TEA DOCKET NO. 092-SE-1216

STUDENT	§	BEFORE A SPECIAL EDUCATION
BNF PARENT & PARENT	§	
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
RIESEL INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STUDENT, by next friends Parents (hereinafter Petitioner or Student) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq. Riesel Independent School District (Respondent or the District) is the Respondent to Petitioner's complaint. Petitioner alleges that the District deprived Student of a Free Appropriate Public Education (FAPE) during the 2015-2016 and 2016-2017 school years.

PROCEDURAL HISTORY

Petitioner filed the complaint with the Texas Education Agency (Agency) on December 28, 2016, and the case was assigned to this Hearing Officer on December 29, 2016. This Hearing Officer issued an order establishing the procedural schedule on December 29, 2016, and set the hearing for February 14, 2017. The initial prehearing conference in this matter convened on January 20, 2017, at which time it was determined that 2 days would be required for the hearing. The hearing was continued and rescheduled for April 6 and 7, 2017.

On March 20, 2017, a prehearing conference was convened. The hearing was rescheduled for May 1 and 2, 2017. The relevant time period for this case was established as December 28, 2015 to the present, and ongoing.

By order dated March 21, 2017 Petitioner's claim for relief arising under Section 504 of Rehabilitation Act of 1973, the Americans With Disabilities Act and Petitioner's claim for relief for attorney fees were dismissed for want of jurisdiction.

The hearing convened on May 1 and 2, 2017, at the Riesel ISD Board Room located at 600 E. Frederick, Riesel, Texas. Sonja Kerr and Elizabeth Angelone represented Petitioner. Gigi Driscoll and Jennifer Carrol represented Respondent.

ISSUES FOR THE HEARING AND REQUESTED RELIEF

A. Issues

During the March 20, 2017 prehearing conference in this matter, Petitioner identified the following broad issues for resolution at the hearing:

1. Whether Respondent failed to properly evaluate Student during the 2015-2016 and 2016-2017 school years, resulting in denial of a FAPE for Student.
2. Whether Respondent failed to properly provide Student with a FAPE with the meaning of the IDEA during the 2015-2016 and 2016-2017 school years.
3. Whether Respondent failed to provide Petitioner's parent prior written notice (PWN) pursuant to the IDEA, during the 2015-2016 and 2016-2017 school years, resulting in denial of a FAPE for Student.
4. Whether Respondent failed to educate Student in the least restrictive environment (LRE) during the 2015-2016 school year, resulting in denial of a FAPE for Student.

Petitioner identified the following mixed sub-issues of law and fact in support of the broad issues above as follows:

1. Whether Respondent failed to properly evaluate Student during the 2015-2016 and 2016-2017 school years, resulting in denial of a FAPE for Student:
    a. Did Respondent fail to properly evaluate Student for ***.
    b. Did Respondent fail to properly evaluate Student for assistive technology needs.

c. Did Respondent fail to properly evaluate Student in all areas of suspected disability and need, or incorrectly evaluate Student in the areas of cognitive/ academic, behavior, assistive technology, and ***.

2. Whether Respondent failed to provide Student with a FAPE within the meaning of the IDEA during the 2015-2016 and 2016-2017 school years.
    a. Did Respondent fail to provide Student services for ***.
    b. Did Respondent fail to properly write Present Levels of Performance and goals and objectives in meaningful and measurable ways to accurately track progress.
    c. Did Respondent fail to track Student's progress and goals and objectives during the 2015-2016 school year, and/or did Respondent fail to provide Student's parent with progress reports on the one goal and four objectives.
    d. Did Respondent fail to provide Student with an appropriate individualized program of education that permitted Student to receive meaningful benefit, rather than de minimus or trivial educational advancement.
    e. Did Respondent fail to consider and ensure positive behavioral support programming for Student.
    f. Did Respondent fail to provide assistive technology devices for Student.
    g. Did Respondent fail to provide Student with *** in accordance with the IDEA requirements.
    h. Did Respondent fail to provide Extended School Year (ESY) services for Student during the summer of 2016.
    i. Did Respondent fail to provide Student with instruction and strategies based on peer-reviewed research based educational programming practices designed to meet Student's individual needs.
3. Whether Respondent failed to provide Student's parent prior written notice (PWN) pursuant to the IDEA during the 2015-2016 and 2016-2017 school years, resulting in denial of a FAPE for Student.
4. Whether Respondent failed to educate Student in the least restrictive environment (LRE) during the 2015-2016 school year, resulting in denial of a FAPE for Student.

B. Requested Relief

During the March 20, 2017 prehearing conference, Petitioner requested that the Hearing Officer order the following relief:

1. An Order that Respondent provide an appropriate educational placement for Student to include intensive *** instruction, and provide intensive *** instruction by a *** (***).

2. An Order that Respondent conduct evaluations in all areas of disability and need including a Functional Behavioral Assessment (FBA), assistive technology evaluation, cognitive/academic, and ***.

3. An Order that Respondent provide compensatory services to compensate for the amount of deprivation.

4. An Order that Respondent reimburse Parents for privately obtained tutoring services.

5. An Order that Respondent reimburse Parents for out -of -pocket expenses for the 2015-2016 school year or alternatively, provide Student with compensatory educational services, in an amount to be determined, for the failure to provide Student with an appropriate program during the years disputed herein.

6. Any other additional relief that may be appropriate and necessary to ensure that Student is provided with a free, appropriate public education including transportation or transportation costs to any services deemed appropriate by the Hearing Officer.

STIPULATION

The parties agreed that Respondent granted the parents' request for a speech and language IEE.[1]

FINDINGS OF FACT

Based upon the evidence presented at hearing that pertains to the above listed issues pled by the parties, this Hearing Officer makes the following findings of fact and conclusions of law. Citations to the transcript are designated as "Tr." followed by the page number(s). Citations to exhibits are designated as "PE" for Petitioner, and "RE" for Respondent, followed by the exhibit number.

1. The District is responsible for the provision of special education services

[1] Tr. at 74.

to Student who resides within its geographical boundaries.

2. During the 2015-2016 and 2016-2017 school years, Student was in the *** and *** grades respectively.

3. During the 2015-2016 and 2016-2017 school years, Student's eligibility classification was specific learning disability (SLD).[2]

4. ***, the special education teacher, served as the monitor of all special education and Section 504 students.

but did not pass the *** state assessment.[8] Only ***% of students in the state passed the *** that year.[9]

8. During the 2014-2015 school year, Student failed the *** state assessment by a few questions.[10] Student did pass the *** and *** state assessments.[11]

9. During the 2015-2016 school year, Student took the *** state assessment again and failed it by a few questions; however, Student passed it in the spring of 2016.[12] When Student passed the *** state assessment, only ***% of students in *** passed it.[13]

10. During the spring of 2016 Student took the *** state assessment and failed it by a few questions. Student did meet the progress measure.[14] In the summer of 2016, Student passed the *** state assessment.[15]

11. Petitioner called Dr. *** as a witness. Dr. *** is a licensed specialist in school psychology (LSSP) and a licensed psychological associate.[16] Dr. *** testified that Student is *** grade level.[17] However, Student has passed the *** and *** state assessments, which include *** *** on a *** and *** grade levels.[18] Further, these assessments, which Student passed, showed Student's *** skills to be at the *** and *** grade levels, respectively.[19]

12. Student's passing of the *** state assessment, which assesses Student's *** skills on a *** grade level, showed that Student's *** skills are commensurate with Student's grade level.[20]

[8] RE8 at 2-3.
[9] RE13 at 3.
[10] RE8 at 4.
[11] RE8 at 5.
[12] RE8 at 7- 8.
[13] RE13 at 11; Tr. at 716-718.
[14] RE8 at 9.
[15] RE8 at 10.
[16] Tr. at 308-309.
[17] Tr. at 370.
[18] Tr. at 718.
[19] Tr. at 718-719.
[20] Tr. at 719-720.

13. The District provided Student's parent with notice and consent to conduct a full and individual evaluation ("FIE") for Student on March ***, 2016, and Student's parent signed such consent in response to a parental request to evaluate.[21]

2016 FIE and IEP

14. The District completed the initial FIE for Student on May ***, 2016.[22]

15. Parent obtained a private evaluation from Dr. *** for Student in 2009.[23] Parent did not provide a copy of that evaluation to the District until 2016.[24] The District evaluator considered the report as part of the 2016 FIE.[25] The evaluator in the 2009 report did note Student's test results were inconsistent with a diagnosis of attention deficit and hyperactivity disorder ("ADHD").[26] Student was not enrolled in the District at the time of this 2009 evaluation.[27]

16. The District's 2016 FIE included a variety of sources of information and data.[28]

17. During the FIE evaluation Student did not present with expressive or receptive language deficits, and Student's language skills appeared adequate for performing academic tasks in the classroom.[29]

18. When completing the FIE, the Educational Diagnostician *** gathered information from Student's teachers regarding Student's language skills.[30] He also administered the Woodcock-Johnson IV Test of Oral Language and obtained Language and Academic Skills scores as part of the FIE eva

23. Student's cognitive functioning was consistent with Student's adaptive behavior.[42] According to teacher information and informal assessment, Student met the standards of personal independence and social responsibility of Student's age and cultural group.[43] Student's global intellectual score was within the low range due to Student's substantially lower scores on weighted sub-tests.[44]

24. Student scored within the average range on the cluster score of comprehension knowledge, which measures language and requires verbal directions and responses.[45]

25. The Diagnostician assessed Student's adaptive behavior skills to be within normal limits.[46]

26. The Diagnostician considered information regarding Student's performance on state assessments over time and grades, as well as information from teachers regarding Student's academic performance.[47] The Diagnostician administered comprehensive achievement assessments to Student an

39. Prior to filing the request for the due process hearing, Student's parents never contacted the Director of Special Education regarding the concerns/allegations they presented for the first time in their request for a due process hearing.[77]

2017 FIE and IEP

40. The District completed another FIE on March ***, 2017.[78] This FIE included assessment in expressive, receptive, and pragmatic language; ***; a FBA; assistive technology; cognitive; academic; and *** as requested by the parents.[79]

41. At the time of the FIE, Student had passed all of Student's classes from the fall semester and was passing all of Student's classes during the current six- week grading period.[80]

42. The FIE included information from a variety of sources of information, including Student's grades, information from several of Student's teachers, state assessment results, ***, numerous formal assessments, observations of Student, information from Student's parent, and information from Student's discipline reports.[81]

43. Student's teachers reported, among other things, that Student had average skills, was quick to grasp ideas, was motivated, had good social skills, ***, was on time for class, completed assignments, had good attendance, and worked well with others.[82]

44. Diagnostician *** considered all

47. The District administered the *** to Student. ***.[86] The Diagnostician also interviewed Student. Student talked about Student's ***.[87] The District obtained information from Student's parent and teacher as part of the ***/***.[88] Based on her interview and cognitive assessment, achievement assessment, and *** with Student, the Diagnostician concluded that Student's *** was appropriate.[89]

48. The District administered a cognitive assessment to Student which revealed an overall full scale cognitive ability that was in the low average range. Student presented with a pattern of cognitive strengths and weaknesses in comprehension-knowledge and processing speed.[90] The evaluator recommended various accommodations for ARDC consideration to assist Student with these cognitive deficits.[91] The Diagnostician assessed Student's full cognitive profile to ascertain Student's cognitive strengths and weaknesses when determining whether Student continued to present with a learning disability.[92]

49. The District administered formal academic achievement assessments to Petitioner.[93] The Diagnostician, in collaboration with the District *** Specialist and based on the results of the evaluation data and various sources of information, recommended Student did not present with ***.[94]

50. The District conducted an assistive technology assessment for Student.[95] Based on results T1.1369(0)]TJ 104(n)2(139(0 S)1(T)12(u)42(d)18(e)6(n)10(da)10(t)]002 Twofo.004 7S1 cs (

behavioral skills based on information from Student's teachers and Student's interactions with the Diagnostician. As a result, the Diagnostician determined further emotional/behavioral assessments were not warranted.[98] Nonetheless, the District conducted a Functional Behavioral Assessment (FBA) Consultation for Student in response to parental request.[99] The LSSP gathered information from all of Student's teachers regarding Student's behavior.[100] The teachers did not report serious behavioral issues that suggested any specific behaviors that interfered with Student's learning or the learning of others.[101] At the time of the FBA, in March of 2017, Student had *** office referrals.[102] Teachers reported Student has some difficulty with attention to task, but responds well to redirection.[103] Further, teachers reported many positive behaviors presented by Student such as "great student, very personable, doing well, good natured, always willing to actively participate in class activities, and asks questions when Student doesn't understand something, easily motivated, and can meet set goals."[104]

52. The Diagnostician did not rely on any single measure of assessment as the sole criteria for her recommendation that Student presented with a SLD. The Diagnostician used technically sound instruments; selected assessments and administered assessments ***; used the assessments for the purposes for which they were valid and reliable; was trained to administer all the assessments administered; administered the assessments in accordance with the instructions; ensured the assessments were tailored to assess Student's specific areas of educational need and not merely to provide a general intellectual quotient; selected assessments and administered assessments so as to best insure results that accurately reflect Student's

[98] Tr. at 748-752.
[99] RE6 at 31.
[100] RE6 at 32.
[101] RE6 at 31.
[102] RE6 at 31.
[103] RE6 at 31.
[104] RE6 at 31.

present aptitude or achievement level; and assessed Student in all suspected areas of disability and need.[105]

53. The District convened an ARDC meeting to review the FIE on March ***, 2017.[106] The District continued to recommend Student met eligibility as a student with a SLD.[107] More specifically, the ARDC determined that Student continued to be eligible for special education as a student with specific learning disabilities in the areas of ***, ***, and *** ***.[108]

63. Based on a single standardized assessment alone, the ***, Dr. *** concluded Student presented with a language deficit. Dr. *** ignored numerous sources of data showing that Student did not present with a language deficit, and her own conclusion that Student's scores may have be depressed due to Student's attention during her testing.[128]

64. Contrary to Dr. ***'s conclusion that the District should not have administered a cognitive assessment to Student with verbal questions and responses, Student's verbal comprehension index score obtained by Dr. *** was within the average range, and required verbal directions and verbal responses.[129]

65. The principal testified that he had no concerns with Student's language.[130] Additionally, the Diagnostician determined that a verbal cognitive assessment was appropriate to assess Student's cognitive strengths and weaknesses.[131]

66. Dr. *** concluded Student's academic skills were at *** *** grade level, yet the Kaufman Test of Educational Achievement (KTEA) she administered is not based on the state curriculum or any curriculum at all for that matter. Dr. *** was unable to explain how grade equivalency scores are obtained.[132] Dr. *** acknowledged that the

74. The general education policy in the District allows students to ***. ***. Student successfully *** in previous school years.[149]

75. The District utilizes researched based instructional strategies in the general education classroom.[150]

76. Student is progressing on enrolled grade level curriculum and ***.[151] As a result, the District concluded that it would be inappropriate to pull Student out of the general education classroom for instruction on a modified curriculum.[152]

77. Student's initial ARDC meeting was on May ***, 2016.[153] Therefore, Student's IEP goals and objectives were not in place for a full school year at the time of the due process hearing during May of 2017. Nonetheless, Student made good progress on Student's goals and objectives.[154] The *** goal included a mastery level of 70%, and Student had obtained a 60% mastery level by April of 2017 on one objective, and mastered the second objective with 80% mastery.[155] Student's *** goal included a 70% mastery of criteria.[156] Student mastered the *** objective with 70% mastery, and was close to mastery of the *** objective with 60% mastery.[157]

78. The special education teacher gathered information from Student's teachers to update Student's IEP progress reports.[158] She spoke to all of Student's teachers on a weekly basis regarding Student's academic and nonacademic performance in school.[159] She testified Student is making progress commensurate with Student's peers ***.[160] None of Student's teachers recommended to her that Student should receive instruction in the special education resource classroom instead of the

[149] Tr. at 286, 305.
[150] Tr. at 733.
[151] Tr. at 765, 776-778, 832-835.
[152] Tr. at 765-767, 836.
[153] RE4.
[154] RE11.
[155] RE11 at 1-2.
[156] RE11 at 3-4.
[157] RE11 at 3-4.
[158] Tr. at 212.
[159] Tr. at 224, 227-228.
[160] Tr. at 262.