

DOCKET NO. 218- ,

**§ BEFORE A SPECIAL EDUCATION
§ HEARING OFFICER FOR**

Respondent § THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, ***, b/n/f *** (“Petitioner” or “Student”) brings this action against the Northside Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1482 (IDEA) and its implementing state and federal regulations.

The main issue in this case is whether the

A. Continuances and Extension of Decision Due Date

There were two continuances of the hearing in this case and three extensions of the decision due date. The hearing was initially scheduled for June 20-23, 2017, with the decision due July 26, 2017. Respondent's request to continue the hearing to August 1-4, 2017, and extend the decision due date to August 23, 2017 was granted for good cause. The decision due date was extended for good cause to September 11, 2017 to allow the parties the opportunity to file post-hearing briefs.

On July 20, 2017, the hearing was continued to August 30, 31, and September 1, 2017, and the decision due date extended by joint request and for good cause to October 20, 2017, so a *** (***) meeting could convene in an ongoing effort to resolve the case informally. The *** meeting was not successful in resolving the issues in this case.

The decision due date was extended by joint request to October 27, 2017 so the hearing

after the IEE was completed.

II. DUE PROCESS HEARING

The due process hearing convened August 30, 2017 through September 1, 2017. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's legal counsel Elizabeth Angelone. Idris Motiwala, also with the Cuddy Law Firm, entered an appearance as Petitioner's co-counsel on September 5, 2017.

Respondent continued to be represented by its legal counsel Elvin Houston. In addition ***, Assistant Director of Special Education – ***, attended the hearing as the school district's party representative. Both parties filed written closing arguments in a timely manner. The Decision in this case is due October 27, 2017.

III. ISSUES

A. Petitioner's Issues

Petitioner confirmed the following IDEA issues for decision in this case:

1. Free appropriate public education (FAPE): 2016-2017 school year. Whether the school district failed to:
 - a. include proper and timely present levels of performance and/or meaningful and measurable goals and objectives in Student's Individualized Educational Program (IEP);
 - b. include appropriate IEP goals and programming for Student's behavioral counseling, and social skills needs, including the need for in-home services;
 - c. track Student's progress towards mastery of IEP goals during the 2016-2017 school year;
2. FAPE: IEP Proposed for 2017-2018 school year: Whether the school district's proposed IEP is reasonably calculated to provide Student with the requisite

appropriate. The school district argues

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demonstrated by a student as opposed to using a diagnostic category in developing a set of behavioral interventions.²⁷

12. Student first enrolled as *** grader in the school district ***,²⁸ A 30 day temporary placement meeting was held on ***. Student's mother attended the transfer meeting. The group agreed on Student's placement at *** – *** setting comparable to the *** placement.²⁹

- Student's behavior at school.⁴⁵ ***. Students receive academic instruction but the *** classroom also focuses on behavioral needs.⁴⁶
22. Student received specialized instruction in *** and *** for *** hours per day in the *** special education class and *** of *** instruction per week. In addition, Student received in-class support for *** in a general education setting for *** minutes per day. The teacher collected and documented Student's response to instruction and anecdotal behavior data as Student worked toward mastery of IEP goals.⁴⁷
23. In early November 2016 Student received *** from *** (***).⁴⁸ ***. ***.⁴⁹
24. The REED was completed on November ***, 2016.⁵⁰ The ARD met on November *** to review the REED. Behavioral data collected by the teacher from August to November 2016 was reviewed. The evaluation confirmed Student's language delay in the area of expressive and pragmatic language.⁵¹ The school district conducted an evaluation to determine whether Student met eligibility as a student with a specific learning disability (SLD) but Student did not meet the criteria.⁵² Another ARD convened on December ***, 2016. Student's mother was unable to participate in the ARD but gave permission for the ARD to proceed without her. ***.
25. The December 2016 ARD added Speech Impairment (SI) as an eligibility classification in the areas of expressive and pragmatic language. Measureable and objective communication goals and speech/language services were added to Student's program. Present levels of academic achievement and functional performance (PLAAFPs) were updated to reflect Student's current progress in all areas. Although Student made progress towards mastery of Student's February 2016 IEP goals the ARD deferred to a parental request not to revise them. A set of accommodations were added for academic instruction and for the State of Texas Assessments of Academic Readiness (STAAR) and benchmark testing.⁵³ PWN was sent to Student's mother on December ***, 2016.⁵⁴
26. ***. ***. The *** evaluation diagnosed Student with *** and ***. The *** evaluator concluded that although Student met some of the clinical criteria for an Autism Spectrum

⁴⁵ R.5:20; I: 97.

⁴⁶ P. 19; I: 97.

⁴⁷ P.19; R.13:513; I: 103.

⁴⁸ R.7:46.

⁴⁹ P. 73.

⁵⁰ Stipulations of Fact 3 and 4 (SOF).

⁵¹

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***.⁷⁸

41. The teacher and *** collected data on Student's behavior each day through the ***.⁷⁹ Data collection in combination with teacher input and teacher observation are necessary in formulating IEP goals and monitoring a student's academic achievement and functional performance.⁸⁰ Student *** for exhibiting ***.⁸¹
42. Student could not ***.⁸² Student did not *** in the classroom from January to March 2017 although Student did ***. By the *** day Student was engaged in the classroom, followed directions, and was on task for the whole day. The teacher noticed Student's *** behavior often occurred after Student ***. Student would ***.⁸³
43. *** was not noted as a negative behavior on *** because it was not distracting or harmful to others.⁸⁴ However, Student's *** behavior was also task avoidance behavior.⁸⁵ Student's behavior at *** included ***, and being inattentive at times.⁸⁶ ***.⁸⁷
44. Student adjusted quickly to the classroom and got along well with Student's classmates. Student responded well to the routine. ***.⁸⁸ ***.⁸⁹ Student generally demonstrated appropriate behavior in the classroom at ***.⁹⁰
45. Student exhibited appropriate ***.⁹¹ The special education teacher never had concerns that Student ***.⁹² The special education teacher is familiar with ***. The teacher never saw Student engage in anything that suggested Student was ***.⁹³ The teacher never

⁷⁸ III: 595-596, 597.

⁷⁹ R. 14:16; III: 500, 503.

⁸⁰ I: 26.

⁸¹ R. 14:19; III: 504-507.

⁸² III: 507.

⁸³ R. 14:16, 18; III: 501, 503, 509, 586.

⁸⁴ R. 14:20; III: 506.

⁸⁵ P. 41; P.51:6.

⁸⁶ III: 580-581.

⁸⁷ III: 585.

⁸⁸ III: 509-510.

⁸⁹ III: 512-513.

⁹⁰ III: 519; III: 519.

⁹¹ III: 513.

⁹² III: 514.

⁹³ III: 515.

- ***. Student never appeared to be ***.⁹⁴
46. Student participated appropriately in *** social skills lessons. Student gave good solutions to social problems discussed in the lessons.⁹⁵ The teacher used a social skills curriculum to provide the training.⁹⁶ The social skills training supported Student's use of language to label and communicate feelings, teach alternative behaviors, coach problem-solving and role play the consequences of behavior.⁹⁷
47. The speech therapist also worked with Student on social skills for the development of language under the IEP.⁹⁸ Student was resistant to participating in ***. The speech therapist then ***.⁹⁹
48. Student worked independently and engaged in the academic activities of the classroom.¹⁰⁰ At times, particularly with *** tasks, Student required prompting. Student asked for help appropriately. The *** provided support.¹⁰¹ Student had difficulty with ***. The teacher ***. ***.¹⁰² The OT provided Student with training on ***.¹⁰³ Student responded well to the ***.¹⁰⁴
49. Student improved Student's ability to ***.¹⁰⁵ ***. Student enjoyed using ***.¹⁰⁶ Student also had access *** in the classroom.¹⁰⁷ Student made progress *** from 2016 to 2017.¹⁰⁸
50. The teacher used a *** to assess Student's *** skills.¹⁰⁹ By March 2017 Student was

⁹⁴ III: 586-587.

⁹⁵ III: 511-512.

⁹⁶ III: 594.

⁹⁷ P.32:14

⁹⁸ P.32: 5-6; III: 578-579.

⁹⁹ III: 579.

59. OT and speech/language therapy services were proposed at the March ***, 2017 ARD. The proposed schedule of the related services was from March ***, 2017 to March ***, 2018.¹³⁶ OT and speech were provided through collaborative sessions in the classroom and in integrative sessions through conferences, modeling, and/or observation. Student's mother agreed with the continued placement at *** but disagreed with the proposals for OT and speech. The parties also disagreed as to whether Student needed Extended School Year Services (ESY).¹³⁷
60. Sometime around ***, 2017 Student transitioned into another special education classroom at ***.¹³⁸ The second classroom included *** other students and was also staffed by a special education teacher and ***.¹³⁹ The IEP designed at the March *** ARD was implemented in the second classroom.¹⁴⁰ The second classroom also followed a very structured daily routine.¹⁴¹ Social skills training through the use of a social skills curriculum continued to be part of the daily routine.¹⁴²
61. Student responded well to changes in routine in the second classroom.¹⁴³ At times Student ***.¹⁴⁴ ***.¹⁴⁵ ***.¹⁴⁶
62. *** was noted by the special education teacher on the daily communication log.¹⁴⁷ It is possible Student's *** is reinforced when task demands are removed.¹⁴⁸ However, Student was on task for the majority of every school day for the remainder of the 2016-2017 school year.¹⁴⁹
63. Assessments confirmed Student demonstrated some fine motor deficits.¹⁵⁰ Student was

¹³⁶ P. 34:22-23.

¹³⁷ P. 34:27.

able to ***. Student continued to exhibit issues with *** in class ***.

was doing, Student's needs, and about various issues as they arose.¹⁶² The campus counselor, OT, and other school district staff also communicated with Student's mother about Student.¹⁶³

69. Student's mother received IEP progress reports in June 2016, December 2016, and March ***, 2017 from the special education teachers at *** and ***.¹⁶⁴
70. On May ***, 2017, an ARD convened to review the counseling and dyslexia assessments. The school district proposed a counseling goal directed at Student's need to learn coping strategies when Student became upset, frustrated or angry. Although the ARD agreed Student qualified for counseling it could not reach consensus on counseling goals. The ARD tabled a decision on whether Student qualified for dyslexia services pending results from an agreed upon IEE. The ARD also discussed goals to support Student's ***.¹⁶⁵
71. The ARD re-convened on May ***, 2017. The ARD agreed Student qualified for counseling as a related service and for dyslexia services based on the recent assessments. The May *** ARD also increased summer 2017 ESY to *** weeks.¹⁶⁶
72. The May ***, 2017 ARD discussed Student's placement for the upcoming 2017-2018 school year. The ARD agreed Student would begin the year at ***. The ARD planned to reconvene after the *** grading period to determine if Student was ***. The ARD agreed on a "****" goal; i.e. Student would need to ***.¹⁶⁷
73. The IEP developed in March 2017 and implemented thereafter continued to be proposed for Student's 2017-2018 school year up through the date of the next annual ARD in March 2018. The set of accommodations and related services, including OT and speech/language therapy designed in March 2017, were also to continue until the next annual ARD in March 2018.
74. The May ***, 2017 ARD reached consensus on a dyslexia program for the upcoming 2017-2018 school year and agreed to the proposal of *** sessions of counseling for *** minutes per session and counseling goals. The plan was to revisit Student's counseling goals at the beginning of the upcoming school year. Dyslexia and counseling services were added to the IEP for the upcoming 2017-2018 school year.¹⁶⁸

¹⁶² P. 51.

¹⁶³ P.51: 28-29, 42, 44, 46, 48-49.

¹⁶⁴ R.15:1-4, 5-9.

¹⁶⁵ P. Ex. 40; II: 419-420.

¹⁶⁶ P.43.

¹⁶⁷ P.43:2, 6.

¹⁶⁸ P. 43, 22; II: 442-444.

75. An IEE was undertaken by a licensed neuropsychologist/LSSP beginning in April 2017. The purpose of the IEE was to confirm whether Student exhibited a specific learning disability. The IEE included a review of educational records, parent interview with Student's mother, review of previous testing, a school observation conducted on the first day of summer school in June 2017, behavioral observations in the IEE examiner's office, and attempted formal assessment. The IEE Report was issued on July ***, 2017.¹⁶⁹
76. The IEE examiner attempted testing in her office. Although Student initially appeared to adjust well to the assessment environment Student's negative behaviors of task refusal and *** began to escalate after the first 25 minutes of testing. Student became ***.¹⁷⁰
77. The IEE examiner was unable to reach a conclusion as to whether Student demonstrated a specific learning disability.¹⁷¹ Student was oppositional ***

81. ***. ***. ***.¹⁸¹

C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.¹⁸² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

2009).

2. Individualized on the Basis of Assessment and Performance

The evidence showed the IEP implemented during the relevant time period was individualized on the basis of assessment and performance. Petitioner complains the school district failed to utilize proper and timely PLAAFPS in formulating IEP goals for Student. Petitioner also complains the IEPs did not include measureable goals and objectives. Petitioner also argues the school district failed to track Student's progress towards mastery of IEP goals.

The evidence showed otherwise. The teachers prepared current PLAAFPS based on their review of Student's performance through teacher assessment and observation including, for example, the use of ***. The evidence showed Student's IEPs were revised to reflect Student's progress towards mastery of IEP goals. IEP goals were measureable and objective. Student's IEP was revised on the basis of the REED completed in November 2016. As part of the REED the school district conducted a speech/language assessment. Objective and measureable communication IEP goals were formulated, in part, on the basis of that assessment as well as behavioral data. An OT assessment was the basis for services and accommodations to address Student's fine motor deficits.

Behavioral data collected by the teachers was used in designing and revising, as needed, Student's BIPs. The results of the FBA were used to revise Student's BIP. Student's IEP included accommodations and supports (such as ***) based on both formal and informal assessments. Student's program was revised in April 2017 on the basis of counseling and dyslexia assessments. The evidence showed the school district did track Student's progress towards mastery of IEP goals through administration of the ***, classroom performance, and behavioral data collection.

The IEP designed and revised on the basis of assessment and performance in March, April, and May 2017 was proposed for implementation through March 2018 of the upcoming 2017-2018 school year.

3.

and showed improvement in the acquisition of *** this past school year.

6. Conclusion as to FAPE

Petitioner did not meet Student's burden of proving the school district failed to provide Student with FAPE during the 2016-2017 school year. Schaffep

conferred Student with the requisite educational benefit from this holistic perspective.

are “related services” as defined by the IDEA. Michael Z, 520 F. 3d at 300, 301.

Other factors to consider include, but are not limited to, whether the student was placed at the private facility for educational reasons and whether the student’s progress is primarily judged by educational achievement. If, upon analysis as a whole, the residential placement is primarily oriented towards enabling the student to obtain an education, the hearing officer must then weed out inappropriate treatments from the appropriate; i.e., reimbursement is only available for treatments that are related services as defined by the IDEA. Michael Z., 530 F. 3d at 301.

2. Residential Placement Test Applied to the Facts

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- burden of proof on this issue. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176; Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017); CypressFairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245 (5th Cir); Schaffer v. Weast, 546 U.S. 49 (2006); 34 C.F.R. §300.101 (a).
2. Respondent proposed a free, appropriate public education reasonably calculated to provide Petitioner with the requisite educational benefit for the 2017-2018 school year. Petitioner did not meet Student's burden of proof on this issue. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176; Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017); CypressFairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245 (5th Cir); Schaffer v. Weast, 546 U.S. 49 (2006); 34 C.F.R. §300.101 (a).
 3. Petitioner's placement in the special education classroom on the Respondent's self-contained special education campus was the least restrictive environment for Petitioner for the 2016-2017 school year. Daniel R.R. v. El Paso Ind. Sch. Dist., 874 F. 2d 1036 (5th Cir. 1989); 34 C.F.R. §300.114.
 4. Petitioner's proposed placement for the 2017-2018 school year in the special education classroom on the Respondent's self-contained special education campus is the least restrictive environment for Petitioner. Daniel R.R. v. El Paso Ind. Sch. Dist., 874 F. 2d 1036 (5th Cir. 1989); 34 C.F.R. 300.114. Petitioner did not meet Student's burden of proof that Student required a residential placement for an educational purpose. Schaffer v. Weast, supra; Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286 (5th Cir. 2009); 34 C.F.R. § 300.34 (a)(c)(5).
 5. Respondent conducted timely and appropriate evaluations of Petitioner, including a timely and appropriate Functional Behavior Assessment during the 2016-2017 school year. 34 C.F.R. §§ 300.303; 300.304; 300.305; 300.307; 300.530 (e)(f)(1)(i).
 6. Respondent complied with all procedural requirements under the IDEA including providing Petitioner with timely IEP progress reports, Prior Written Notice, and with an opportunity for meaningful participation in the development of Petitioner's IEP. 34 C.F.R. §§ 300.322; 300.323 (e); 300.513 (a)(2)(ii); 19 Tex. Admin. Code § 89.1050(g).

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's requests for relief are **DENIED**.

SIGNED October 27, 2017.

IX. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any