DOCKET NO. 072-SE-1116

STUDENT, B/N/F PARENT, **Petitioner**	§ § §	**BEFORE A SPECIAL EDUCATION**
v.	§ § §	**HEARING OFFICER FOR**

[1] Clear Creek Independent School District (District/Respondent) is the respondent to the Complaint. Petitioner alleges that after the District received Petitioner's request for an Independent Educational Evaluation (IEE) it unreasonably delayed in filing a due process complaint to show that the evaluation was appropriate. Petitioner also alleges the District denied

The hearing officer further finds that, although the 2015 FIE was not inaccurate or incomplete, the District failed to provide Student with FAPE when it revised the 2015 IEP in June 2016, without further evaluation and without including the recommended accommodations in the 2015 FIE. It should be noted that these accommodations were, for the most part, reinstated in the November 2016 Individualized Education Program (IEP) and have helped Student. Nevertheless, Petitioner is entitled to compensatory services to address the denial of FAPE from the beginning of the 2016-2017 school year, through November ***, 2016.

I. PROCEDURAL HISTORY, RESOLUTION SESSION, AND STATUTE OF LIMITATIONS

A. Procedural History

Petitioner filed the Complaint on November 30, 2016. On December ***, 2016, the District filed a request for a due process hearing (Docket No. 077-SE-1216) seeking to establish the appropriateness of its 2015

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2. Provide Student compensatory educational services for failing to provide Student with FAPE.

The District requests a finding that its 2015 FIE was appropriate, thus Petitioner is not entitled to an IEE at public expense. The District also requests findings that it has provided Student with FAPE.

C. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.[9] A party attacking the appropriateness of an IEP established by a school district bears the burden of showing why the IEP, and resulting placement, were inappropriate under the IDEA.[10] However, when a parent requests an IEE at public expense, the school district must without unnecessary delay either provide the requested IEE or file a due process complaint for a hearing to show its evaluation is appropriate. Consequently, District bears the burden to prove that the 2015 FIE was appropriate and that it did not unnecessarily delay filing its due process complaint. t2.(sW)15.7(e(de)4s-10e)-2(a)4,021-0 F(c).6a615 05)(t).4(;)-1019 2(a)4,023-0 F(c)-6a215

9. In the beginning of Student's *** grade at a District *** school, Student's academic performance began to decline, and Student started having behavioral issues at school. Student's parents expressed their concerns that Student had trouble with writing and writing assignments as reflected by Student's poor performance in the English/Language Arts class (ELA).[24] The District determined that Student needed a FIE to evaluate whether Student had any SLDs and to recommend strategies to aid in wae D1tThe

16. The OT has a Bachelor of Science in occupational therapy and a master's degree in education. She is licensed by the State of Texas as an OT and has worked as an OT for 30 years.[32]

17. Although Student's *** than expected for Student's age, Student's fine motor skills are functional for school related activities.[33] When the written activity requires ***, such as ***, Student uses ***; otherwise, Student uses ***. Student has the mechanics of handwriting and has no mechanical difficulty writing.[34] Student is also able to use a standard keyboard, mouse, and headphones.[35]

18. Student has accurate conventions of writing in punctuation, capitalization, spacing, left to right progression, and in Student's quantity of writing, but Student *** because Student struggles with planning and organizing Student's ideas, which interferes with Student's educational performance.[36]

19. *** *** are typically able to ***. Student's ***, ***

25. Student had some sensory processing issues in the areas of social participation, tactile exploration, body awareness, balance and motion, and planning and ideas (organizing), but none rose to the level of a deficit requiring an accommodation.[43]

26. Although the OT evaluated assistive technology and tried a word-

32. Social skills and pragmatics are related because both involve eye contact, listening to the speaker, inferencing, drawing conclusions about what the person said, vocabulary, and using the

40. The WISC-5 assessed five areas of cognitive ability, specifically crystallized intelligence (aka verbal comprehension), fluid reasoning, processing speed, and visual spatial and working memory.[58]

41. The KTEA-3 assessed Student's math skills, reading skills, and written expression. The KTEA-3 written expression test measured Student's ability to construct sentences, to combine sentences into a more complex product, to evaluate grammar, and to edit by providing Student with several paragraphs where Student had to add the punctuation marks or missing words. At the end of the written expression test, Student was required to write an essay.[59]

42. In the math portion of the KTEA-3, Student exhibited "well above average skills in Student's problem solving capabilities" in the math concepts and applications subtest and above average on the math computation subtest.

43. On the KTEA-3, Student's reading comprehension was average, Student's letter word recognition was average, and Student's written expression was average.[60]

44. The KTEA-3 written expression contains a story appropriate to the student's grade level. As the student goes through the story the student is asked to do certain tasks, such as writing a sentence about what is happening, editing the text, and filling in words. Consequently, the student is required to write throughout the test.

45. During the KTEA-3 written expression test, Student wrote at least 94 words in formulating sentences, combining sentences, and editing. But, when Student was asked to write an essay about the story, without giving Student specific directions about what to write, ***. The essay accounted for about 14 points on the test.[61]

46. Because Student scored so well on the rest of the written expression test even though Student *** Student did extremely well.[62] ***.[63]

47. Student's *** is not a skill deficit because Student can do it as indicated by Student's performance on ***. It is a behavioral issue because Student simply ***.[64]

48. It was unnecessary for the diagnostician to do a cross-battery analysis to determine if Student had a SLD for written expressions because Student's achievement tests results

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[58] Pet. Ex. 6 at 19; Tr. at 207.

[59] Tr. at 436.

[60] Pet. Ex. 6 at 21-22; Tr. at 219, 458.

[61] Tr. at 470-471.

[62] Tr. at 220, 436.

[63] Tr. at 436.

[64] Tr. at 221-222.

were average or above and were supported by both Student's grades and Student's *** grade STARR results.[65]

49. Student does have some deficits in short-term memory, and *** than Student's peers, but those deficits do not to rise to the level of an SLD in written expression. A deficit in processing speed is not associated with a SLD in written expression.[66]

50. Student had more than a one standard deviation between the two verbal-comprehension tests, but because Student's performance on both tests was average and above average, it was unnecessary to run any further tests unless additional sources of data indicated that further testing was required, which it did not.[67]

51. Student's writing sample score reflected in the 2012 FIE was consistent with Student's writing expression score in the 2015 FIE.[68]

52. Student's spelling errors were phonetic and very readable, and were consistent with that of other students in Student's grade.[69]

53. Student scored extremely high in fluid reasoning, high average in visual spatial, and average in verbal, but scored below average in working memory, short-term memory, and processing speed.[70]

54. Student's intelligence quotient fell in the high-average range.[71]

55. In the spring of 2016, Student took the *** grade STAAR in *** and scored *** (***% accuracy) showing a consistency across time in ***.[72]

56. Student did not have a deficit in spelling because on the KTEA-3 test protocol Student misspelled only *** words out of approximately 94 words—so Student's accuracy was about *** percent.[73] Most of the misspelled words were spelled phonetically so they did not affect the ability to understand what was written. On occasion, Student would misspell a word in one place, but spell it correctly later.[74]

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[65] Tr. at 215-216.

[66] Tr. at 454 -455.

[67] Tr. at 456.

[68] Tr. at 437.

[69] Tr. at 229.

[70] Pet. Ex. 6 at 19.

[71] Pet. Ex. 6 at 20.

[72] Pet. Ex. 8 at 1; Tr. at 437.

[73] Tr. at 433.

[74] Tr. at 434.

LSSP Evaluation

57. The LSSP holds a Bachelor of Science in Physical Education and a Master of Science in School Psychology and has completed the requirements to become a licensed specialist. He has worked under the supervision of another LSSP for two years and as an LSSP for the past nine years.[75]

58. In evaluating Student, the LSSP considered information from Student's parents and teachers, classroom data sheets, and direct observations of Student in the classroom and while working with Student. The LSSP also employed the Autism Spectrum Rating Scales (ASRS) and performed a functional behavior assessment (FBA) using the Behavior Assessment System for Children-2nd edition (BASC-2).

59. Student's functional social skills were properly evaluated by the multi-disciplinary team.[76]

60. Student has difficulty completing assignments that are open-ended or when Student fails to understand the purpose of the assignment. Student frequently ***.[77]

66. The teacher's rating scale of Student's BASC-2 profile showed that Student's ADHD characteristics were not prominent, but Student's autistic characteristics were. Therefore, it was not necessary for the District to conduct an OHI/ADHD assessment.[83]

67. When Student transitions from one grade level to the next, Student has a history of having behavioral and academic problems until Student gets used to Student's teacher's expectations and the teacher adjusts to Student.[84] Transitioning from a *** in *** grade to the *** in the *** grade amplified the transitioning problems because of ***.[85]

68. The more structure Student is provided in class, the better Student does and the fewer behavioral issues arise.

69. The LSSP assessed Student's executive functioning through the evaluations of Student's social behavior, metacognitions, attention skills, and self-regulation skills because all these areas are part of executive functioning.[86]

81. The 2015 ARDC consisted of the parents, a District representative, three general education teachers, a special education teacher/provider, the OT, the diagnostician, and the LSSP.[97]

82. Based on the 2015 FIE and the information provided during the ARD meeting, the ARDC determined on December ***, 2015, that Student is eligible to receive special education and related services as a student with ASD and a speech impairment.[98]

83. At the conclusion of the meeting, Student's parents signed below the statement that they understood and agreed with the ARDC decision and gave permission for the educational placement recommended for Student.

84. The ARDC developed an IEP with two goals to target Student's problematic behavior of failing to complete homework assignments and avoiding group participation.[99]

85. The ARDC put in place several modifications to enable Student to be involved in and to progress in the general education curriculum for the period from December ***, 2015 to December ***, 2016. The modifications included, among others things: (1) *** (2) "***."[100]

86. Student's parents signed the 2015 IEP because they understood that if they did not sign it Student would not receive any special education services and their consent for placement in special education was voluntary and could be revoked.[101]

87. When Student's parents signed the 2015 IEP, they did not represent that they agreed with the 2015 FIE.[102]

88. At the end of *** grade, Student progressed to *** grade with *** As (in ***), *** B (in ***) and *** C (***).[103]

89. The accommodations provided for in the 2015 IEP were *.34 0 15u85 >>BDC 0 Tc 0 Tw 12 -0 0 12 22

June 2016 ARDC Meeting

90. The *** program is designed so *** learners will have *** skills as demonstrated through *** products that represent their individuality and creativity.[104]

91. Student's mother wanted Student in the *** program so Student *** and because the program would be *** for Student. [105]

92. Student's mother attended the June 2016 ARD meeting without Student's father. The purpose of the June 2016 ARD meeting was to consider changes to Student's accommodations.[106]

93. Student's mother agreed to waive several of the accommodations set out in the 2015 IEP that the District maintained would affect the *** the *** program.[107]

94. The June 2016 Revision to the Annual ARD noted that the 2015 ARD IEP misstated one of Student's accommodations. The accommodation that read "***" should have read ***. However, this accommodation was removed too.[108]

95. The June 2016 ARDC decided Student would continue receiving the following four accommodations, out of the original 12 accommodations, while in the *** program: (1) ***; (2) ***; (3) ***; and (4) ***.[109] The ARDC also added the *** as an accommodation.[110]

96. The 2015 IEP accommodations that were removed during the 2016 June ARD meeting include: (1) ***; (2) provide time at school to complete homework assignments before, during, or after the school day; (3) ***; (4) ***; (5) clear and concise directions/expectations; (6) organizational checklist, (7) ***; and (8) ***.[111]

97. The June 2016 IEP did not meet Student's behavioral and educational needs and it failed to follow the accommodations recommended in the 2015 FIE.

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[104] Tr. at 355.

[105] Tr. at 411-412.

[106] Pet. Ex. 8 at 1.

[107] Pet. Ex. 8 at 1.

[108] Resp. Ex. 2 at 1.

[109] Resp. Ex. 2 at 2.

[110] Resp. Ex. 2 at 2.

[111] Tr. at 400.

*** Grade

98. In August 2016, Student participated in ***.[112]

99. On August ***, 2016, Student's *** grade ELA teacher wrote to the District Special Services Team Leader expressing concern that Student was unable to complete the work in the *** ELA class without the accommodations that were removed in the June 2016 revision to the 2015 IEP.[113]

100. Shortly after Student began *** grade, Student's ELA teacher expressed concern that Student was ***

117. Student has a ***, but the demands of the *** frustrate Student.[133]

118. Student can write and can organize Student's thoughts once Student knows what Student wants to say. Student's spelling does not affect the readability of Student's work, and Student's handwriting is legible. Student had difficulty dealing with the synthesis, evaluation and analysis of the material in the *** class before producing it.[134]

IEE Request

119. On October ***, 2016, the District's Director of Special Education Programs requested that the District begin the process to have Student undergo a Functional Behavioral Assessment (FBA) after Student's parents signed the consent for the evaluation. Later she learned that an FBA had been done the year before and Student's behavior had not changed so the new FBA was not performed.[135]

120. On October ***, 2016, the District's Director of Special Education [illegible]

Student. If the work was too in-depth and required creativity, Student became emotional

and their children would not receive, as the IDEA intended, a 'free and appropriate public education' as the result of a cooperation process that protects the rights of parents."[152]

Under the IDEA, a parent has a right to request an IEE at public expense "if the parent disagrees with an evaluation obtained by the public agency."[153] In response, and "without unnecessary delay," the school district (the public agency) must either file a due process complaint to request a hearing to show its evaluation was appropriate or ensure that an IEE is provided at public expense.[154] If the district files a complaint and establishes that its evaluation was appropriate, the parent may still obtain an IEE, but not at public expense.[155]

A. Did the Parent's Signature on the 2015 ARD/IEP Bar Their Right to Request an IEE at Public Expense?

The District argues that because Student's parents were provided the IDEA procedural safeguards and then signed the 2015 ARD document (2015 IEP), Petitioner waived their rights to object to the 2015 FIE, and to request an IEE at public expense.[156]

The District asserts that agreeing to an FIE is analogous to an agreement with a proposed IEP and cannot be rescinded without agreement or a due process hearing. Moreover, the District points out that parents who agree with an FIE initially are not left without recourse because the parent has the right to request a reevaluation or to obtain an IEE at their own expense.[157] The District urges that if Congress wanted to allow parents to rescind or revoke parental agreement to an FIE, it would have provided such language in the regulation in the same way Congress included language that allows revocation of parental consent to an evaluation.[158] In support of

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[152] *Phillip C., v. Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 693 (11th Cir. 2012) (quoting 34 C.F.R. § 300.502(b)(1)).

[153] 34 C.F.R. § 300.502(a), (b).

[154] 34 C.F.R. § 300.502(b)(2).

[155] 34 C.F.R. § 300.502(b)(3).

[156] Pet. Ex. 7 at 13, 17, and 20.

[157] 34 C.F.R. § 300.303.

[158] Respondent's Closing Argument at 11.

this argument, the District relied on *Lauren W. v. DeFlaminis.*[159] In *Lauren,* the hearing officer found the parents agreed to the evaluation and were not entitled to an IEE at public expense. The 3rd Circuit agreed that the parents were not entitled to an IEE at public expense because "Lauren's parents both checked 'yes" and signed the District's evaluation, they indisputably agreed with it."[160]

the state's statute of limitations.[162] The statute of limitation in this case would be one year from the known or should have known date, December ***, 2015, when the FIE was first presented to parents. The request for an IEE was presented to the District on October ***, 2016, within the Texas one-year statute of limitations, as was Petitioner's complaint filed on November 30, 2016.

Accordingly, the hearing officer finds that Petitioner was entitled under 34 C.F.R. § 300.502(b)(1) to disagree with the 2015 FIE and to request an IEE at public expense.

B. Did the District Timely Respond To IEE Request?

It is undisputed that the District received Petitioner's IEE request on October ***, 2016, and that the District did not file a complaint to show its 2015 FIE was appropriate until December ***, 2017, 49 days later. When a district receives a request for an IEE, it must respond in one of two ways: (1) file a due process complaint and meet its burden of showing the FIE was appropriate; or (2) ensure that an IEE is dsly,.[44 [(2 utem)-2(e)4(e)4(t)-.ttttg t1(n)-10(g)10(d(he)4(I

The issue then becomes whether the District filed its complaint without unnecessary

was appropriate."[166] The court noted, § 300.502(b)(2)(ii) has no such requirement because the school district is not required to pay for an IEE if the IEE does not meet the school district's criteria. In *Seth,* the court explained:

> "[w]hen a parent first requests an IEE, the school placement or educational plan for the child may be contingent on the outcome of the IEE. A months-long delay before even starting the process of holding a due process hearing on the need for an independent evaluation is a significant amount of time when compared to the length of the school year. In contrast once the IEE has been completed, school officials can consider it immediately before reimbursement issues are resolved. Thus, the IEE's function is not vitiated when only reimbursement is delayed.[167]

Moreover, the District failed to provide a reasonable explanation for the 49-day delay between the time Petitioner's requested the IEE and the time the District filed its complaint. And finally, throughout this time period, Student was struggling in *** despite the efforts of the *** teacher and Student's parents. Time was of the essence because Student's behavior and academic success was rapidly deteriorating culminating in a failing grade for ***. Throughout this period, Student's parents and the ***

A. Was the 2015 FIE Inaccurate and Incomplete?

The District's multi-disciplinary team used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student to determine Student's disability and to create Student's 2015 IEP. The qualified evaluators included an educational diagnostician, an OT, a SLP, a LSSP, and two of Student's educational teachers. The multi-disciplinary team observed Student in class, in the cafeteria, during P.E., and during one-on-one meetings. The team also o0 Td (7S9 -0.01 Tc 0.17G)e0 >1 Tc 0.n10(E)1(.,-2(c)s)-1(e(e t)-6(eam, de)4

deficit that is supported by multiple sources of data.[173] Student did not have an academic deficit in written expression. Student received an average standard score on the written expression subtest of the KTEA-3, passed STAAR in *** grade, and teacher reports.[174] Regarding Student's spelling, Student wrote approximately *** words on the KTEA-3 on the written expression test, and only misspelled *** words. Most misspellings were phonetic spelling errors. Student would also misspell a word in one place on the test, but correctly spell it later. In addition, Student was evaluated for a SLD in the 2012 FIE and none were found. The diagnostician confirmed she would have re-evaluated Student for an SLD had Student exhibited any academic deficits.[175]

Based on the preponderance of the evidence, the hearing officer finds that the 2015 FIE appropriately evaluated Student for SDL in written expression.[176] The multi-disciplinary team considered various sources of data in evaluating whether Student has a SLD in written expression. The evaluators observed Student in the classroom, in the cafeteria, during PE and 3(a)1teao3xol

academic area given the totality of information available to the evaluators.

According to Petitioner's expert, when evaluating for a SLD, the "best practices" is to evaluate seven areas of intelligence, but the 2015 FIE only evaluated five areas of

2015 IEP was successful as reflected in Student's performance, Student's end of the school year grades, and Student's score on the ***-grade STARR.

Student's problems began after the ARDC revised the 2015 IEP in June 2016 (June 2016 IEP revisions). The ARDC did not conduct any new evaluations or assess Student's performance when it withdrew the majority of Student's accommodations. Other than to admit Student into the *** program, the ARDC presented no other reason to revise Student's 2015 IEP. When Student began *** grade with the June 2016 IEP revisions, Student's *** teacher and Student's parents noticed a marked decline in Student's academic and behavioral performance at school.

The evidence established that the June 2016 IEP revisions to the 2015 IEP were not specifically designed to meet Student's unique needs so Student could benefit from the educational instructions, particularly ***. Moreover, the 2016 IEP revisions failed to include appropriate and measurable goals and objectives. Although the June 2016 IEP revisions state that no changes to the goals and objectives were made, the evidence shows this was not the case. The 2015 IEP's goals and objectives incorporated most of the accommodations recommended in the 2015 FIE. For instance, in the 2015 IEP, the first Measureable Annual Goal stated:

***[189]

However, this 2015 IEP annual goal was changed dramatically in the June 2016 IEP revisions. The majority of the accommodations noted above were removed. In contrast to the 2015 IEP, the June 2016 IEP revisions did not follow the recommendations of the 2015 FIE and wholly failed to provide appropriate and measurable goals and objectives.

2. Academic and Non-Academic Benefits

In addition, the June 2016 IEP revisions, negatively affected Student's academic performance, particularly in the *** class. From the beginning of the school year, the ***

[189] Pet. Ex. 7 at 5.

3. Least Restrictive Environment and Collaborative Manor

Petitioner did not dispute that the IEP was being provided in the least restrictive environment. The District included student's Parents in the 2015 ARD/IEP and the November 2016 ARD meeting. Although Petitioner and District did not reach consensus, the services have been provided in a collaborative manner.

C. 2016 IEP

The hearing officer further finds that at the November 2016 ARD meeting, the District followed the 2015 FIE and considered observations, a revT0 14-1(, t)d (-)Tj 0.--folNs

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