

DOCKET NO. 011-SE-0914

STUDENT bnf PARENT & PARENT § BEFORE A SPECIAL EDUCATION
VS. § HEARING OFFICER FOR
WEST ORANGE COVE § THE STATE OF TEXAS
CONSOLIDATED ISD §

DECISION OF HEARING OFFICER

Petitioner, *** through next friends, *** & ***, requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*, to challenge the student educational program. The Respondent is the West Orange Cove Consolidated Independent School District

PROCEDURAL HISTORY

Petitioner filed a Request for Due Process Hearing on September 8, 2014. The parties participated in a Pre-Hearing Conference on September 23, 2014, at which time the undersigned hearing officer granted a continuance for November 20-21, 2014, with Petitioner appearing with attorneys Dorene Philpot and Yvonnilda Muniz. The Respondent appeared with attorneys of record, David Hodgins and Amber King. At the conclusion of the hearing, both parties requested an extension of the decision due date in order to submit briefs and proposed findings of fact. The decision due date was initially extended to January 28, 2015. I subsequently found good cause to extend the decision due date to February 4, 2015. The Decision was timely issued and forwarded to the parties.

Prior to the filing of this case, the parties appeared before the undersigned hearing officer in an appeal of a manifestation determination review (MDR) (Docket No. 120-SE-0114). A decision in that case was rendered in favor of the parent on April 9, 2014. Both parties requested that I take official notice of the MDR decision and a copy of the decision was included in the record as P18. References to factual findings in that matter are included in this decision to provide background history and context for the current matter.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law.

number if applicable.¹ Citations to relevant findings and conclusions from the MDR hearing will be designated *rtkqt"fgekukqpö"*

ISSUES PRESENTED BY PETITIONER

The issues identified for hearing are as follows:

1. unilateral change to the IEP); a
2. Whether Respondent failed to develop an appropriate IEP for the student;

¹ Many exhibits were produc

4.

11. One physical aggression referral involved an altercation ***. I found that the incident reflected the act. There were other referrals, however, that appeared to be impulsive or involve off-task behavior. For example, the student engaged in ***. There were numerous other instances of fighting and aggressive behavior. *See prior decision.*

12. At the time of the previous hearing, the ARD Committee had and elected to utilize an agenda notebook with the student instead. Additionally, the ARD Committee failed to adopt behavioral goals. *See prior decision.*

13. On February ***, 2014, the student became involved in an altercation ***. The teacher directed ***, and the student struck the teacher ***. *See prior decision.* According to the credible evidence, the student continues to ***

20. The independent evaluator administered a variety of instruments and obtained information from a variety of sources. Although he was unable to observe the student in school because of the time of year in which the records. The independent evaluator also provided the BASC-II Teacher Rating Scales form and the Vineland II to the District to provide its personnel for completion. P5; *see testimony of independent evaluator.*

21. Counsel for the District emailed the contract evaluator and suggested that she should meet with the teacher to explain the questionnaire prior to the time it was completed and suggested which teacher should not complete it. P32-22. The contract evaluator testified that she never met with the teacher.

22. The *** teacher completed the BASC-II Teacher Rating Scale, a school questionnaire, and the Vineland II Teacher Rating form. The Vineland II was returned unscorable because of an excessive number of estimated items and an insufficient number of actual ratings completed. P5-14 The GADS (Gilliam A Disorder Scale), though completed and returned with the *** , did not identify the person completing the instrument. P5-14.

23. The IEE evaluator also administered cognitive and achievement testing, a Social Communication Questionnaire (SCQ), the Autistic Diagnostic Interview Revised (ADIR),

letters, prior school evaluations evaluator concluded that the student met the criteria for Autism and Emotional Disturbance and noted that there are overlaps in the symptoms of both disorders. P5-16. It is important to note, however, that the independent evaluator did not include a speech language assessment or a school observation. *See testimony of independent evaluator.* ion lacked important components of an FIE, specifically a speech-language evaluation, school observation, a functional behavior assessment. RR302-305.

24 litigation co Dr. *** who administered portions of the evaluation, but the contract psychologist was primarily responsible for assimilating the data from all team members and coordinating the report. RR630. Other members of the evaluation team included a speech language pathologist and a behavior specialist. R1.

25. The contract evaluator requested that the psychologist follow up wi93 291.531contr

33. The ARD Committee convened on August 22 and September 5, 2014. The contract evaluator

Dis g goals, and determined that the student was capable of following the student code of conduct with the support of BIP. R4. The IEP does not address the elements contained in the Autism Supplement pursuant to 19 Tex. Admin. Code 89.1055(e).

34. and social skills goals are currently being implemented by the school guidance counselor who has no special education certification. RR607. On direct examination, the counselor testified that the student was making progress this school year, that the student engages with other students and has friends at school. RR596. On cross-examination, she admitted telling the contract evaluator that the student does not have a group of friends. P32-1075, RR599. She then clarified that the student does not have enemies. Although she testified the student has a group of friends, she could not name one.. RR599-600, 605. not a psychologist, LSSP or diagnostician and has no special education certification. RR607.

35. -compliance as target behaviors. The behavioral goals focus on reduction of non-desirable behavior rather than the development of replacement behaviors. R4-0048. Although the focus of the BIP is on consequences for behaviors rather than the development of replacement behaviors or positive interventions appropriate target behaviors, antecedents and functions of the behaviors, and intervention strategies. RR 324-326; RR0047. She also testified that the targeted behaviors were consistent with the behaviors identified in the functional behavior assessment and appropriate. RR327-328. the appropriate focus should have been on the identification and development of appropriate replacement goals. RR279; 324-326.

36. lity should be categorized as Autism rather than Emotional Disturbance. RR289. According to the expert, Autism Spectrum Disorder has broader implications for behavior. RR187-188.

37. expert in a prior hearing regarding the student and then contracting to complete the evaluation. According to the evaluator, this raised questions about the goal of the evaluation, whether it was focused on ruling in or ruling out a particular diagnosis or focused on making a point for a legal proceeding. RR101-102.

38. request was frivolous, unreasonable, groundless, meritless, without foundation, pursued in bad faith and/or for an improper purpose.

DISCUSSION

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party

The MDR hearing between the student and the District was contentious. In that matter, the District disciplined the student by placing the student in the DAEP following an ARD Committee determination that the

case manager. According to the instructions, the instrument should have been completed by someone who had taught and observed the student over the previous 4 weeks. R31-1158. The instrument was completed by someone the student during the previous school year and summer. RR576-580. The witness acknowledged that she questioned the evaluator about how to proceed, and the evaluator instructed her to base her answers on the most recent four week period that she had spent time with the student. RR580. This time period would have been months previous to completing the instrument, according to the witness. RR580-581. The evaluator scored the instrument and included the findings in the evaluation to support the conclusion that the student does not present with a profile consistent with autism spectrum disorder. R1-1979, 1996.

When questioned about this instrument at hearing, the contract evaluator acknowledged that she should not have scored it, that the manner in which it was administered invalidated the results, and that she knew it was invalid when she made the report. RR633, 676.

before she commenced it. The above actions, in combination with the action of submitting the evaluation to counsel for input prior to completing it, give support to that perception. It very well may be that the outcome was not predetermined and that another evaluation by a different evaluator would yield the same results. However, a primary principle of IDEIA and a Free Appropriate Public Education is the collaboration with key stakeholders and the inclusion of the parent in the decision making process. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., supra.* The actions of the contract

infringed seriously
student a FAPE. s educational program, denying the

The question regarding the eligibility and programming of the student is also not appropriately left to the independent evaluation because it did not include multi-disciplinary approach, a speech evaluation, a classroom observation, or other -303. Rather, there is no evaluation in this case that can be relied upon with confidence to answer the questions of eligibility,

It is important to note that the decision in this case is not a decision that the student should be properly classified as AU rather than ED. In fact, this hearing officer has previously held that eligibility classification alone does not determine whether the student receives a FAPE. *Student v. Banquette ISD*, Dkt. No. 048-SE-1010 (Ramage, March 8, 2011). e identification of

The procedural error in this case is
the process by which the evaluation was conducted, from a lack of informed consent, to the failure to administer testing instruments in accordance with the instructions of the producer, to the failure to include key information in the report.
programming. The procedural error, under the totality of the circumstances, and given the credibility of the evaluator and report, resulted in a denial of a FAPE.

Having determined that the procedural errors associated with the evaluation in this case resulted in a denial of FAPE such that a new evaluation should be conducted, this decision will not address the substantive sufficiency

CONCLUSIONS OF LAW

1. The student is eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations. The student resides within the physical boundaries of the WOCCISD.

2. WOCCISD is a political subdivision of the State of Texas and a duly incorporated Consolidated Independent School District responsible for providing the student a FAPE under IDEIA and its implementing regulations.

3. educational program bears the burden of proof.
Schaffer v. Weast, 126 S.Ct. 528 (2005). Petitioner has met this burden in part.

4. Procedural errors that occurred during the evaluation relied upon by the ARD Committee in IEP

20 USC 1415 (f)(3)(E); 34 CFR § 300.513(a)(2); *Adam J. v. Keller ISD*, 328 F3d 804 (5th Cir. 2003).

ORDER AND RELIEF

Compensatory and prospective relief is available under IDEIA as an equitable device to remedy violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). The parent is entitled to limited prospective relief in this case to remedy the errors that occurred during the evaluation of the student. The relief is limited to an order requiring the District to provide an outside evaluation that complies with the procedural requirements of IDEIA and by a process that provides confidence in the outcome.

1. IT IS THEREFORE ORDERED that the District shall arrange and pay for an evaluation to be conducted

