DOCKET NO. 229-SE-0419

STUDENT	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENT & PARENT	§	
Petitioner		R5 Td ( )Tj /TT2 1 Tf 8 0.002 Tc 0 Tw 4.11 0 Td ( )A-P8

Petitioner was represented by Meera Krishnan and Elizabeth Angelone, attorneys with Cuddy Law Firm PLLC in Austin, Texas. Respondent was represented by Jamie Turner and Kelly Janes, attorneys with Walsh Gallegos Trevino Russo & Kyle P.C. in Austin, Texas. The hearing was recorded and transcribed by Ann Berry, a duly certified court reporter,

At the close of the hearing, and on the record, the parties requested a continuance and extension of the decision due date to receive the transcripts of the hearing and file written closing arguments. The requests were granted by the hearing officer. Both parties timely filed their closing

represented the student Respondent requested various sanctions, including the striking of Petitioner's pleadings and an award of attorney fees and costs allegedly incurred by Respondent because of conduct of the Petitioner's attorneys.

Findings of Fact

1. Petitioner, ***, is a *** student who resides with Student's

8. The student was *** that occurred on May ***, 2018 outside of school and not at a school related activity. (R. 11).

9. On May ***, 2018, the student's DAEP teacher spoke with the student's father by phone. The father told the DAEP teacher that the student would not be back at the district school. (R. 8).

10. A MDR ARDC meeting was held on August ***, 2018 to address the student's *** outside of school and not at a school related activity. The student's father attended the meeting. The MDR ARDC, including the student's father, agreed that the conduct was not related to the student's disability and was not a result of the district's failure to implement the student's IEP. (R. 11).

11. The MDR ARDC determined that the

18. On November ***, 2018, the parents requested a evaluation of the student to determine if Student qualified for special education eligibility as a student with an Emotional Disturbance. (R. 21). The parents failed to return parent information forms and refused consent for the district to access medical information from the student's doctors. The district's partial FIE, lacking sufficient information to determine emotional/behavioral disability, was reported on January ***, 2019. (R. 29)

19. The student's annual ARDC convened on March ***, 2019. The incomplete January ***, 2019 FIE was reviewed as well as the district's proposed IEP for the student for the 2019-2020 school year. ***. The parent disagreed with the incomplete FIE and with the proposed IEP. The ARD dismissed and was scheduled to reconvene on April ***, 2019. (R. 32)

20. On April ***, 2019, the parents filed a request for due process hearing. The parents did not notify the district of the litigation. (Tr. 1146).

21. On April ***, 2019, the annual ARDC was reconvened to try to come to consensus on the areas of disagreement. The parent continued to disagree with the incomplete FIE and proposed IEP. The parents did not inform the district of the pending due process hearing. The parents requested an IEE and requested residential placement for the student. The student did not attend the ARDC meeting. (R. 32: 2225).

22. On May ***, 2019, the district proposed completing the partial January ***, 2019 FIE to determine whether evidence of other disability existed and if in-home training was needed. The parents had at this time returned parent information, [illegible]

30. The *** assessment conducted by Dr. *** was reviewed and considered in the August ***, 2019 ARDC. (R. 52:5)

DISCUSSION

I. The Governing Legal Standards

A. Burden of Proof

Petitioner has the burden of proof to establish the inappropriateness of the educational plan proposed by the district. As the Supreme Court has explained, "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 62 (2005). Applying this principle, the Fifth Circuit held that "the IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it." See White v. Ascension Parish Sch. Bd., 343 F.3d 373, 377 (5th Cir. 2003). Consequently, Petitioner bears the burden of proof to overcome the presumption that the plan proposed by the district was appropriate. See id. This includes the burden of proof with regard to harm or deprivation of educational benefit. Texas Student v. Conroe ISD, TEA Dkt. 016-SE-0908 (January 12, 2009).

B. FAPE

The IDEA requires that all children with disabilities who are in need of special education and related services are identified, located, and evaluated and that a practical method is developed and implemented to determine which children [illegible]

II. Petitioner Failed to Prove That the Student's IEP Was Not Appropriate.

Application of the *Michael F.* factors to the evidence in this case supports the conclusion that the school district's program was appropriate. Although the student did not make the progress that either the school or family desired, that was not the result of an inappropriate IEP.

The student's IEPs in place during the 2017-2018 and 2018-2019 school years adequately addressed Student's needs. (R4).

- The student's IEP was based on evaluation data.
- The student was provided the accommodations to address academic difficulties and target behaviors.
- The student was evaluated to determine the function of Student's behaviors.

In this case, the student was provided with a FAPE in accordance with the controlling legal standards. Student's IEPs were reasonably calculated for Student to receive an educational benefit, and Student made some meaningful amount of educational progress, more than de minimus, during the time when Student attended school and agreed to engage in Student's education. In March 2019, when the student informed Student's teachers that Student wanted to ***, Student actively sought support, completed assignments, and completed grade-level coursework in Student's area of disability.

The student's father testified that he could not make the student go to school if Student did not want to go. (Tr. 725). And the record shows that the student was frequently absent from school. (R. 15). The student's teachers and counselors testified that when Student did attend, the student would often *** and refuse to do Student's assignments or ***. (Tr. 140, 460, 447, 501, 503). The student reported ***. (R. 12:15; Tr. 220, 1013, 1065).

Even Petitioner's own expert witness, Dr. ***, testified she could not begin her evaluation as scheduled because the student *** demonstrated symptoms of *** when Student finally arrived for the evaluation (Tr. 1014:14-22). The student's teachers responded to *** by frequently checking on Student, offering verbal encouragement, and presenting incentives and positive behavioral supports as outlined in the student's IEP.

During the summer of 2019, the student was offered summer school [illegible]

Behavior Intervention Plan

administered by the district's ***. (Tr. 463). The ***goals are based on the student's ***and the

confirmed that the FIE was based upon assessments and evaluations that were not discriminatory or biased; were administered in the child's native language; were used for the purpose for which the assessments are valid and reliable; were administrated by trained and knowledgeable personnel; and were administered consistent with testing instructions. (Tr. 911-931; R. 26). The district's evaluation was tailored to assess specific areas of educational need. The assessments were chosen as to accurately reflect the student's aptitude, regardless of communication or physical difficulties. The district's evaluation identified the student's special education and related services needs. However, the district was not able to fully explore all areas of eligibility until summer 2019 when the parents finally returned information forms, consented to the release of medical information, and participated in the evaluation. Therefore, the district's FIE of the student was not completed until August ***, 2019. The evidence indicates that the district's completed FIE complies with the evaluation requirements of IDEA. Therefore, Petitioner failed to meet Student's burden of proving that the district's evaluation of the student was inappropriate

Regardless of the student's disability eligibility, the student's IEPs for the relevant time period addressed Student's needs. As required under IDEA, the student's IEPs were created in response to need, not eligibility area. (Tr. 1136-7). For example, although the student did not have an updated physician statement regarding OHI ADHD until June 2019, the relevant IEP addressed the need for the student to have accommodations for Student's ADHD symptoms.

The district provided in April 2018 counseling services as well as positive behavior and ADHD and ADH

all areas of eligibility until August ***, 2019. The parents were the main cause of the delay because until June 2019, they refused to return completed parent information forms and refused to consent to the release of medical information from private physicians and psychologists treating the student, all of which were necessary for the district to complete its evaluation.

On April ***

discovery and the hearing process by engaging in various improper tactics, including misrepresentations to the district and to the hearing officer that obstructed the district's efforts to obtain testimony from the student. The district requested an award of attorneys' fees and costs allegedly incurred as a result of the misconduct of the Cuddy attorneys.

Authority of Special Education Hearing Officers to Impose Sanctions

In Texas, special education officers are authorized to "make any . . . orders as justice requires, including the application of sanctions as necessary to maintain an orderly hearing process." 19 TAC 89.1170(e). The Cuddy attorneys have not disputed that the hearing officer has the authority to impose sanctions on attorneys for discovery abuse or for abuse of the hearing process.

Relevant Facts and Analysis

Respondent's Motion for Sanctions, filed on September 18, 2019, pp. 5-11, is substantially accurate in its description of the hearing record on key relevant facts supporting the district's argument that the Cuddy attorneys did unlawfully abuse the discovery and hearing process. Beginning in April 2019, the Cuddy attorneys filed multiple pleadings in this case as "Attorneys for Petitioners" without any statement that they did not represent the student whom they listed as a party bringing this action. Their filings consistently were made in the name of the student, who was referred to as "Petitioner ***," represented "by next friends" *** and ***, Student's parents.

Moreover, the Cuddy attorneys have acknowledged that the parents brought

accepting such service on the student, which made it much more difficult for the district to secure the student's testimony, which the hearing officer had authorized the district to take. The record therefore supports the conclusion that the Cuddy attorneys first disavowed their representation of the student at a time when it assisted their tactical goal of preventing the district from taking the student's testimony. Such conduct constitutes abuse of the hearing process and arguably also abuse of discovery.

However, the conduct of the Cuddy attorneys did not materially delay the hearing. It also did not affect the outcome. Even without the student's testimony, the district prevailed on all of Petitioner's claims. Although the district alleges that the conduct of the Cuddy attorneys caused them to incur additional attorney fees and costs, it provided no supporting evidence. As a result, the district has not shown that it is entitled to an award of fees or costs. Accordingly, the district's motion for sanctions must be denied

CONCLUSIONS OF LAW

1. The student

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that all relief sought by Petitioner is DENIED and that all Petitioners' claims are DISMISSED with Prejudice. Respondent's Counterclaim is GRANTED, and the district's completed August 7, 2019 FIE of the student, including the incomplete January 30, 2019 FIE, is hereby declared to be appropriate

SIGNED on November _____, 2019

_____
Sandy Lowe
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer 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 district court of the United States. 20 U.S.C. §§1415(i)(2) and (3)(A); 19 Tex. Admin. Code § 89.1185(n).