

DOCKET NO. 014-SE-0918

STUDENT, B/N/F PARENT,  
Petitioner

v.

SANTA ROSA INDEPENDENT  
SCHOOL DISTRICT,



## II. DUE PROCESS HEARING

The due process hearing was conducted January 24, 2019. Petitioner continued to be represented by Student legal counsel Sonja Keen and for purposes of the hearing was assisted by her cocounsel Yvonnilda Muniz of the Law Offices of Yvonnilda Muniz. In addition, Student's mother, \*\*\* attended the hearing. Respondent continued to be represented by its legal counsel Heather Rutland and Abraham Brandtutu c

### III. ISSUES

#### A. Petitioner's Issues

Petitioner raised the



## IV. REQUESTED RELIEF

## A. Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. The hearing officer determine the Student was denied FAPE.
2. The hearing officer determine the school district failed to evaluate Student in all suspected areas of disability.
3. The school district develop an appropriate IEP, which includes any needs associated with Student's\*\*\* and ADHD.
4. The school district have a nurse or other medically licensed individual participate in Student's Admission, Review, & Dismissal (ARD) committee meetings and regularly update Student's IEP with respect to Student's \*\*and ADHD including any \*\*. The school district shall train staff about Student's\*\*\* and ADHD.
5. The school district provide Student's parent meaningful participation at future ARD meetings by ensuring her receipt of documents at least 5 days before the meeting, a copy of any document discussed at meetings, and a copy of any document completed at the ARD meetings at the same time as it is logged into any electronic IEP system and available to staff.
6. The hearing officer determine the Student was denied FAPE because the school district failed to ensure Student had a legally compliant IEP and received meaningful academic and nonacademic benefit.
7. The school district release Student from the DAEP and not in the future for Student because it does not provide Student FAPE or alternatively ensure the DAEP includes a licensed special education teacher at all times Student is sent to DAEP.
8. The school district provide private, individualized, outside counseling at the school district's expense for two IEP years.
9. The school district provide private, individualized tutoring at the school district's expense (including transportation costs) for the timeframe equivalent of February 2016 to the completion of this case by decision of the Special Education Hearing Officer.
10. The school district provide all listed accommodations, modification, and interventions as they are listed in Student's IEP/BIP and ensure that each accommodation and modification is objective and measurable for purposes of tracking implementations.

11. The school district provide Student a revised IEP, consistent with the IEE results, that includes goal/objectives and services that provide meaningful educational benefit and are based on Student's disability.
12. The school district provide Student direct instruction from a licensed special education teacher in the areas of reading, math, writing, and other core subjects (such as science and social studies) and transition services.
13. The school district provide Student with compensatory education in an amount equal to a full school day program from February 2016 forward.
14. The school district correct Student's disciplinary records and provide a corrected copy to Petitioner parent.
15. Any other relief the Hearing Officer deems necessary and just.
16. The hearing officer find Student's parent and Student have administratively exhausted pursuant to the IDEA, for purposed of any 504 or ADA action in other forums.
17. The hearing officer find Petitioner the prevailing party.

#### B. Respondent's Requested Relief

Respondent requests the hearing officer to dismiss any claims arising outside of the scope of IDEA and any claims that arose outside of one year prior to the filing of the complaint by Petitioner.

### V. FINDINGS OF FACT

#### STUDENT'S EDUCATIONAL HISTORY

1. Student enrolled in the school district as a \*\*\* grade the 2013-2014 school year<sup>1</sup>. In 2011, Student was determined eligible for § 7123 of the Education Law.

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3. Special Education Services for the school district provided by the \*\*\* Cooperative (Co-op). The Co-op consists of \*\*\* school districts with a shared services arrangement. The Co-op is headed by the Special Education Director. The Co-op does not supervise teachers, only diagnosticians, speech pathologists, and Specialist in School Psychology (LSSP), and other licensed special education providers.
4. On November \*\*\*, 2014, the \*\*\* Co-op conducted a psychological evaluation on Student and Student met the criteria for \*\*\*. Student displayed the following characteristics which adversely affect Student's educational functioning: inappropriate types of behavior or feelings under normal circumstances and a general Student showed defiance and impulsivity, which is consistent with Student's diagnosis of ADHD. ADHD is characterized by increased levels of inattention, behavioral activity, and impulsivity which often disturbs others and result in rule violation.<sup>5</sup> \*\*\*. The current information indicated the presence of a \*\*\*.<sup>6</sup>
5. The recommendations of the 2014 psychological included the following: the ARD committee determine Student's ability for special education; continue special education counseling; if Student continues to \*\*\*, inform the physician to address possible \*\*\*; use of different tools to remind Student to stay on task; use of logical consequences as a disciplinary technique; use of a behavior plan to address specific behaviors; and ensure home and school have the same expectations for Student.<sup>7</sup>
6. The school district completed a Full Individual Evaluation (FIE) of Student on January \*\*, 2015. At the time of the evaluation, Student was a \*\*\* grade the school district. Student's overall general intellectual ability was in the average range. The Woodcock-Johnson Normative Update Test of Achievement Edition was administered to Student to measure Student's academic achievement and oral language abilities. Most of Student's scores were in the average range; however, Student was in the low average range for reading comprehension, broad mathematics, and math calculations.<sup>8</sup>
7. The 2015 FIE indicated Student did not require to access grade level curriculum because Student displayed no physical ailments that prevented Student from accessing the classroom or utilizing school computers. Student's vision and hearing were within the normal range.<sup>9</sup> The FIE acknowledged Student had a prior diagnosis of ADHD, which Student was \*\*\* at the time of the evaluation.<sup>10</sup> The FIE recommended the ARD

<sup>4</sup> Transcript Volume IV at 503 (referred to hereafter as T.V. \_\_\_ at \_\_\_).

<sup>5</sup> PE 2 at 17.

<sup>6</sup> RE 24 at 317.

<sup>7</sup> RE 24 at 318-9.

<sup>8</sup> RE 26 at 325-6.

<sup>9</sup> RE 26 at 327-8.

<sup>10</sup> RE 26 at 323.





progress reports, which was concurrent with the report card scheduled. Student was scheduled to take \*\*\* at the school district.<sup>24</sup> Student's IEP contained goals for all of Student's classes at \*\*\* ISD and the school district.<sup>25</sup> Student started \*\*\* ISD on September \*\*, 2017 for \*\*. <sup>27</sup>

12. The September \*\*, 2017 IEP contained a statement of Student's present levels of academic achievement and functional performance (PLAAFP) for physical, behavioral, discipline, functional, and academic. Student was receiving grade level instruction in all classes in the general education classroom.<sup>28</sup> The ARD committee reviewed Student's most recent FIE, psychological, BIP, STAAR tests, information from Parent, information from Student, and information from school personnel to develop Student's<sup>29</sup> IEP. PLAAFPs area snapshot of how a student is doing at the time of the IEP. Student participated in this ARD meeting.<sup>30</sup> Parent attended the ARD, signed receipt for procedural safeguards, signed receipt of Prior Written Notice, and waiver of the 5 day waiting period to implement the IEP!
13. Student's counseling goal for the 2017-18 school year was that Student will learn to utilize coping skills to use for 85% of the school day to prevent walking off and the use of aggressive behaviors. The following objectives were included: Student will learn and demonstrate self-calming techniques to manage Student's mood, behavioral choices, and prevent aggressive behaviors in 4 out of 5 daily situations; Student will learn to identify and differentiate between good and poor behavioral choices in 7 out of 8 daily situations;

consequences immediately and consistently. Progress reports were to be provided every 6 weeks. Staff was to use a point sheet to document Student's positive behavior.<sup>34</sup>

15. During the 2017-2018 school year, Student received ~~\*\*\*~~ discipline referrals.<sup>35</sup> Student received ~~\*\*\*~~.<sup>36</sup>
16. On ~~\*\*\*~~, 2017, Student ~~\*\*\*~~. On ~~\*\*\*~~, 2017, Parent received notice of expulsion hearing for ~~Section 11~~ ~~\*\*\*~~, 2017 infraction.  
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19. Student was placed in DAEP on \*\*\*, 2017 based on the \*\*\*, 2017 MDR assignment.<sup>46</sup> Student never went to the JJAEP and was assigned to the DAEP for the remainder of the 2017-2018 school year instead of the JJAEP assignment.<sup>47</sup> Student returned to regular classes from the DAEP on \*\*\*, 2018 during the 2018-19 school year.<sup>48</sup>
20. \*\*\*, \*\*\*, \*\*\*, 49
21. Parent emailed the school principal on \*\*\*, 2017 and expressed her concerns about disorganization and lack of communication within the school district administration.<sup>49</sup> She requested a copy of Student's schedule, information on who provide instruction, copies of all work Students assigned and weekly grades in the parent portal system in the DAEP.<sup>50</sup> Parent would text with the Director of Student Services about Student.<sup>51</sup>
22. An additional change of placement ARD was held on \*\*\*, 2017. Student's placement was officially changed to the DAEP. Parent attended the meeting with her advocate. Parent signed the IEP acknowledging receipt of Prior Written Notice waiving the 5-day waiting requirement prior to implementing the ARD decisions. Procedural safeguards were provided to parent.<sup>52</sup>
23. On \*\*\*, 2017, Parent wrote an email to the school district's superintendent. She was concerned that school district employees were discussing confidential information on Facebook about Student's discipline issue from 2017. Parent requested Student's current special education case manager be removed due to the post.<sup>53</sup>





33. Parent disagreed with the IEE providers the school district suggested. One person on the list was no longer in business and the two others were friends or former coworkers of the Director of Special Education for the \*\*\* Co-op.<sup>80</sup> Parent was provided IEE operating guidelines from the school district. The guidelines state steps to request an IEE, which include providing the name of the proposed evaluator to the school district to allow the school district to contract directly with the evaluator.<sup>81</sup>
34. Parent never notified the school district of the name of the IEE provider for the school district to contract with.<sup>83</sup> Parent fB9 58-4( )JTA7o8 Tc -0.058-4(t)-6(k-4( ) 2.04-9.1(F)-7.5(F)-7.4(I)

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45. The school district starts \*\*\*ne296 parent, student, sr, s

51. Parent participated in ARD meetings and assisted in developing the IEP and BIP.<sup>127</sup> Teachers and administrators<sup>128</sup> emailed each other multiple times about Student. The emails contained reminders for teachers to see Student at DAEP, put Student's grades in parent portal, teacher updates on Student progress, and setting ARD meetings.
52. \*\*\*

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- regarding Student's \*\*\*condition for those providing services while Student was in the DAEP.<sup>156</sup> The school district attempted to obtain a completed OHI form from Student's neurologist for \*\*\*; however, Student never sent a completed form to the school district.<sup>157</sup>
62. Student had \*\*\*through the school district in October 2013 and January 2014, which Student failed.<sup>158</sup> Student passed the \*\*in November 2015.<sup>159</sup> Student also had a \*\*\*on \*\*\*, 2017 and failed.<sup>160</sup> The school nurse spoke to parent and informed parent was planning on taking Student to a \*\*evaluation at a private clinic.<sup>161</sup> The school district does not have \*\*\* on staff. If a student fails \*\*\*, the school district informs the parent and it is the parent's responsibility to take the student to the doctor.<sup>162</sup>
63. Student has history of \*\*\* or difficulty staying awake. Student reported this himself in counseling.<sup>163</sup> Student's case manager would find Student in \*\*DAEP at times and he would \*\*\* and get Student motivated.<sup>164</sup> Student's \*\*\* teacher would confront Student about not doing problems some times and Student would say Student was tired \*\*\* or had spent the morning reading or writing.<sup>165</sup> Student reported to the evaluator for the May \*\*\*, 2018 reevaluation that Student often stays up late \*\*\*.<sup>166</sup>
64. Parent previously filed a request for a special education due process hearing on February 20, 2018. The case was dismissed without prejudice on April 6, 2018.
65. Student's behavior has improved.<sup>168</sup> Student is described as bright and capable.<sup>169</sup> Student is a high functioning student, "very" independent and intelligent.<sup>170</sup>

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<sup>156</sup> JE 12 at 238.

<sup>157</sup> T. V. IV at 504

<sup>158</sup> JE 12 at 237.

<sup>159</sup> JE 12 at 234.

<sup>160</sup> JE 12 at 239.

<sup>161</sup> T. V. I at 4748.

<sup>162</sup> T. V. I at 4850.

<sup>163</sup> JE 17 at 604.

<sup>164</sup> T. V. VI at 706707.

<sup>165</sup> T. V. VI at 781.

<sup>166</sup> JE 7 at 134.

<sup>167</sup> PE 30.

<sup>168</sup> T. V. IV at 725.

<sup>169</sup> T. V. IV at 778.

<sup>170</sup> T. V. IV at 699.



year. No evidence was provided of any ARD meetings or Notice of Procedural Safeguards prior to the September \*\*, 2017 ARD. Student has been enrolled in the school district since 2011.

When a school district delivers a copy of IDEA procedural safeguards to a parent the statute of limitations period for IDEA violations begins regardless of whether the parent later examines the text to acquire actual knowledge of procedural rights. The simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights. *IDEA El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp 2d 918, 945 (W.D. Tex. 2008) *quoting* *Id.*, 591 F.3d.417 (5<sup>th</sup> Cir. 2009)

Petitioner filed a Due Process Complaint on February 20, 2018. At minimum, that is the date by which Parent knew or should have known about the alleged action that serves as the basis for the hearing request because the same issues were brought up in the current case, parent had a year from February 20, 2018 to file and did so by filing this case on September 17, 2018 within the one year limitation period. The relevant time frame is the 2017-2018 school year to present facts from prior school years are relevant and may be used as background information to understand Student's educational program.

#### B. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, email) F3( (al)3 2.5 ) F3( TD (

*Sch. Dist. v. Rowley*, 458 U.S. 176, 18889, 200201, 203204 (1982).

### C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>171</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Yeague Ind. Sch. Dist. v. Todd L.*, 999F.2d 127, 131 (5<sup>th</sup> Cir. 1993). In this case, the school district was obligated to provide Student with FAPE during the 2017-2018 school year and the current 2018-2019 school year and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for the school year. The burden of proof is on Petitioner to show the school district did not do so.

### D. Identification

The School District has an affirmative duty to identify, locate, and evaluate all children with disabilities residing within its jurisdiction who may need special education. 20 U.S.C. § 1412(a)(3) *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp.2d 918, 9459 (W.D. Tex. 2008). This affirmative duty is known as a school district's "Child Find" obligation. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128, 300.220. Under Texas law, a special education referral is required as part of a school district's overall regular education referral or scree



OHI for \*\*\*, \*\*\*, and \*\*\*. Petitioner did not include \*\*\* or \*\*\* in Petitioner's original Complaint. The school district agreed at hearing to the issue of OHI

Student was diagnosed with \*\* in 2015. The school district put an emergency plan in place for Student after it was made aware of the diagnosis. Petitioner presented no evidence that Student needs special education services due to Student's diagnosis of \*\*. Student is able to attend school, learn while in school, and succeed academically and socially.

Petitioner argues that Student could benefit from some services to help Student understand Student's diagnosis and any limitations that may come along with it in the future. However, to be eligible for special education services, a student must both have a qualifying disability and be in need of special education services to address the disability, not simply be likely to benefit from special education services. *Alvin Ind. Sch. Dist. v. A.D. ex rel Patricia F.*, 503 F.3d 378, 382<sup>nd</sup> (5<sup>th</sup> Cir. 2007). While it may be true that Student could benefit from education related to Student's \*\*, it does not impede Student's access to Student's education.

Petitioner also argues the School District should have identified Student as OHI for \*\* and ask this hearing officer to declare the Student eligible for services under Student failed a couple of \*\* assessments provided by the school district. The school district does not have \*\* on staff, it notifies parents of a failed \*\* screening and then it is the parent's responsibility to take the child to \*\*. In January 2018, Parent notified the school district Student would have a \*\* soon. At the time of disclosures for the due process hearing, no screening had occurred. At the due process hearing, Petitioner offered no evidence, but it was not admitted due to failure to comply with the disclosure deadline and the fact Respondent was unaware that \*\* occurred. No evidence was presented by any expert that proved or that any \*\* impacted Student's access to education.

In weighing evidence, teacher observations are most instructive when determining the impact a disability, or potential disability, has on a Student's educational performance. *Christopher M. ex rel Lveta McA. v. Corpus Christi Ind. Sch. Dist.*, 933 F.2d 1285, 1292<sup>nd</sup> (5<sup>th</sup> Cir. 1991). No teachers, staff, or administrators who worked with Student indicated \*\* as an issue.

Petitioner's expert diagnosed Student with \*\*\* in December 2018. Many of the attributes of this disorder are similar to ADHD. Petitioner did not include OHI\*\* in Petitioner's Complaint. However, Student has not shown a need for special education related to this disorder. The behavioral issues related to this disorder can be addressed in Student's current counseling goals and BIP.

On this basis, the School District had no reason to suspect Student needed special education services to address \*\*\*, \*\*, or \*\*\*. Moreover, Petitioner failed to produce an OHI form signed by a physician for any of these diagnoses. Without the physician's diagnosis, neither the School District, nor this hearing officer may find the Student eligible under OIA. Tex. Admin. Code §89.1040 (a)(8). Therefore, Petitioner did not meet Student's burden of showing the School District failed to properly identify Student for \*\*\*, OHI\*\*, or \*\*\*.

#### E. FAPE

##### The Four Factors Test

The Fifth Circuit has articulated a four factor test to determine whether a Texas district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated. *Cypressbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to

guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

1. Individualized on the Basis of Assessment and Performance

First,

Student's academic progress.

Each IEP for Student had PLAAFPs. Petitioner claims the district failed to write the PLAAFPs in a meaningful or measurable way to determine baselines and accurately track Student's progress. A baseline is not required under the Federal Regulations for PLAAFPs. 34 C.F.R. §300.320(a)(1). The requirement is a "statement" of the child's present levels of academic achievement and functional performance. The PLAAFPs in Student's IEPs for the relevant time period provide a snapshot of Student's present levels of academic achievement and functional performance in the areas of behavioral, disciplinary, and academic. Student was on grade level, passing STAAR tests, and progressing as stated in the PLAAFPs. PLAAFPs comply with IDEA requirements.

Student originally had goals for academics and behavior. Each academic goal had a list of what skills Student was expected to acquire, how the skills would be measured. State (7)(b)(4)(B) 035210

2017-2018, and 2018-2019 school years. Student made academic progress each of these years and displayed no signs of regression of skills after a school break. ESY was not necessary for Student to access Student's educational program or achieve academically. In addition to no ESY services, Petitioner complains Student did not receive any AT services.

The use of AT or AT services is determined by the student's IEP team on a case-by-case basis if the services are necessary for student to r

Student's interest. The IEP address all of the areas required by state law.

Petitioner argues Student did not receive physical education on a regular basis as other students during Student's time at the DAE. The evidence showed Student participated in physical education on a daily basis. Student only missed PE when the activity for the day was Student is medically not allowed to participate in due to Student's

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year to present. Parent typically agreed with the ARD decision. Parent had an advocate or an attorney with her at 4 of the 7 ARDs she attended. During this time, Parent's main disagreement with Student's services was Student attending the DAEP and Student's confidentiality being potentially violated \*\*\* regarding the DAEP incident. Parent was in frequent contact with the school through emails and with the Director of Student Services via text messages. Parent did express frustration in some of the emails to the school district when she was seeking Student's grades, assignments, and information on Student's level of instruction at the DAEP. The school district personnel worked in a collaborative manner amongst themselves to address any issues brought up by the Parent. The case manager was removed, teachers posted Student's grades, and teachers responded to administration's questions about how Student was performing in the classroom. A parent's disagreement with some part of a student's education plan does not mean the process is not collaborative.

582 F. 2d at 590. The evidence showed Student received more than a *de minimis* educational benefit from the program provided given Student's unique circumstances. *Andrew F.*, 137 S. Ct at 999.

Student passed all of Student's classes and all of Student's STAAR assessments from \*\*\* grade to present. Student's \*\*\* grade \*\*\* teacher said Student was one of his most successful students and Student was talented. Student's teachers indicated Student was successful in class and Student's behavior improved.



Student's IEP was individualized on the basis of assessment and performance. Student was educated in the least restrictive environment, services were provided in a coordinated, collaborative manner by key stakeholders, and Student made academic and non-academic progress. According to the 5<sup>th</sup> Circuit Court of Appeals, the academic and non-academic benefit is the most critical factor in the FAPE analysis. Student was successful academically as shown by Student's grades and passing the STAAR exams. Student was also successful academically as shown by the decrease in Student's discipline referrals and teachers' comments that Student had improved and was not a behavior problem.

#### F. Procedural Safeguards

Petitioner did not meet Student's burden on proving the school district violated Student's Parent's procedural rights under the IDEA. Under the IDEA, a denial of FAPE can only be found if the procedural violations: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or caused a deprivation of educational benefit.



ADHD and not OHI-\*\*\*, OHI-\*\*\*, or \*\*\*. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128, 300.220.

2. Student was provided FAPE during the relevant time period and Student's was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Endrew* 137 S. Ct. 988.
3. Respondent complied with parental procedural rights under the IDEA. Any procedural violations did not impede Petitioner's right to FAPE, significantly impede the parent's opportunity to participate in decisionmaking regarding the provision of FAPE or cause a deprivation of educational benefit. 34 C.F.R. §§ 300.503(a)(c), 300.504(a)(d), 300.513(a)(2).
4. All of Petitioner's claims arising under any laws other than the IDEA are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503(a); 300.507, 19 Tex. Admin. Code § 89.1151(a).

#### VIII. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are DENIED.
2. Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are dismissed as outside the jurisdiction of the hearing officer.

All other relief not specifically stated herein is DENIED.

SIGNED March 22, 2019.



**Kasey M. White**  
Hearing Officer

