SOAH DOCKET NO. 701-21-2259.IDEA
TEA DOCKET NO. 176-SE-0521

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Student, by next friends Parent and Parent (Student or, collectively, Petitioner) brings this action against the Highland Park Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations.

The main issues in this case are whether the District failed to provide Student a Free Appropriate Public Education (FAPE) and whether the District improperly failed to find Student eligible for Dyslexia services and serve Student accordingly. The Hearing Officer concludes that, although the District was correct not to identify Student as a student with Dyslexia, the District has failed to confer a FAPE on Student.

II. PROCEDURAL HISTORY

A. Legal Representation

Petitioner was represented throughout this litigation by their legal counsel, George Shake with Duffee and Eitzen, LLP. Respondent was represented throughout this litigation by its legal

counsel, Nona Matthews and Jennifer Carroll with Walsh, Gallegos, Treviño, Russo and Kyle, P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted September 29-30, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by their legal counsel, George Shake. In addition, Student's parent m2 T1 1 Tf-0.03 Tw 35.

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Pursuant to FERPA – 20 U.S.C. § 1232g;
34 C.F.R. Part 99

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a number of others. The evaluator did not mention a possibility Student had Dyslexia and did not recommend any Dyslexia-specific interventions.[5]

6. When Student arrived in the District from *** in 2019, the District conducted a Full and Individual Evaluation (FIE). Student was served primarily in a self-contained special education classroom in a public school in *** during the 2018-19 school year when Student was in *** grade. Student was receiving special education services in *** under the eligibility categories of a specific learning disability, ED, and OHI for ADHD.[6]

7. The District performed ten standardized assessments in its FIE, including the Behavior

15. On February ***, 2021, the District held an ARD Committee meeting to review the December 2020 outside evaluation which posited that Student had Dyslexia. The District continued to believe Student did not have Dyslexia. No prior evaluation had found Student had Dyslexia and Student's teachers' experiences with Student did not indicate Student

§ 1400(d). The district has a duty to provide FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student'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).

In order for a child to receive a FAPE, a school district must provide a student an educational program reasonably calculated to enable a student to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 983, 1001 (2017). That progress must be something more than mere *de minimis* progress. *Id.*, at 1000.

C. FAPE

Petitioner's allegations

Petitioner alleges the District should have found Student eligible as a student with a specific learning disability for Dyslexia and then served Student appropriately as a student with Dyslexia. Petitioner wanted the District to provide a CALT to serve Student and to provide Student an evidence-based Dyslexia program, because Petitioner asserts the District should find Student has Dyslexia.

The District refused to change Student's eligibility without the opportunity to do its own evaluation. Student's parents refused to consent to the District's desired evaluation. The District, in the absence of additional data, served Student in a Dyslexia program. Student's parents requested the District serve Student in the *** Dyslexia program. Instead, the District served

Student in ***. The main question in the case is whether the District's chosen program provided Student a FAPE.

The Four-Factor Test

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

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

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997). Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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

In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual

of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, 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). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.,*

evaluates a student to target specific issues a student is experiencing, it need not identify and diagnose every possible disability a child has. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3rd Cir. 2012). In this case, the District was targeting Student's weaknesses in reading, writing, and math without specifically finding Student had a specific learning disability. The District also had a BIP to address Student's behavioral issues related to Student's ***. The District was addressing Student's areas of need despite not specifically labeling Student a student with specific learning disabilities.

Then, in December 2020, a private evaluation determined Student had Dyslexia. In April 2021, the District placed Student in ***. No evaluator had recommended ***. No District staff member could give an evidence- or observation-based reason for recommending ***. *** is a Dyslexia program and the District's evaluation and observations did not hint that Student might have Dyslexia.

arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including mainstream, homebound, hospital class, *** room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

To determine whether a school district is educating a student with a disability in the LRE, consideration must be given to:

> Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
>
> If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State BD. Of Ed., 874 F. 2d 1036, 1048 (5th Cir. 1989).

In this case, Student has not been educated in Student's LRE. Student is being pulled out of Student's *** class four days a week for 45 minutes at a time to be educated without access to any peers in ***. The evaluator who found Student had Dyslexia recommended Student not be educated in such a restrictive, one-on-one environment. The District does not feel Student has Dyslexia. Yet it still pulls Student out of Student's class to place Student in a Dyslexia program in a more restrictive setting without access to peers who do not have disabilities. Student's reading needs can be met in a special education *** class instead of the more restrictive, one-on-one setting.

Petitioner also raised the issue as to whether math should be provided in a general education setting. The parties have agreed to provide math instruction in a combination of a special education and general education setting. The District did implement this portion of the IEP with fidelity. Petitioner did not present evidence that Student should be educated entirely in the general education setting as opposed to the hybrid approach on which the parties have agreed previously.

However, due to the restrictive setting away from Student's peers in which the District delivers reading instruction, the district is not educating Student in Student's LRE.

3. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*