated the bullying complaint. The school district concluded Student was not a victim of bullying.[53] Student *** on ***, 2016

24. Student's behavior *** was highly disruptive and inappropriate. Peers reacted negatively to Student's behavior.[53] An ARD convened on February ***, 2016 to discuss Student's behavior. As Student's behavior in other classes deteriorated Student's inappropriate behavior started to bleed into ***.[54] Student's *** continued. *** was a factor in triggering maladaptive behaviors ***. Student was not making much progress in counseling with the LSSP.[55]

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25. The February 2016 ARD conducted a REED and planned for Student's three year re evaluation due April ***, 2016.[56] The BIP was revised to address additional target behaviors including ***, ***, and, *** . Replacement behaviors were included in the revised BIP as well as the use of positive behavioral interventions, strategies and supports, a set of recommended consequences, and mastery criteria.[57] Self-advocacy and self-regulatory coping skills were added to the *** IEP.[58] Instructional accommodations and supports and counseling continued to be components of Student's educational program in *** grade.[59]

26. During the spring of 2016 Student's negative behavior at school continued. Non-compliance and *** were issues.[60] Student's behavior at school was very problematic and in some ways escalated. Student began ***, ***, ***, and *** . Non-compliance with teacher directives and inappropriate behavior were problems in the *** classroom. Student was *** . However, when the *** teacher dropped in Student straightened up and behaved appropriately. Student was also able to complete some academic work and exhibited greater calm when the counselor dropped in.

Another ARD convened on March ***, 2016 to discuss Student's progress and placement. Student's mother expressed concern that other students in the *** classroom influenced Student's ***. Anecdotal data from staff documented in February 2016 was available to the ARD in discussing Student's behavior.

was not sufficient to meet Student's needs. There was also a disagreement about communication between home and school. The school district agreed to provide Student's daily behavior logs to Student's parents weekly but could not commit to doing so daily.[66]

30. The March ***, 2016 ARD also planned Student's reevaluation. An outside LSSP met with the school district's assessment team to plan the evaluation prior to the March *** ARD. The outside evaluator returned later in March to begin testing.[67] Following the March *** ARD the school district began collecting and tracking behavioral data. Behavior data collection continued through the end of *** grade.[68]

31. An annual ARD was conducted on March ***, 2016.[69] Student's behavior in the *** was discussed. Despite some strengths Student continued to display noncompliant and *** behavior. At times Student's behavior posed safety risks to *** or others. Student resisted returning to a regular class because Student did not want to do the work. Student continued ******

34. Student's parents secured an independent FBA March ***, 2016. Student was not attending school at the time of the

presence of the school campus officer. Student's behavior in the regular edu-1(H(a)4 t)-2vin

provided at the time of the September *** ARD.[138] The parties could not reach consensus.[139] The school district's legal challenge to the parental request for an IEE

73. If TEA approves the placement the school district negotiates with TEA to determine what proportion of the cost TEA will pay including funding for related services. The school district's financial contribution is then limited to a certain percentage of its federal set-aside funds. TEA ultimately decides how much of the cost towards the non-public placement it is willing to contribute.[170]

74. ***, ***, and *** are on the TEA list of approved non-public placements. *** sent the school district a fee schedule. The Director of Special Education secured cost estimates from the other facilities by telephone.[171] The school district did not request parental consent to share Student's records or information about Student with the proposed treatment facilities.[172]

75. School district staff did not visit *** right away.[173] It was not until early December 2016 when the parent contacted the Director of Special Education to offer signed consent that school district staff took steps to visit ***. The parent signed the requisite consent form and returned it to the Director in early December. The Director and the campus LSSP visited *** in early January 2017. They spoke with the head of school, observed Student in Student's *** class, and reviewed records. Student was not exhibiting the same extreme behaviors Student demonstrated on the ***.[174]

76. However, the Director concluded Student was not being appropriately challenged academically and was receiving too much support and guidance with too many prompts from the teacher. The Director also thought Student would not receive sufficient counseling, behavior services, or social skills training. The Director and LSSP concluded *** was not appropriate for Student.[175]

77. At all relevant times Student's parents were provided with copies of ARD documents, including Prior Written Notices

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83. After each class the student attends a *** Two adults are assigned to every *** .[187] There is an opportunity to socialize with peers or staff if the student does not have any work to do. Students may also collaborate with one another on class projects in the *** .[188]

84. The total student body at *** is roughly *** full-time students *** . There are some *** . *** .[189] There are *** administrators on campus. The physical building is *** .[190] *** operates under a *** day calendar. *** students are required to take a total of *** classroom hours per year.[191]

85. Student attends *** *** . Student attends *** classes on *** and *** .[192] For the first two weeks Student was *** - typical of new students. By the third week Student was "a different child" and became part of the community.[193] Early on Student was academically slightly behind as a *** grader. Student had a hard time with writing even though

Student about *** he "never had to bring Student back for the s

93. There is a licensed professional counselor (LPC) on staff available to provide counseling services to students as needed. Individual counseling is also available at a cost of ***/hour.

A secondary issue is whether the school district should have identified Student as a student with dysgraphia and whether the failure to do so resulted in the denial of FAPE. Another secondary issue is whether the school district committed procedural violations that significantly impeded parental participation in the educational decision-making process that resulted in the denial of FAPE.

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to

public education and the private school's program is appropriate. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass, 471 U.S. 359, 370 (1973).*

In this case the first issue is whether the school district's program was appropriate. If not, the second issue is whether Student's unilateral private placement at *** is appropriate *Burlington, 471 U.S. at 370.* The private placement need not meet all State requirements for reimbursement purposes so long as the private placement meets Student's individualized needs and is therefore appropriate. *Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 13, 15 (1993)* If both prongs of the *Burlington* test are met the hearing officer may also consider whether reimbursement should nevertheless be reduced or denied. *34 C.F.R. § 300.148(d).*

## V. BURDEN OF PROOF

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.[222] *Schaffer v. Weast, 546 U.S. 49, 62 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F. 2d 127, 131 (5th Cir. 1993).* Therefore the burden of proof is on Student to prove that the IEP issue were not reasonably calculated to enable Student to make educational progress given Student's unique, individual circumstances.

### A. First Prong: Was the School District's Program Appropriate?

There are two components to determining whether the school district's program was appropriate. First, whether the IEP in place and implemented during the spring semester from April ***, 2016 to the end of that school year was appropriate. Second, whether the IEP proposed for the 2016-2017 school year that proposed residential or day treatment placement was appropriate.

[222] There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).*

B.

2.

The evidence is clear that writing tasks are difficult for Student and trigger negative behaviors. Student has difficulty in the physical task of producing written work and *** is also an area of weakness. Although Student's attentional deficits and resistance to engaging in sustained periods of instruction were also obstacles to reading performance, the evidence also showed Student responded well to direct individualized dyslexia instruction. Student needed direct dyslexia services in order to support academic performance and appropriate behavior.

5. Least Restrictive Environment

Under the IDEA the school district must ensure that to the maximum extent appropriate children with disabilities are educated with children who are nondisabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environsbib[(c7r)3(de)4(r)3( )1deu0.1(t)Kl]x0(m)1.9( )10(m)-2(ona)i]x0(m)1.9( )10(m)-2(o6e)4(3( ot(rob(

supports, and the progress Student is making at Student's current private school, undermine

The record is clear that Student's behaviors in the public school were impeding Student's ability to learn. The record is also clear that

The evidence also showed the school district provided Student's parents with the requisite Prior Written Notice. Student's parents had plenty of information to understand the basis and reasons for the school district's identification, evaluation and placement decisions as well as those related to FAPE. Furthermore, there is not much in the record to show any failure to provide Prior Written Notice resulted in significantly impeding the parental right to participate in the educational decision-making process with regard to the provision of FAPE. To the contrary, the evidence showed Student's mother had numerous opportunities and did actively participate in all ARD discussions and decisions. There may have been disagreement about those decisions but disagreements alone do not prove Student's mother was denied a meaningful opportunity to participate. *34 C.F.R. § 300.513 (a) (2.)* Finally Petitioner provided virtually no evidence to show the school district failed to provide Student's parents with progress reports as required by the IDEA. *34 C.F.R. 300.320 (a) (3) (ii).*

6. Requests for Mileage and Compensatory Dyslexia Services

Petitioner requested reimbursement for the cost of mileage to and from Student's

## VII. CONCLUSIONS OF LAW

1. Respondent failed to provide Petitioner with a free, appropriate public education in light of Petitioner's unique circumstances for the spring 2016 and for the period of time Petitioner attended the public school at the beginning of the 2016-2017 school year. *Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley; 458 U.S. 176 (1982); Endrew F. v. Douglas Cnty. Sch. Dist., No. 15-827, 2017 WL 10662601@*10 (U.S. Mar. 22, 2017); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245 (5th Cir. 1997); 34 C.F.R. § 300.101 (a).*

2. The unilateral private placement made by Petitioner's parents is appropriate. *Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).*

3. Petitioner is entitled to reimbursement for the out of pocket costs to Student's parents of private school placement. *Sch. Comm. Town of Burlington v. Dept. of Educ., Mass, 471 U.S. 359 (1973); 34 C.F.R. § 300.148(c).*

4. Petitioner is entitled to reimbursement for the cost of the independent psychological because Respondent agreed to fund the independent psychological and failed to prove that the independent psychological did not otherwise meet Respondent's IEE criteria. *34 C.F.R. § 300.502.*

## ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are GRANTED IN PART AND DENIED IN PART as follows:

1. The school district shall reimburse Petitioner for Petitioner's out of pocket costs of the placement and program provided by *** as follows:

| | |
|---|---|
| $ *** | Registration Fee |
| $ *** | Tuition for the spring semester of the 2016-2017 school payable within 30 school days from the date of this Decision; |

2. The school district shall reimburse Petitioner for the cost of the private psychological in the amount of $ *** payable within 15 school days from the date of this Decision;

3. The school district shall fund the cost of tuition at *** for the remainder of the 2016-2017 school year in the amount of $*** payable within 60 school days from the date of this Decision;

4. The school district shall reimburse Petitioner for the cost of *** services for the 2016-2017 school year in the amount of $*** payable within 15 school days of the date of this Decision;

5. The school district shall fund the cost of *** services for the remainder of the 2016-2017 spring semester in the amount of $*** payable within 30 school days of the date of this Decision;

6. The school district shall fund the cost of individual counseling at *** for the remainder of the 2016-2017 school year or when Petitioner completes the *** grade curriculum at ***, whichever is first, in the amount of $***. The arrangements for invoicing and payment of the counseling services are to be arranged by mutual agreement between the school district and ***;

7. Student's parents must provide written consent for school district staff to confer with *** staff at regular grading period intervals for the remainder of the 2016-2017 school year within 10 calendar days from the date of this Decision;

8. Student's parents shall facilitate an ARD meeting with the school district, at a mutually agreeable time and place, and ensure participation of *** teaching and administrative staff in the ARD for the purpose of reviewing Student's progress both academically and behaviorally

All other requests for relief not specifically stated in these Orders are hereby DENIED.

SIGNED April 10, 2017.

## NOTICE TO THE 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. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*