DOCKET NO. 056-SE-1018

STUDENT, B/N/F PARENT AND PARENT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
SWEETWATER INDEPENDENT SCHOOL DISTRICT ,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, by Student's next friends, Parent and Parent (collectively, Petitioner or Student), brought this action against the Sweetwater Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., and its implementing state and federal regulations. Petitioner requested a due process hearing on October 31, 2018 with notice issued by the Texas Education Agency the same day.

The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) by failing to develop an appropriate Individualized Education Program (IEP) reasonably calculated to enable Student to make progress in light of Student's unique circumstances.

The hearing officer concludes Student's IEPs for the 2017-2018 and 2018-2019 school years were reasonably calculated to enable Student to make progress in light of Student's unique circumstances and Student was not denied a free, appropriate public education.

A. Continuances

One continuance was granted and the decision due date was extended twice. The hearing

II. DUE PROCESS HEARING

The due process hearing was conducted in person on January 23-25, 2019 and reconvened by telephone on January 31, 2019 to hear testimony from one previously unavailable witness. The hearing was recorded and transcribed by a certified court reporter.

Petitioner was represented by Petitioner's legal counsel, Devin Fletcher. Student's parents, *** and ***, attended the hearing. Respondent was represented by its legal counsel, Holly Wardell, with the assistance of co-counsel, Amy Foster. ***, Director of Special Education for the District, was the party representative.

III. ISSUES

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Petitioner seeks the following items of relief:

1. A finding Student was denied a free appropriate public education.

2. An order for an IEE at District expense in all areas of suspected disability and need by an independent, qualified provider.

3. An order directing Student's ARD Committee to convene and develop a new IEP for Student that is ambitious in light of Student's unique circumstances and:

   a. Accurately reflects Student's present levels of academic achievement and functional performance;

   b. Includes appropriate goals and short-term objectives that address Student's academic and behavioral needs;

   c. Includes appropriate related services, including speech therapy, social skills, occupational therapy, counseling, and a one on one aide;

   d. Identifies appropriate teaching methodologies that will be used to address Student's academic needs;

   e. Identifies appropriate behavior methodologies and includes a plan to implement positive behavioral methodologies;

   f. Includes parent training to support implementation of the student's IEP;

   g. Provides services in Student's least restrictive environment; or

   h. In the alterative, if the District is unable to provide the above, placement in a private or non-public day school at District expense.

4. Compensatory services, including services Student was entitled to but did not receive, including any academic, social skills, or other services determined necessary by the IEE.

5. Reimbursement and/or funding for costs incurred by Student's parents for evaluations, tutoring, and mileage.

6. Any additional relief deemed appropriate by the hearing officer.

V. FINDINGS OF FACT

1. Student is *** years old and in *** grade. Student is eligible for special education as a student with *** and ***.[1] Student lives with Student's parents in Sweetwater, Texas and enjoys ***.[2]

2. Student was initially referred for a special education evaluation due to a possible speech/language delay.[3] An FIE dated May *** [illegible]

instruction two times per week. Instruction would be in small groups or one on one.[17]

13. Student has good attendance and attends school regularly. Student has an even disposition generally and is a happy kid.[18] Student's social skills are a strength and Student enjoys being around Student's peers, is personable, and has many friends.[19]

14. Student has good behavior at school, understands classroom rules, and follows school rules. Student works hard and wants to learn. Student understands oral directions and follows teacher directives.[20] Student has never had a disciplinary referral or suspension.[21] Student requires slightly more redirection, but Student's behavior is consistent with ***.[22] Student achieved a year end score of *** during the 2017-2018 school year. ***.[23] Student's behavior does not impede Student's learning or that of others and Student did not require a Behavior Intervention Plan.[24]

15. The District uses *** to assess academic strengths and weaknesses and measure reading abilities for all students. The program generates graphs and a scaled score for each reading domain, allowing for evaluation of progress over time. *** results are one data point used to form Student's PLAAFPs and track overall reading progress.[25]

16. October 2015 and May 2016 *** testing in Overall Reading showed a grade equivalent of ***.[26] In May 2017, the fall semester of Student's ***, Student was moderately below grade level, performing at a grade equivalent of the ******.[27] Results from January 2018 and May 2018 testing reveal a grade equivalent of the *******.[28] The ups and downs in Student's *** scores are to be expected and stem from Student's short-term memory and long-term retrie, vet 0.004 Tc-2( )-u0-8()ade level

23. Student required speech therapy in a small group setting and would otherwise receive instruction in a combination of the general education and resource classrooms. Student's presence in the general education classroom did not interfere with the learning of others. Student's Schedule of Services called for 303 minutes per day in the general education classroom and 80 minutes of instruction in Reading and Math in the general education classroom, or 40 minutes daily in each subject. Student would also receive speech therapy for 30 minutes twice a week.[40]

24. The District uses *** Diagnostic software to establish academic benchmarks for all students.[41] Student's Math *** testing in September 2017, early in Student's ***, yielded a scaled score of **, in the *** percentile as compared to same age peers nationally.[42] An October 2017 *** Reading test, Student's Oral Reading Fluency score of *** revealed Student would likely be unable to read any grade level text.[43] *** These scores indicate Student had only an emerging understanding ***.

25. Student's IEP call for Student's parents to receive progress reports when report cards are issued, ***.[44] The District uses software to generate progress reports, so a given report may reflect both the most recent *** period and previous *** grading intervals. Some data on a progress report will therefore reflect a prior goal.[45]

26. Progress is reported in a percentage and reflects Student's accuracy for the goal at the time it is reported. Progress on a goal is tracked in a session where the goal is worked on.[46] The reports included a Progress Code (percentage of progress towards achieving goal), yes/no check boxes indicating whether sufficient progress was being made, whether further action was needed, and a space for general comments.[47] Individual speech goals were targeted every other session. Session documentation and participation detail Student's percentage of goal achievement.[48]

27. Student's first progress report after beginning *** is dated October ***, 2017 and reflects progress on the goals established in January 2017.

***. In Math, Student demonstrated ***% mastery in achieving the goal of reading, writing, and ***.[49]

28. Student's November ***, 2017 progress report reflects *** % progress in achieving Student's functional goal, ***% progress in Student's English Language Arts and Reading goal, and ***% mastery of Student's Math goal.[50] The December ***, 2017 progress report reflected mastery of Student's functional and English Language Arts and Reading goals. Student demonstrated ***% mastery of Student's goal in Math.[51]

29. The District provided software generated progress reports on Student's Speech *** and *** goals. Speech specific progress reports were prepared on the following dates: October ***, 2017; November ***, 2019; December ***, 2017; February ***, 2018; April ***, 2018; May ***, 2018; September ***, 2018; November ***, 2018; November ***, 2018.[52]

30. Student was in the fall semester of *** grade when the ARD Committee convened for Student's annual review on December ***, 2017.[53] Student's parent expressed concern about Student's reading abilities.[54]

minutes twice a week. During the 2018-2019 school year (August ***, 2018 – December ***, 2018) Student would receive instruction in the general education classroom for 263 minutes per day, with 40 minutes of instruction each in Math, Language Arts, and Reading in the resource setting. Student would continue to receive Speech Therapy for 30 minutes per day twice a week.[63]

40. The District provided Student's parents PWN dated December ***, 2017 that reflected Student's annual ARD Committee meeting was held to review Student's annual progress and the option of dismissing Student from special education was rejected. The District considered Student's FIE, parent and teacher information, observations, and health information in making any proposals or refusals.[64]

41. *** data from January 2018 and May 2018 found Student was at significant risk of not meeting grade level expectations in Overall Reading with a grade equivalent of ***. Student achieved Ability Index scores of *** and ***, respectively (*** percentile).[65]

42. In *** Math tests in January 2018 and May 2018, Student received scaled scores of *** and ***, respectively, placing Student in the *** and then *** percentile as compared to same age peers nationally. Both scores reflected a grade equivalent of ***, or performance comparable to an average *** grader after the start of the school year. The percentages of mastery of skills were: *** (***% , ***%); *** (***% , ***%); and *** (***% , ***).[66]

43. In a *** Reading test in January 2018 Student's skill set scores indicated Student was a *** with a scaled score between *** and ***. Student's estimated Oral Reading Fluency (words correct per minute) was ***. In a *** Reading test in May 2018, Student's skill set scores indicated Student was a *** Reader with a scaled score between *** and ***. Student's estimated Oral Reading Fluency (words correct per minute) was ***.

44. Student achieved the following sub-domain scores in the January 2018 and May 2018 *** tests, respectively: ****.[67] These scores reflect improvement across all domains. By the end of Student's *** grade year, Student was a ***.[68]

45. A *** Diagnostic Reading Report of testing in October 2017, January 2018, and May 2018 reflects progress in each domain.[69]

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[63] R. Ex. 11 at 15.

[64] R. Ex. 11 at 20.

[65] P. Ex. 3 at 4-5, 6-7; R. Ex. 12 at 16-17, 18-19.

[66] P. Ex. 2 at 3, 4; R. Ex. 12 at 23, 24.

[67] P. Ex. 2 at 1, 2; R. Ex. 12 at 21, 22.

[68] Tr. at 416.

[69] R. Ex. 14 at 30; Tr. at 438-39.

at the meeting.[79] The family's advocate and the District's attorney attended.[80] Student's goals in Math, English Language Arts, and Reading were modified and work samples were added as a method of evaluating progress at parental request.[81] Student's father reported Student wants to *** and the family is encouraging Student to achieve that goal.[82]

51. Student was evaluated *** at parental expense. The evaluation found Student was *** years behind Student's peers in reading. Student's parents shared thCID 64 >>B[o.9.4 03Tj -0.i0 p09

The District further declined to treat the August 2018 ARD Committee meeting as Student's annual review because it was not due for four months. The District agreed to consider the request for an IEE, but noted it had not yet conducted an OT evaluation because data did not suggest Student required OT. Student also did not exhibit behavioral concerns *** that would suggest an FBA was needed.

56. The PWN declined to move Student to a self-contained classroom for Science and Social Studies given the steady progress on Student's reading goals and ability to access the curriculum with supports and accommodations. Specific concerns included decreased access to the full range of curriculum, reduced educational opportunities with nondisabled peers, and limiting exposure to typically developing peers for language development. The District again offered to conduct an updated FIE. Petitioner declined. [TJ -0.004 Tc 0.Tc 0.Th4 T1(ur)3(e).Tc 0pan</MCID

61. Independent examiner qualifications were provided to the parents, which included a 100 mile geographichhn unless there are no avlabe providers.[96] Numerous individualswithin the 100 mile geographic a5mit2(h)ion(h)ere quified to evue Student .[97] The Districid not file a due procss compl2(h)aint against Student's parents after refusing to evue Student for OT and conduct an FBA.[98]

62. On September ***, 2018 the parents provided the District the names of two proposed independent evaluators. One proposed evaluator was from ***, Texas and the other from ***, Tex – both outside the Districs 100 mile geographichhn . The second proposed evalu ur also did not have the professional credentials required by the District's IEE criteria.[99]

63. The District provided Student's parents the names of additional evaluators who met Districu2(h)iifichns, both educational diagnostician.[100] In a Septemb r ***, 2018 correspondence, the p2(h)rents expressed diss2(h)tisfac(h)tion with the sm2(h)il numbe(h)r of p evuors provided and the District's geoh2phicalcriteria and renewed the requt fo comprehensive testing of Student.[101] The Districafirmed its p revious position regarding the geographichhn and scope of testing in correspondence on Sptember ***, 2018.[102]

64. In Prior Written Notic d2(h)ted September ***, 2018 the District declined the parental requt for priv2(h)te tutoring 2(h)t Districxpense because of Student's progress in reading and slow but steady m2(h)stery of Sudent's IEP go2(h)is. The(h) District 2(h.1(is)0.9(o)2(c)h)ited Student spached instruc(h)tion by a crtified Spech Educhn teac(h)her, not ator. The(h) District also refused to reimburse Student's parents for advocate fees and time off work to 2(h)ttend ARD Committee(h) mee(h)tingsoTs n9ipro-2(8 .9(nt)9)Tj 0.002 [(e)6x15oL1(te)-4(r).tingpoth m

evaluator

use simulated mental imagery to solve problems, Student scored *** (Lower Extreme range). Each score, with the exception of Fluid Reasoning, reflected relative weaknesses.[113]

71. Student was administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), an assessment of academic ability. In Math Concepts and Application, which entails applying math principles to real life situations, Student scored *** (Low range). In ***, or basic reading skills, Student scored

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***.

82. In Math, Student could ***. ***.

83. Student responded to teacher directive, required some cues to stay on task, and completed Student's work. Student did not require behavioral or functional goals. Student was able to access the grade level TEKS in Science and Social Studies in the general education classroom with accommodations. Goals in each subject were developed. Student's Math goal was revised to ***.[128] The meeting was adjourned pending the results of the IEE.[129]

84. Student can ***. ***. Student knows ***. Student works on ***, a research-based reading program every day.[130] Student can ***.[131] Since the beginning of the 2018-19 school year, Student has learned to ***. Student has progressed from ***.[132]

85. Student has made slow progress academically and is progressing at a slower rate than Student's peers due to Student's disabilities.[133] Even with several different teaching methods, ***.[134] Fluctuations in progress and skills are common for a student with disabilities like Student. It is expected Student will score lower on academic testing than Student's non-disabled peers and Student's level of academic performance is commensurate with Student's Full Scale IQ. Even intensive instruction would not close the gaps between Student and Student's non-disabled peers. No type of instruction can remedy Student's ***.[135]

86. Student has made slow, yet tangible progress in speech, particularly with ***. Student's speech is now ***. Student's speech is impacted by Student's *** and repetition is needed to master goals.[136] Student continues to struggle with certain ***. Student has almost mastered ***. At the January 2019 annual ARD Committee meeting, Student's speech goal was updated to require ***% *** and the ARD Committee hopes Student will reach or surpass this by the end of the annual period as this skill becomes more solidified in Student's speech. Strategies used with Student by District speech related service personnel are based on peer-reviewed research.[137]

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[128] R. Ex. 14 at 4, 8; Tr. at 664-665.

[129] R. Ex. 14 at 22; Tr. at 153.

[130] Tr. at 296, 648-649, 650, 676.

[131] Tr. at 658.

[132] Tr. at 465, 686.

[133] Tr. at 98, 419.

[134] Tr. at 411.

[135] Tr. at 99-100, 127, 613-614.

[136] Tr. at 351-352, 357, 366-367, 370, 381.

[137] Tr. at 356, 375-376.

87. The District inquired about parental concerns. Student's parent or parents attended and participated in ARD Committee meetings and were given opportunities to ask questions and did so. The District provided the parents drafts of documents at meetings.[138]

88. Student's parent recalls her *** reporting incidents of bullying at school to Student as early as 2014.[139] The principal he tthe ent

VI. STATUTE OF LIMITATIONS

Under the IDEA, a parent may file a due process complaint on any matter relating to the

A. Duty to Provide a Free, Appropriate Public Education

Students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The District must provide a FAPE to all children with disabilities residing within its jurisdiction between the ages of three and twenty-one. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). The District must provide these students specially designed, personalized instruction with sufficient support services to meet their unique needs in order to receive an educational benefit. Instruction and services must be at public expense and comport with the IEP developed by the Student's ARD Committee. 20 U.S.C. § 1401(9); Bd.

D. Individualized Education Program Requirements

In developing an IEP for a student with a disability, the ARD Committee must consider his or her strengths, parental concerns for enhancing the student's education, results of the most recent evaluation data, and academic, developmental, and functional needs. A student's IEP must include a statement of PLAAFPs, including how a student's disability affects his or her involvement and progress in the general education curriculum. 34 C.F.R. 300.320(a)(1)(i). For students whose behavior impedes his or her learning or that of others, the IEP must also consider positive behavioral interventions and supports and other strategies to address that behavior. 34 C.F.R. 300.324(a)(2)(i).

The District evaluates academic proficiency of all students with ***

- The nonacademic benefits of regular classroom placement;
- The overall experience in the mainstreamed environment balancing the benefits of regular education and special education to the student; and
- The effect of the student's presence on the regular class, specifically whether the student's behavior so disruptive in the regular classroom that the education of the other students is significantly impaired and whether the student requires so much attention that the needs of other students will be ignored. *Id.* at 1048-49.

No single factor in this non-exhaustive list is dispositive. *Id.* at 1048. The analysis must be an individualized, fact-specific inquiry and requires careful examination of the nature and severity of the student's disabilities, his or her needs and abilities, and the school district's response to those needs. *Id.* The issue of whether the IEP was provided in the least restrictive environment is a relevant factor in making the overall determination whether the school district's program provided the student FAPE. *Daniel R.R.*, 874 F.2d

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education and improvement in every academic and nonacademic area is not required to receive an educational benefit. The issue is not whether the school district could have done more, but whether the student received an educational benefit. Houston Ind. Sch. Dist. v. A.P., 582 F. 2d 576, 590 (5th Cir. 2009). Whether a student demonstrates positive academic and nonacademic benefits is one of the most critical factors in this analysis.

Petitioner's procedural allegations are as follows: Whether the District failed to allow meaningful parental participation in the decision-making process regarding the provision of FAPE to Student by failing to:

a. Provide Student's parents with compliant PWN;

b. Provide timely and adequate progress reports to Student's parents;

c. Conduct appropriate, comprehensive, and timely evaluations of Student; and

d. Provide an IEE in OT and an FBA and impermissibly cap the parents' IEE request and failed to provide a truly independent evaluation.

To prevail, Petitioner must show these procedural violations significantly impeded parental

including a more restrictive placement, but agreed to consider the request for an IEE in PWN provided on August ***, 2018. PWN provided on August ***, 2018 and September ***, 2018 confirmed refusal of several parental requests and agreement to an IEE in the areas of cognitive and achievement testing

The notices served as written communication to Student's parents of the District's proposals and refusals regarding their ***'s special education program. The notices were provided contemporaneously with annual ARD Committee meetings and at other junctures where parental requests were accepted or refused as the regulations required. The District met its obligation as to PWN.

2. Progress Reports

Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA by failing to provide timely and adequate progress reports. Periodic reports to parents of students with disabilities on the progress he or she is making on his or her goals are required under IDEA, such as through the use of quarterly reports, other periodic reports concurrently with report cards. 34 C.F.R. § 300.320(a)(3)(ii).

The District provided Student's parents software generated progress reports in each subject or other area, including speech, where Student had a goal every *** weeks concurrent with reports cards as required by Student's IEP. The reports reflected the percentage of mastery toward a particular goal on the date the report was prepared. There is no evidence Student's

The District imposes a 100 mile geographical limit on independent evaluators to facilitate student observation and ARD Committee participation. The District will exceed this limitation if there are no available providers within the geographical limitation. While Student's parents may have preferred an evaluator from outside the 100 mile limit or one with other qualifications, numerous qualified providers were available in the area, rendering the geographical limitation reasonable. Letter to Bluh, 211 LRP 7086 (OSEP 1980). Student's parents also did not prove Student has unusual behavior or other disability that would necessitate an exception to the District's IEE criteria. Letter to Parker, 104 LRP 30069 (OSERS 2004).

The District never conducted an OT evaluation of Student because Student did not demonstrate an academic need for OT. At school, Student is able to *** Student is independent in Student's personal care needs. Student demonstrates *** has good spatial awareness. Student is able to access the curriculum with Student's current fine motor skills and does not otherwise demonstrate deficits in sensory processing, fine motor, or visual motor skills impeded Student's academics.

The District has also never conducted an FBA of Student because Student's behavior did not warrant one. Student has good behavior in school and has never been disciplined or suspended. Student consistently achieves high marks in the area of Conduct. There was no evidence Student's behavior interferes with Student's learning.

Not only did Student not show a need for either an OT evaluation or FBA, the District has not first conducted evaluations in those areas with which the parent can disagree. The parental request for IEEs in OT and behavior are therefore not ripe. 34 C.F.R. § 300.502(b)(1). Because the District granted the parental request for an IEE for cognitive and achievement testing, the District did not need to sue Student's parents to defend its evaluation. 34 C.F.R. § 300.502(b)(2)(i).

VIII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proof as the party challenging a student's IEP and educational placement. Schaffer v. Weast, 546 U.S. 49 (2005).

2. Student was provided a FAPE during the relevant time period. IEPs for the 2017-2018 and 2018-2019 school years were appropriately ambitious and reasonably calculated to meet Student's needs in light of Student's unique circumstances. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017).

3. The District did not violate parental procedural rights under the IDEA as to PWN progress reports, or an IEE in areas previously unassessed by the District. 34 C.F.R. § 300.513(a)(2)(ii).

4. The District conducted timely and comprehensive evaluations of Student as required under the IDEA. 34 C.F.R. § 300.304.

IX. ORDERS

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are DENIED.

SIGNED April 1, 2019.

X. NOTICE TO PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code Sec. 89.1185(n).