

DOCKET NO. 144-SE-0119

STUDENT

§

§

§ **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner, “Student”, by next friend, “the Parent” filed a complaint requesting an impartial

3. The District violated Student's and Parent's procedural rights.
4. The District failed to conduct a psychological evaluation of the Student timely and appropriately.

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On May 18, 2019, Respondent filed an unopposed Motion for Continuance of the deadline for filing of written closing arguments and an extension of the decision due date for a commensurate number of days due to a family emergency. Based on a finding of good cause for a continuance, the motion was granted by this Hearing Officer on May 20, 2019. As a result, the deadline for filing of written closing arguments was continued to June 7, 2019, and the decision due date was extended to June 21, 2019.

FINDINGS OF FACT

Based on a preponderance of the evidence admitted at the hearing, the Hearing Officer makes the following findings of fact.

1. Conroe Independent School District is a political subdivision of the State of Texas and a duly incorporated Independent School District.
2. Student is a ***-year old ***. At all relevant times, with the exception of October ***, 2018, through November ***, 2018, Student resided with Student's Parent within the jurisdictional boundaries of the District.
3. Student was determined eligible for special education services as Other Health Impaired (OHI) for Attention Deficient Attention Disorder (ADHD) on May ***, 2013. (R. Ex. 6-38). Student received special education services from the District from May ***, 2013 until Student withdrew from the District on October ***, 2018.
4. Beginning on October ***, 2018, and ending November ***, 2018, Student resided at ***, ***. (R. Ex. 23-1).
5. Parent was timely provided with notices of procedural safeguards beginning on ,

8. The first IEE obtained by Parent, a psychological evaluation, was conducted by Dr. ***. (R. Ex. 5-1—35). On the WISC-IV, *** determined that *** full-scale IQ was in the low average range – an ***. (R. Ex. 5-18). He noted Student’s working memory score, a ***, was in the “extremely low range,” ranking in the 2nd-percentile range. Aware of Student’s medical and psychological treatment for a mood disorder, *** also assessed Student’s emotional and behavioral well-being but noted that Student did not present with mood difficulties at school. (R. Ex. 5—3). Dr. *** did not identify Student as a student with an *** ***

24. The IEP was based on the student's present levels of academic achievement and functional performance. Academic goals and objectives were developed. Due to Student's failures on the STAAR examinations, the ARDC determined that the accelerated instruction plan would include "targeted instruction during the school day to address deficit areas." (R. Ex. 3-5). To that end, annual goals and objectives were developed in all core academic areas. Recognizing that grade-level TEKS "exceed Student's present levels of educational performance," the committee considered the least restrictive environment factors for the student's educational placement. The ARDC recommended instruction on a modified curriculum and placement in the resource classroom for core academics, all other classes were in the regular education classroom. (R. Ex. 3)

25. All of Student's *** grade teachers described Student as a very positive person who worked diligently in class, advocated for ***self when needed, and followed all instructions. (Tr. at p. 428 (lines 18-21) (***); Tr. at p. 433 (lines 18-20); Tr. at p. 434 (lines 6-11); Tr. at p. 438 (lines 1-8) (***); Tr. at p. 440 (lines 23-25); Tr. at p. 441 (lines 1-7)) (***); Tr. at p. 489 (lines 8-25) (***); Tr. at p. 511 (lines 19-25); Tr. at p. 512 (lines 1-5) (***); Tr. at p. 519 (lines 23-25); Tr. at p. 520 (lines 1-10) (***); Tr. at p. 529 (lines 11-25); Tr. at p. 530 (lines 1-11) (***)). Student passed the *** STAAR test and was close to passing ***. (R. Ex. 10) (noting mastery of IEP goals in ***); Tr. at p. 507 (lines 3-6) (teacher regarding passing of *** STAAR); Tr. at p. 532 (lines 5-18)).

26. Student was ***. (Tr. at p. 173 (lines 21-24)).

27. In the first-half of *** grade, Student's grades for the first semester ranged from a *** (***) to a *** (***). (R. Ex. 12-2).

28. On November 14, 2017, Student received disciplinary referral, Student's first one ever. (Tr. at p. 566 (lines 17-26)) related to Student's behavior when a substitute teacher was present. (R. Ex. 14) (4/14/18) BFD (Dr. Jess. 78) calling (4/14/18) Tc) 40.06 Tw 03]IT T0 [(r(s, 52)fub)]T52(4) Tj4

the ARD committee, which included Parent, concluded that no additional data was needed, and no new evaluations were requested because the historical data was consistent with Student's current data and Parent did not request new evaluations. (R. Ex.1-35).

32. Parent was notified verbally and in writing that the Parent had a right to request an evaluation "at any point." (Tr. at p. 546 (lines 14-18); R. Ex. 1-36).
33. The ARDC reviewed Student's *** goals, discussed Student's *** strengths and needs and informed the Parent of *** resources (R. Ex. 1-10).
34. Student failed to meet the requirements of the STAAR *** examinations administered (***) in May 2018 at the end of Student's *** grade year. (P. Ex. 11-4).
35. In May 2018, to avoid ***." (Tr. at p. 307 (lines 18-25)); (Tr. at p. 308 (lines 9-12)) (Parent explaining Student "****). ***. (R. Ex. 20-9).
36. Petitioner's expert, Dr. ***, did not appear concerned about the *** incident in isolation because "sometimes people try to get out of things." (Tr. at p. 386 (lines 12-21)).
37. Beginning on August ***, 2018, Student made ***. (R. Ex. 14-1—14-2) (noting additional visits on September ***, 2018 and September ***, 2018). On September ***, 2018, the nurse called the Parent to discuss her concern. (R. Ex. 14-2). In a conversation with the nurse at school, the Parent explained that Student was diagnosed with *** and was having significant *** issues for which the Parent was seeking immediate placement at ***. (R. Ex. 14-2).
38. Parent informed the school counselor of the same information (Tr. at p. 651 (lines 13-19)).
39. Parent testified that the primary source of Student's anxiety was ***. (Tr. at p. 174 (lines 14-25)).
40. On September ***, 2018 Student became disruptive and disrespectful during Student's *** class. When confronted by the teacher, Student ***. The teacher emailed the Parent about the problem. (P. Ex. 28-6). The teacher referred Student to the school counselor. (R. Ex. 19-4; Tr. at p. 608 (lines 23-25)).
41. The *** grade counselor, Ms. ***, first met with Student on September ***, 2018 after receiving an email from Student's *** teacher about Student being upset and acting out in class. She was read an email from Parent to the *** teacher noting Parent's concerns, including the Student's ***, and allegations of bullying. (Tr. at p. 649 (lines 1-12)). Student was *** when Student met with the counselor and when questioned about specifics relating to the alleged bullying, Student did not reveal any information or respond to the counselor. The counselor informed Student that the counselor took bullying very seriously and that Student should let her know if Student encountered any bullying. (Tr. at p. 657 (lines 15-22)).

42. On September ***, 2018 and October ***, 2018, Student's psychologist, Dr. ***, wrote letters recommending *** placement of Student for *** purposes. Dr. *** wrote that Student was diagnosed with ***, had recently developed symptoms of ***, and was experiencing large mood fluctuations. (P. Ex. 5).
43. On or about September ***, 2018, Student reported an alleged *** occurring on ***, 2018, at school by another student attending the school. (Tr. at p. 192 (lines 14-16)).
44. Student's last day of attendance at *** was September ***, 2018. (R. Ex. 19-9).
45. Parent withdrew Student from the District on October ***, 2018. (R. Ex. 17-1).
46. October ***, 2018, Student was admitted to ***, a *** (***) in ***. (P. Ex. 6-27).
47. *** provided Student primarily with *** service to address Student's *** issues. Student was also provided 1,800 minutes weekly specialized academic instruction, *** minutes weekly *** services, and *** minutes weekly *** services. (P. Ex.6-26).
48. On October ***, 2018, Parent sent an email to the District requesting that the District schedule an ARD for Student's *** from *** back to the District and to add suggestions from the *** to Student's IEP. (P. Ex. 28-22). On October ***, 2018, Parent spoke with ***, CISD diagnostician, who informed Parent that she was not sure if the District could convene an ARDC meeting at that time because Student was still enrolled at the *** and Parent was unsure when Student would return home. Ms. *** inquired when Student was expected to return, asked about the types of services the *** was recommending and asked Parent to send the District information about the services recommended by the ***. (Tr. at p. 667 (lines 11-25)).
49. The Parent contacted the *** and requested a list of recommended services but did not provide the district with the recommendations. (R. Ex. 22-27) (Tr. at p. 668 (lines 2-6)).
50. The District did not provide Parent with prior written notice (PWN) that the District would not schedule an ARD as requested by Parent on October ***, 2018. (Tr. at p. 185 (lines 4-7)).
51. On November ***, 2018, CISD received a request from Parent for an IEE. (P. Ex. 28-24). On November ***, 2018, Parent filed a request for a due process hearing.
52. The District did not send prior written notice to Parent explaining why the District was not going to grant the IEE requested by Parent. (Tr. at p. 77 (lines 15-23)).
53. Dr. ***, a Licensed Psychologist with Psychological Solutions in *** performed a psychological evaluation of Student on November ***, 2018 during the period of time that Student was in ***. The report recommended continued *** placement for student. (P. Ex. 4). The report was provided to the District on November ***, 2018. (P. Ex. 4-1).

54. Student was discharged from *** at *** in *** on November ***, 2018 and returned home to reside within the boundaries of Conroe ISD.
55. From November ***, 2018, through January ***, 2019, Student enrolled in *** (***). The program was held Monday through Friday 9:00-4:00 and on Saturday from 9:00 -2:00. (P. Ex. 10)
56. The District learned on November ***, 2019 that Student was *** and that Student was not receiving educational services at ***. The Director in an email to the Parent on November ***, 2019, offered to facilitate Student's having school work at *** to give Student an opportunity to ***. (R. Ex. 16-1).
57. On November ***, 2018, December ***, 2018, and January ***, 2019, the District offered to perform a FIE of Student. On each occasion, Parent refused the offers (R. Ex. 16-1; 16-15; 16-21) and accessed private assessments. (P. Ex. 14; P. Ex. 2).
58. On January ***, 2019, the District filed a Request for Due Process Hearing requesting permission to conduct a reevaluation of Student in the absence of Parental consent. The District claimed that a reevaluation of Student was necessary due to Student's changed circumstances. On January 24, 2019, *Student v. Conroe ISD* Docket No. 144-SE

and lines 1-5)). Ms *** did not see any programming provided at *** that CISD could not provide. (Tr. at p. 688 (line 21)).

72. Ms *** is familiar with the educational programming recommendations made for Student by Dr. *** in his report. CISD can provide the educational programming recommended by Dr. ***. (Tr. at p. 688-689 (lines 22-25 and 1-3 and line 16)).

DISCUSSION

I. The Texas One-Year Statute of Limitations

Respondent asserts the defense of statute of limitations. Texas has a one-year limitations period for filing due process hearing litigation. 34 C.F.R. §300.511; 19 Tex. Admin. Code 89.1151. There are two exceptions to the one-year period. Petitioner pled one of the two exceptions: the District withheld information that was required to be given and/or made misrepresentations to the family. Petitioner presented no evidence to support a finding in Petitioner's favor. The one-year statute of limitations therefore applies in

152-SS (W.D. Tex. Filed Aug. 10, 2007); *Alvin Indep. Sch. Dist. V. A.D.*, 46 IDELR 221 (5th Cir. 2007).

C. Standards of IEP Appropriateness

The Fifth Circuit has addressed the meaning of the *Rowley* standard in light of the Supreme Court's recent decision in *Endrew F. v. Douglas Cnty. Sch. Dist. Re-1.*, 137 S. Ct. 988 (2017). While *Rowley* sets the floor of opportunity for an eligible student, the Fifth Circuit concluded that the *Endrew F.* decision does not displace or differ from the Circuit's own standard set forth in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). This case must be analyzed in accordance with the holding in *Michael F.*

The Court in *Michael F.* determined that a student's IEP is reasonably calculated to provide meaningful educational benefit when:

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

The Fifth Circuit in *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012), explained that the focus of the IDEA is on the child's "whole educational experience, and its adaptation to confer 'benefits' on the child." In *Endrew F.*, the Supreme Court held schools must offer an IEP reasonably calculated to enable a child to make appropriate progress in light of the child's circumstances. See 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV). Every IEP begins by describing a student's present level of achievement, including explaining "how the child's disability affects the student's involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). It then sets out "a

withdrew Student from the District on October ***, 2018 and enrolled Student in a *** in *** on October ***, 2018.

On October ***, 2018, Parent sent an email to the District requesting that the District schedule an ARD for Student's *** from *** back to the District and to add suggestions from the *** to Student's IEP. On October ***, 2018, Parent spoke with ***, CISD diagnostician, who informed Parent that she was not sure if the District could convene an ARD at that time because Student was still enrolled at the *** and Parent nddlle77aoB not 0 Tc -0.03 Tw w (***)T37.91 -1.7ot 0 Pn0rk. T

returned to the geographical boundaries of the District, the District acted within a reasonably prompt time to attempt to hold an ARDC meeting and to offer a reevaluation.

Accordingly, Petitioner's claim that the District failed to reevaluate Student and determine whether Student needed psychological services was not proven. While it is true that the District committed a procedural violation of the IDEA by failing to provide Parent with prior written notice of the reason for failing to schedule an ARD as requested by the Parent, the violation did not result in a denial of FAPE to Student because the District was not able to reevaluate or provide services to Student after Student was withdrawn and removed from the District, was not able to obtain Parent's consent even after being informed, in November 2018, that Student had returned from the ***, and had not received the recommendations from the *** that the District had requested from the Parent on October ***, 2018 .

VI. Petitioner Did Not Prove That Bullying Caused A Denial Of FAPE.

Although Petitioner alleges CISD did not protect Student from bullying, harassment, discrimination and/or retaliation, the evidence does not support the conclusion that Student was the victim of such actions, much less that the District failed to respond to any such reports. The only teacher who testified that she received a report of bullying was Student's *** grade *** teacher who referred the allegation to the counselor. The counselor immediately called Student to her office to discuss the issue. Student did not open up about the allegation but was soon withdrawn from school and enrolled in ***. Although the Parent testified to concerns during Student's *** that she characterized as "bullying," the evidence does not show that it impacted Student's educational progress. Petitioner therefore failed to prove that bullying caused a denial of FAPE.

VI. Petitioner Did Not Prove That Petitioner Is Entitled To Reimbursement For Private * Placements.**

addressing a child's *** difficulties, as it was for Student, the public school is not responsible for the placement.

VII. Petitioner Did Not Prove Petitioner Is Entitled To Reimbursement for Placement of Student At * Private School**

Petitioner argues that the District's IEP in place when Student returned to Texas from the *** in *** was inappropriate and Student is therefore entitled to reimbursement for expenses for private school. The IDEA permits the Hearing Officer to award reimbursement of private school expenses if the district did not make a FAPE available to the child in a timely manner prior to the child's enrollment in the private school. 20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R. §300.148(c). To be eligible for reimbursement, the Parent must establish that 1) the school denied the child a FAPE, and 2) the private placement is appropriate. *Richardson Indep. Sch. Dist. v.*

3. The ARDC shall complete a Functional Behavior Assessment (FBA) of Student and develop a Behavior Intervention Plan (BIP) for Student.
4. Any and all other requested relief is **DENIED**.

SIGNED on the 21st day of June, 2019.

Sandy Lowe
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision made by the Hearing Officer, or the performance thereof by any party, may bring a civil action with respect to the issues