

DOCKET NO. 128-SE-0119

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, ***, by Student’s next friends *** and *** (“Petitioner” or “Student”), brought this action against the Houston Independent School District (“Respondent” or “District”) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 *et seq.* (IDEA) and its implementing state and federal regulations. The main issue in this case is whether the District failed to fulfill its Child Find duty in a timely manner and whether Petitioner was denied a free, appropriate public education (FAPE) as a result. Petitioner established a Child Find violation and denial of a FAPE beginning in January 2018 through August 14, 2018. Claims that arose prior to January 2018 are dismissed as outside of the one-year statute of limitations as applied in Texas.

II. PROCEDURAL HISTORY

A. Legal Representatives

Student was represented throughout this litigation by Student's legal counsel, Terry Gorman and Chigozie Odediran of the Gorman Law Firm. The District has been represented throughout this litigation by its legal counsel Hans P. Graff, Deputy General Counsel for the District.

B. Resolution Session

The parties conducted a timely, but unsuccessful Resolution Session on January 19, 2019.

C. Continuances

There were no continuances in this case. An amended scheduling order (Order No. 4) was issued on February 1, 2019 after Petitioner requested, and was granted leave to file an amended complaint.

III. DUE PROCESS HEARING

The due process hearing was held on March 26-27, 2019. Petitioner continued to be represented by Petitioner's legal counsel, Terry Gorman, assisted by his co-counsel Chigozie Odediran. Student's parents, *** and ***, attended the hearing. Respondent continued to be represented by its legal counsel, Hans P. Graff. ***, District Senior Manager for Special Education, attended the hearing as the District's party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing, the District made an unopposed request to leave the record open to allow for submission of written closing arguments with the benefit of access to the hearing transcript. The District also proposed an extension of the decision due date to give the Hearing

VI. FINDINGS OF FACT

1. Student is a *** year-old ***.² Growing up Student met all developmental milestones.³
2. Student is a cooperative and happy child who enjoys ***.⁴
3. Student's Mother first suspected a learning disability in 2014 based upon screenings done by Student's *** teacher which revealed Student had an inability or aversion to ***,⁵ that Student was ***,⁶ had difficulty distinguishing ***,⁷ and exhibited other indicators of a possible speech issue.⁸
4. In 2014, Student attended a private ***. During that year,

expectations.¹³

9. Student remained in *** despite the teacher's recommendation that Student *** ***.¹⁴ District administration never informed Student's *** teacher why her recommendation to return Student to *** was not followed.¹⁵
10. Student's teacher began the special education referral process within the first nine weeks of Student's *** year (2015-2016 school year).¹⁶
11. Parent requested a Section 504 Committee meeting on August ***, 2015 (***). Student was referred for a Section 504 evaluation in November 2015 due to concerns Student was having difficulty retaining information, *** letters and single digits, and other concerns raised in a private neuropsychological evaluation from *** completed on October ***, 2015.¹⁷
12. The October 2015 evaluation from *** expressed concern Student was having difficulty *** letters and numbers and retaining information, but the results of the evaluation were inconclusive. "...[Student] is at some risk for later reading and spelling problems. At this point, however, it's too early to know."¹⁸
13. Due to Student's academic difficulties, Student's *** teacher initiated Tier I, II, and III interventions¹⁹ to help remediate academic deficits. The interventions began during the Flegan

Comprehension, Reading Fluency, Math Calculation, and Written Expression.²¹

16. Despite finding Student did not meet the criteria as a student with an SLD, the January 2016 FIE identified deficits in reading comprehension and written expression and found Student met the criteria for dyslexia.²²
17. Parents signed that they received and understood the Procedural Safeguards and Prior Written Notice the District provided in January 2016.²³ The Procedural Safeguards advised Petitioner of their right to file a request for a due process hearing, among other procedural rights.
18. In January 2016, Student began receiving Section 504 accommodations and dyslexia services 4 times per week, for 45 minutes per session.²⁴
19. During ***, Student demonstrated difficulty with reading words on the High Frequency Word Evaluation. Student earned scores of **%, **%, and **%.²⁵
20. Student failed *** and the District proposed Student *** ***. Mother or Parents disagreed with this proposal.²⁶
21. After ***, Student completed summer school in June 2016 and was 12 en r27.46 md (a)6k-1.1ll(a)6 se

determined Student did not need OT.³²

24. On September ***, 2016, Parent consented to a Section 504 re-evaluation to determine whether Student met criteria as a student with impairments of dysgraphia and/or dyscalculia. One year later, on September ***, 2017, Student was determined to be eligible for Section 504 accommodations for dyslexia, dysgraphia, dyscalculia, and a visual disorder.³³
25. Student never received services as a student with dysgraphia or dyscalculia.³⁴
26. The September 2016 Section 504 re-evaluation determined Student continued to struggle with “*** numbers and letters, solving basic math problems, and using correct letter formations and spacing when writing.”³⁵ The Section 504 re-evaluation also noted Student continued to struggle to understand academic concepts, *** numbers, solving simple patterns, *** letters, using correct spacing when writing, recognizing words, and remembering information.³⁶ Furthermore, the 504 re-evaluation also stated Student had difficulty reading words quickly and monitoring for meaning while reading grade level connected text. Specifically, Student was evaluated for Text Fluency (*i.e.*, the ability to read grade level text with meaning within a specific time period) and scored in the *** percentile when compared to students Student’s own age/grade. Student scored in the *** percentile in Comprehension (focused on reading and understanding sentences and paragraphs), Student’s Vocabulary was in the *** percentile, and Spelling was in the *** percentile, as compared to Student’s same age peers.³⁷
27. In May 2017, Student completed ***, receiving four Bs and one A.c t9 SIn 6.58 -1.15 Td [l e aeiShsS.

42. The September ***, 2018 ARD Committee meeting proceeded without Parents in attendance. The District members of the ARD Committee agreed to the District's proposed initial IEP.⁵⁶ The proposed IEP contained measurable annual goals with benchmarks in Language Arts, Mathematics, Handwriting, and Spelling.⁵⁷ The IEP proposed placing Student in both the general and special education (general education setting for Science, Social Studies, and "ancillary time" and special education for Math, Art, Music, ***, ***, and Lunch).⁵⁸ An extensive set of accommodations were included in the proposed IEP.⁵⁹ Direct dyslexia services were to be provided 4 times per week for 50 minutes per session.⁶⁰
43. Parents never consented to the initial provision of special education.⁶¹
44. Student made some, de minimis academic progress between Student's *** and *** years as demonstrated by evaluation data, teacher testimony, STAAR Exam, the High Frequency Reading assessments, and the *** Measures of Academic Progress (MAP) assessment.⁶²
45. Student began attending private *** at *** (***) at the beginning of the current 2018-2019 school year. At the start of the school year, *** administered the MAP standardized assessment which determined Student was in the bottom 3rd percentile for reading and the bottom 10th percentile in math when compared to Student's same age peers.⁶³

VII. DISCUSSION

A. Duty to Provide FAPE

The seminal issues in this case are whether the District timely and adequately evaluated Student and proposed an appropriate initial IEP. Under the IDEA, the District has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional

⁵⁶ JE-12 at 147-48.

⁵⁷ JE-12 at 131-33.

⁵⁸ JE-12 at 138-31.

⁵⁹ JE-12 at 129-30, 140.

⁶⁰ JE-12 at 140.

⁶¹ JE-43 at 4.

⁶² Compare weighted score columns, JE-5 at 25 with JE-8 at 48; Tr. at 454-55 (explaining the weighted scores on the Woodcock-Johnson IV Achievement Test are the only statistical valid measure of academic progress on that instrument).

⁶³ Tr. at 205-06.

boundaries between the ages of 3 and 21. 34 C.F.R. § 300.101(a). The evidence showed, during all relevant time periods, Student was a child with a disability residing within the District's jurisdiction. The District therefore had a duty to serve Student under IDEA.

A free, appropriate public education means special education and related services, and specially designed, personalized instruction with sufficient support services to meet the unique needs of the child in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

B. Statute of Limitations

Respondent asserts the one-year statute of limitations (SOL) should be applied to limit Petitioner's claims and requests dismissal of all claims and requests for relief arising outside the one-year limitations period. 19 Tex. Admin. Code § 89.1151(c).

Petitioner argues Student was not properly evaluated in January 2016 and the January ***, 2016 ARD Committee erred by not identifying Student as a student with a SLD entitled to special education services. Petitioner did not state a position on the SOL.

IDEA provides a parent must request a due process hearing within two (2) years of the date the parent knew, or should have known, about the alleged action that forms the basis of the complaint. However, the two-year statute of limitations may be more or less if the state adopts an explicit time limitation for filing a request for due process hearing. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e); 300.507(a)(2). Texas has adopted such an explicit time limitation -- a parent must file a request for due process hearing within one (1) year of the date the complainant knew, or should have known, about the alleged action that forms the basis of the complaint. 19 Tex. Admin. Code § 89.1151(c); *Tex. Advocates Supporting Kids With Disabilities*, 112 S.W.3d 234 (Tex. App.—Austin 2003, no pet.).

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District, 481 Fed. Appx. 887 (5th Cir. 2012). A failure to timely evaluate for special education is not actionable unless the student is ultimately determined to be eligible for special education services. In this case, the District determined Student was eligible for special education services in August 2018. The question is whether Student should have been found eligible for special education as a student with an SLD sometime prior to August 2018.

The District completed an initial FIE in 2016 and determined Student did not need special education as a student with

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dyscalculia.⁷⁵ The proposed August 2018 IEP identified Student as a student with dyslexia, but did not separately identify Student's dysgraphia and dyscalculia. However, the proposed schedule of services provided special education support in Handwriting for 40 minutes 4 times per week with numerous handwriting accommodations, and math instruction for 75 minutes 4 times per week. The proposed IEP also contained measurable Handwriting and Math goals and objectives to measure progress.

Therefore, because Student's handwriting and math calculation needs are addressed in the proposed August 2018 IEP, there is no need to specifically identify Student as a student with dysgraphia and/or dyscalculia. Those conditions fall within the SLD eligibility category and Student has been identified as a student with a SLD. 34 C.F.R. § 300.8(c)(10).

c. ADHD (Inattentive), *, Unspecified ***, ***, and OHI.**

The 2016 FIE concluded Student did not exhibit significant emotional, behavioral, or attentional problems although Student's attention was below average. The District never evaluated Student for ADHD and the 2016 FIE did not consider attention deficits because it was focused on Student's academic strengths and weaknesses. There was no reason to suspect an attention issue in 2016 until August *** 2018 when the *** diagnostic evaluation diagnosed Student with inattention, learning difficulties, and ***.⁷⁶

Petitioner did not meet Petitioner's burden of showing *** was a suspected area of disability or need prior to August *** 2018—the date of the *** evaluation. *Schaffer*, 546 U.S. 49.

As to the District's alleged failure to identify the *** diagnosed in the 2018 *** evaluation, there is insufficient evidence to support a Child Find violation. The preponderance of the evidence

⁷⁵ JE-39 at 290.

⁷⁶ JE-9 at 075.

does not support a finding *** was a suspected area of disability prior to 2018.⁷⁷ The same is true as to the eligibility as a student with an OHI. Petitioner did not meet Petitioner's burden of proof on this issue. *Schaffer*, 546 U.S. 49.

D. Failure to Provide a FAPE

The second major issue is whether the District failed to propose an IEP that was objective and measurable and demonstrated academic and non-academic progress. Once identified as student eligible for special education, it necessarily follows an IEP was required to address all areas of need. 34 C.F.R. § 300.323(c). Because the District did not complete a second FIE until June 2018 and did not propose an IEP until August 2018, Student was denied the benefit of an IEP from January 2018 through August ***, 2018.

The District must have in effect an IEP for each child with a disability at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, a child's IEP also includes a description of the related services, supplementary support and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, and, the duration and frequency of the services and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

Having found a Child Find violation beginning in January 2018, it follows that without an IEP to address Student's unique circumstances Student was denied a FAPE from January 2018 until August ***, 2018. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

The District's June 2018 FIE and the proposed August ***, 2018 IEP correctly identified Student's SLD and dyslexia, and offered accommodations to address Student's dysgraphia and

⁷⁷ See Tr. at 324. In ***, Student was "doing great socially ... and emotionally."

§§ 300.502(a)(1)-(3), (b)(1). However, a school district may challenge the parent's request for an IEE at school district expense by requesting a due process hearing to show its evaluation was appropriate under IDEA. If the school district's evaluation is appropriate, the parent still has the right to the IEE but not at public expense. 34 C.F.R. § 300.502(b)(2)(i), (3).

2. Limitations on Parental Right to a Publicly Funded IEE

In this case, the District filed a counterclaim to defend the June 2018 FIE. The credible evidence showed the District's 2018 FIE was appropriate under the IDEA and met all of the regulatory requirements. *See*, 34 C.F.R. §§ 300.300, .301, .304, .306. The 2018 FIE also included a review of existing evaluation data as required. 34 C.F.R. § 300.305. The 2018 FIE met the specific additional regulatory requirements for determining whether Student met eligibility criteria as a student with a learning disability. 34 C.F.R §§ 300.307, .309, .310.

The District's counterclaim asserts the June 2018 FIE was aw 1.53d.R

- a. By the ARD Committee when it determines that the school district cannot provide the student with a FAPE at any school district campus, program, or placement. This kind of placement is called a “private placement by a public agency.” 34 C.F.R. § 300.325.
- b. By the student’s parents – this is called “a unilateral private placement” – referring to the parents making a unilateral decision the student needs the private school placement as opposed to the ARD Committee making the placement decision. It is this type of “unilateral” placement that is the subject of “reimbursement” as a remedy.

1. Reimbursement

Reimbursement is an equitable form of relief. This may include not just the tuition, but other fees (such as application fees, assessment fees), the costs of related services (if not covered by tuition), supplies, transportation, etc.

First, was the District's IEP with placement in the public school appropriate? In other words, did it provide a FAPE? If "Yes," the inquiry ends and parent is not entitled to reimbursement. In this case, the answer is "Yes" after August ***, 2018.

Second, if "No," then the Hearing Officer must determine whether the private placement was appropriate. The answer was "No" from January ***, 2018 through August ***, 2018. However, private tuition was not incurred until August ***, 2018 – two weeks after Student was offered an appropriate IEP.

a. First Prong: Was the School District's Program Appropriate?

The first prong of the reimbursement analysis asks whether the District proposed or provided Student with an appropriate program. The failure to properly identify Student's disabilities and offer an adequate IEP prior to August 2018 was a denial of FAPE. The absence of an IEP from January 2018 through August ***, 2018 resulted in an inadequate and inappropriate educational program for Student during this time period. 34 C.F.R. §§ 300.22, 300.323(a).

3. The Four Factors Test

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

- x The program is individualized on the basis of the student's assessment and performance;
- x The program is administered in the least restrictive environment;
- x The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- x Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th 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

4. Private Tuition is Not Reimbursable

As previously discussed, the relevant time period for the amended complaint is January 2018 through August ***, 2018. Student enrolled in *** on August ***, 2018, after the District proposed an appropriate IEP offering a FAPE. Student's right to tuition reimbursement ended when Student was properly identified for special education and offered an appropriate IEP. *Rowley*, 458 U.S. 176 (1982); *Sch. Committee of Town of Burlington, Mass.*, 471 U.S. at 370-371.

G.

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2. The District shall reimburse Petitioner in the amount of \$*** for the 2018 *** IEE.
3. The total out of pocket costs of reimbursement shall be paid within 30 school days from the date of this Decision.
4. The ARD Committee shall convene within 30 school days from the date of this decision to implement Student's IEP and this Final Decision.

All other requests for relief not specifically state in these Orders is hereby **DENIED**.

SIGNED May 24, 2019.



David A. Berger
Special Education Hearing Officer
For the State of Texas

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 § 89.1185(n).