TEA DOCKET NO. 010-SE-0915

STUDENT bnf PARENT AND PARENT	§	BEFORE A SPECIAL EDUCATION
Petitioner/Cross-Respondent	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
EDINBURG CONSOLIDATED	§	
INDEPENDENT SCHOOL DISTRICT	§	
Respondent/Cross-Petitioner	§	THE STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER NUNC PRO TUNC

This Final Decision is reissued pursuant to T.R.C.P., Rule 306a(6) to correct a clerical error in the docket number of the case, as set forth in the style of the case.

STATEMENT OF THE CASE

Petitioner/Cross-Respondent, Student *** and Student's next friends and parents, *** and *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent/Cross-Petitioner Edinburg Consolidated Independent School District (hereinafter referred to as Respondent, the District, or ECISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations.

Issues Raised By Petitioner

1. Whether Respondent improperly changed Student's placement at the start of the 2015-2016 school year by removing Student from the general education environment and placing Student in a special education environment without the decision of an ARD committee and without parental consent?

2. Whether Student's placement in the special education environment violates the LRE (Least Restrictive Environment) provisions of IDEA, i.e. should Student be placed instead in a general education classroom with an aide pending the evaluation process?

3. Whether Respondent violated IDEA by denying the Student's parents meaningful participation and collaboration in the child's decision making process by failing to allow reasonable access to observe the Student in Student's classroom setting and by failing to allow parental input before changing the child's placement?

4. Whether the District violated IDEA by failing to provide Student with Occupational Therapy as recommended by the District's August 2012 FIE?

5. Whether the District violated IDEA by failed to timely reevaluate Student by August ***, 2015?

6. Whether the District violated IDEA by failing to provide Student with proper supports so that Student could be successful in the general education environment at the start of the 2015-2016 school year?

Relief Requested By Petitioner

1. District will fully evaluate Student in all areas of suspected disability (this item is agreed to by both parties);

2. Following completion of new evaluation, District, in collaboration with Parents, will develop an appropriate IEP that addresses all areas of Student need (agreed to by both parties);

3. Pursuant to IDEA's stay put provision, District will place Student in the general education setting with appropriate supports (including a dedicated aide) during the evaluation process;

4. District will allow parent reasonable access to observe child in classroom setting;

5. District will provide compensatory services to the Student for failure to provide OT services.

Issue Raised By Respondent

Whether it is appropriate for the Hearing Officer to override the lack of parental consent to re-evaluate Student, compel a full and individual re-evaluation of Student, and compel Student's parents' full cooperation in providing the information necessary for the District to properly re-evaluate Student.

Relief Requested By Respondent

An order overriding the lack of parental consent and compelling Student's parents to consent to and fully cooperate with Respondent's efforts to evaluate Student.

PROCEDURAL HISTORY

Tomas Ramirez III, Attorney at Law, represents Petitioner. Nick Maddox, Attorney at Law, along with his firm, O'Hanlon, McCollom & Demerath, represent Respondent in this proceeding.

Petitioner filed the instant request for due process on September 17, 2015. Respondent filed its cross action to override lack of parental consent to evaluate Student on October 8, 2015.

The parties held a resolution session on October 2, 2015, but were not able to resolve the issues in dispute.

I conducted a pre-hearing conference and issued an Order Following Pre-Hearing Conference on October 9, 2015 delineating the issues and relief sought by the parties,

granting Respondent's Plea To The Jurisdiction and dismissing all claims arising outside of the IDEA, and issuing a scheduling order to complete discovery and for the due process hearing.

The due process hearing took place on November 5, 2015 at the administrative offices of the District. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Cause and First Revised Scheduling Order, setting the due date for briefs as November 25, 2015 and the decision due date as December 10, 2015.

This decision is timely issued and mailed to the parties on December 10, 2015.

FINDINGS OF FACT

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence.

1. At all times relevant to this action, Student resided within the boundaries of ECISD, a political subdivision of the State of Texas and a duly incorporated school district.

2. Student attended *** providing services to students with autism, beginning at age ***. (Transcript, p. 60; hereinafter cited as T. 60).

3. Also at age ***; *** referred Student to ECISD, at which time ECISD completed a Full and Individual Evaluation (FIE) of Student on August ***, 2012. (T. 63). The FIE found Student eligible for services under IDEA under the disability categories of Autism and Speech Impairment. (Joint Exhibit 4; hereinafter cited as JX 4). The FIE of August ***, 2012 is the only evaluation of Student completed by the District to date.

4. Student began attending ECISD full-time at age ***, for the 2012-2013 school year. (T. 65). Student's 2012 Individual Education Plan (IEP) placed Student full-time in the self-contained *** setting. ((JX 5).

5. On April ***, 2013, Student's annual Admission, Review, and Dismissal Committee (ARDC) convened and adopted an IEP dated April ***, 2013 to cover the 2013-2014 school year. (JX 6). The 2013 IEP also placed Student full-time in the self-contained *** setting. Student attended ECISD for the 2013-2014 school year.

6. Neither the 2012 nor 2013 IEPs provided Occupational Therapy (OT) as a related service for Student. (JX 5, 6).

7. On April ***, 2014, Student's annual Admission, Review, and Dismissal Committee (ARDC) convened and drafted an IEP dated April ***, 2014 to cover the 2014-2015 school year. That IEP also placed Student in the self-contained *** setting and also did not provide for OT as a related service. (JX

7). It is unclear whether this IEP was ever presented at an ARDC or actually agreed to by the Parent. (JX 13, Recording of September ***, 2015 ARDC).

8. The 2014 IEP was never implemented because Student withdrew from ECISD and did not attend during the 2014-2015 school year due to Parents' view that the services provided were akin to baby-sitting. (T. 69). Instead, Parents took Student back to *** to obtain Applied Behavioral Analysis (ABA) therapy. (T. 69). Parents did not homeschool Student or enroll Student in any facility other than *** during the 2014-2015 school year. (T. 89).

9. *** does not provide Student with adopted curriculum designed to meet basic educational goals, including scope and sequence of courses, and formal review and documentation of student progress. (T. 70). *** does not constitute a private school pursuant to 19 T.A.C. § 1096(a).

10. During the 2014-2015 school year, Student was not required to ***. Petitioner and the District had no contact of any kind, initiated by either party, between Student's departure from ECISD at the end of the 2013-2014 school year and Student's return to ECISD for the 2015-2016 school year (August 2015). (T. 71-72).

11. Beginning in the 2015-2016 school year, Student ***. Parent contacted ECISD through the diagnostician on August ***, 2015 to notify the District that Student would re-enroll for the coming school year. (T. 72).

12. At the time of Student's re-enrollment in ECISD for the 2015-2016 school year, there was no IEP in effect for Student, as the 2014 IEP had never been implemented and had expired in April 2015. (T. 73, 109-110; JX 7).

13. The Diagnostician contacted Parent on August ***, 2015 and initially told Parent that Student would likely be placed in a self-contained classroom upon Student's return to the District based on Student's prior placement at ECISD and Student's 2012 FIE, but that she would check and get back to Parent. (T. 137).

14. The Diagnostician then conferred with her supervisor and the Special Education Director, explaining to them that Student had been out of the District for a year, had received ABA therapy and made significant gains (as per Parent), and that the FIE and IEP were both out of date. (T. 139). The supervisor believed that observation was needed before placing Student in a self-contained classroom given that Student had been out of the District for a full year. (T. 140). Based on the lack of current data, the Special Education Director made the decision to place Student in the general education environment with Resource and Self-Help skills support because it was a less restrictive environment than a self-contained classroom. (T. 139, 228).

15. The Diagnostician communicated the decision to both the campus principal and the Parent. (T. 111, 117). Parent was pleased because Student would be in a classroom with typically developing peers. (T. 117).

16. District personnel involved in making the decision about where to educate Student when school began had never worked with Student and did not know Student. (T. 120, 162).

17. District personnel viewed Student's placement in general education with special education supports as a temporary diagnostic placement to allow them to observe Student and collect additional data (T. 139, 144, 228) in advance of the ARDC meeting, but this was not communicated to Parent orally or in writing. (T. 74-75, 203, 226, 250). Instead, Parent's understanding was that District personnel believed the general education environment would be best for Student and that Student would be placed there with supports. (T. 73-75).

18. Parent's understanding was reinforced by the Prior Written Notice (PWN) dated August ***, 2015 sent in connection with the ARDC meeting planned for September ***, 2015 to devise an IEP and placement for Student pending completion of new evaluation. (T. 112-116). The PWN indicated Student's proposed placement to be "mainstream setting, resource supports, and self-help skills." (JX 8).

19. Student began school on ***, August ***, 2015 in the general education *** classroom with resource and self-help special education support. (T. 166, 168). The general education classroom had one teacher and one general education aide to assist with all of the students. (T. 118-119). Student did not know either the teacher or the aide, which posed a challenge given Student's difficulties with transition typical of students with autism. Neither the teacher nor the aide had experience or knowledge concerning students with autism. (T. 164, 168-169).

20. During the first week of school, the Diagnostician observed Student two times and the Principal observed Student every day. Based on their observations, both testified that Student exhibited challenging behaviors, including noncompliance with teacher directives, running around the classroom, destruction of school property, unwanted touching of other students, and behaviors of ***, ***, and retreating into Student's "own world." (T. 140-141, 167-168). After the third day of school, the Principal directed the aide to work solely or mostly with Student due to the significant needs Student was exhibiting. (T. 120, 204-205).

21. Parent also had concerns and anticipated that Student would require time to adjust to the new and unfamiliar setting. As such, Parent requested a "shadow," offered to provide a "shadow" from an ABA-provider Student had worked with, and asked to observe the classroom (himself or personnel from ***) to make suggestions about how to help Student adjust. The District declined all requests/offers. (T. 77-79).

22. By *** of the first week of school, both the Diagnostician and the Principal were concerned that Student required greater support and supervision than could be provided in the general education setting. They had concerns both for Student and for the other *** in the classroom. (T. 179-180).

23. The Principal contacted Parent by telephone on ***, August ***, 2015 to let him know she did not think Student's current placement was appropriate, and that she was working on a new schedule that she would get to him the next day. (T. 79-80, 176).

24. On ***, August ***, the Principal, Diagnostician, and Special Education teacher met to discuss Student's educational setting. Parent was not informed of or invited to the meeting. As a result of their discussions, they all agreed that Student required 1:1 support, structure, and routine that could not be provided in the general education classroom. As such, they drafted a new schedule for Student to be placed in the self-contained special education classroom with *** per day in general education with the support of an aide. (T. 125-126, 143).

25. The Principal spoke to the Parent by telephone and sent the new schedule to Parent on ***, August ***, 2015, in the afternoon, as he was unable to come to the school to discuss it in person. She informed Parent that the new schedule was tentative for *** and *** of the following week to observe Student in a different setting before the ARDC. The Principal stated that "if all goes well" the revised schedule would be presented at the ARDC as Student's schedule to be implemented throughout the school year. (Petitioner Exhibit 3-1; hereinafter PX 3-1; T. 181).

26. The Diagnostician also spoke to Parent on ***, August ***, 2015, to encourage him to give the Special Education teacher a chance to work with Student and to explain that they wanted to observe and collect information to present to the ARDC the following week. (T. 83, 144).

27. The Principal and Diagnostician testified that Parent unhappily agreed to allow the move to the self-contained classroom prior to the ARDC meeting (128-129, 184), but Parent maintains he never agreed to the change. (T. 251).

28. Student moved to the self-contained classroom with *** per day in general education on September ***, 2015, prior to the ARDC meeting. Student's behaviors were essentially the same in the self-contained classroom as they had been in the general education setting. (T. 169).

29. The ARDC convened on September ***, 2015 and recommended continued eligibility under the categories of Autism and Speech, a full re-evaluation, and an IEP with placement in the special education setting except for *** per day (and other elective time), and related services of OT and Assistive Technology. (JX 9). The ARDC deliberations state that the recommendation for self-contained with *** general education per day with supervision was based on observations of Student during the first week of school, prior historical

evaluations, and prior instructional setting. The ARDC also sought consent for the re-evaluation. (JX9). Parents disagreed with the placement recommendation, declined to provide consent, and the ARDC recessed until September ***, 2015.

30. The ARDC met again on September ***, 2015. On September ***, 2015, Parent provided written consent for the District to re-evaluate Student. Student's IEP was developed based on present levels of performance and the District continued to recommend the self-contained placement with *** per day in general education. Parent continued to disagree.

31. The District's initial offer of FAPE (IEP and placement developed at the September ***, 2015 ARDC) to Parent was temporary pending completion of reevaluation of Student and was appropriate based on the limited data available to ECISD at the time of the ARDC meeting.

32. The evidence does not support the conclusion that Student ultimately requires a self-contained classroom as Student's least restrictive environment; rather, the evidence indicates that this determination must be made following completion of Student's reevaluation.

33. Parent subsequently revoked consent to re-evaluate (PX 3-8) and filed the instant action on September 17, 2015.

34. The parties stipulate and agree that an FIE needs to be completed by the District in order to develop an IEP and determine the appropriate placement based on Student's currents needs. (T. 48-49). The District began reevaluation and completion of a full FIE of Student immediately upon Student's enrollment, but was unable to complete the reevaluation due to withdrawal of parental consent. (T. 147-149).

DISCUSSION

Student enrolled in *** in ECISD in August 2015 for 2015-2016 school year. Although Student received IDEA services in the District for two years previously (2012-2013 and 2013-2014 at ages *** and ***), Student has not received services since May 2014. The last IEP that was actually implemented for Student was the April 2013 IEP, which governed Student's services during the 2013-2014 school year. The April 2014 IEP was not implemented, and may not have been agreed to by the parents, because Student did not attend ECISD during the 2014-2015 school year.

This litigation concerns issues arising out of Student's return to the District related to Student's initial placement (Petitioner Issues 1, 2, and 6 as set forth herein), evaluation (Petitioner Issue 5, Respondent Issue 1), related services (Petitioner Issue 4), and collaboration between the parties (Petitioner Issue 3).

I. Student's Initial Placement At ECISD Pending Completion of Evaluation[1]

The central dispute in this case concerns where Student should be placed pending completion of the District's reevaluation and development of an IEP based on current assessment data. The parties agree that existing data is not sufficient to determine an appropriate IEP and placement and that further evaluation is needed before Student's ultimate IEP can be developed. They disagree about where Student should be educated pending the completion of that evaluation.

Petitioner argues that Student must be educated in the general education classroom with special education supports (as Student was during the first week of school) pending reevaluation, and argues that this placement is required by the stay-put provision of IDEA. Respondent also relies on the stay-put provision of IDEA, but argues that placement in the self-contained classroom most closely mirrors the last agreed upon placement, which Respondent urges is found in the April 2014 IEP. Both parties rely on the stay-put provision as determinative of Student's placement pending reevaluation.

Petitioner framed Issues 2 and 6 as whether Respondent violated the least restrictive environment provisions of IDEA by not providing adequate supports in the general education setting to allow Student to be successful and by then placing Student in a self-contained special education classroom. However, Petitioner also stated very clearly that the issue in this litigation is ***not*** the appropriateness of Respondent's placement, but solely whether that placement violates the stay-put provisions of IDEA. (T. 9, Lines 11-25, p. 10, Lines 1-12).

The Legal Standard: The Stay Put Provision

The Stay Put Provision of IDEA provides in relevant part:

"…. during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement…." 34 C.F.R. 300.518(a).

The stay put provision of IDEA is designed to preserve the status quo educational placement during litigation concerning that placement; it operates as an automatic preliminary injunction. The regulation is clear that the stay put provision applies only during the pendency of an administrative or judicial proceeding regarding a due process complaint to maintain the status quo pending the outcome of that litigation.

The Facts of This Case: Stay Put Does Not Apply

The unique facts of this case make it clear that the stay-put provision does not govern Student's placement pending Respondent's reevaluation. Upon Student's return to ECISD in August 2015, the District recognized Student's eligibility under IDEA and its obligation to provide Student with a free appropriate public education (FAPE). It is undisputed that

[1] This section addresses Petitioner Issues 1, 2, 3, and 6 as detailed on pages 1-2 herein.

Student did not have an IEP in effect at that time; indeed, Student's last implemented IEP was from 2013 and Student's last proposed IEP from 2014. The District appropriately recognized that it did not have the necessary information to develop an appropriate IEP or placement for Student, as it did not have current assessment, present levels of achievement and performance, or the other information required by 34 C.F.R. § 300.320. The District immediately began the process of evaluating Student in order to develop an appropriate IEP and placement and sought to offer Student a FAPE pending completion of that evaluation based on available information from school records, Parent, and observations of Student. To that end, the District scheduled an ARDC for September ***, 2015, the *** day of the school year, to develop an IEP for Student pending completion of Student's evaluation.

For *** days before the ARDC meeting to develop Student's IEP, the District served Student in a less restrictive placement than the *** classroom Student had attended when in ECISD previously: Student attended the general education *** class with resource and self-help support (referred to herein as Week 1 Schedule). Based on observation and performance data from the first week of school, District staff members determined that Student's placement did not provide Student with adequate support to be successful and recommended at the ARDC that Student instead be served in the self-contained special education classroom with *** per day in the general education environment with supports (referred to herein as Initial Offer of FAPE). Parent disagreed and this litigation ensued.

Although both Petitioner and Respondent argue that Student's placement must be determined by reference to the stay-put provision of IDEA, it is clear that Student had no "current educational placement" at the time this dispute arose. Pursuant to *34 C.F.R. § 300.116*, an educational placement must be determined at least annually, must be based on the child's IEP, and must be made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The placements urged by both Petitioner and Respondent as Student's supposed stay-put placement do not satisfy these criteria.

Petitioner argues that the Week 1 Schedule is Student's educational placement as it was determined by a group of personal knowledgeable about the child and made in conformity with the provisions of § 300.116. However, the Week 1 Schedule does not constitute an educational placement under IDEA: it was not determined by an ARDC, based on an IEP or current evaluation data, or made by persons knowledgeable about the child, as it is undisputed that none of the District staff involved in making that initial determination had ever met Student. The Week 1 Schedule was clearly an attempt to offer FAPE in the least restrictive environment to the Student based on the scant information available, but it was not an educational placement made by an ARDC in conformity with *34 C.F.R. § 300.116*.

Respondent argues that the proper stay-put placement must be based on the 2014 IEP, which placed Student in a self-contained *** classroom. Based on that IEP, Respondent argues that its Initial Offer of FAPE in the self-contained special education classroom is mandated by stay-put. Like the Week 1 Schedule, the 2014 IEP does not constitute Student's "current educational placement" as it clearly was not determined at least annually and was not based on a current or appropriate IEP. Further, the evidence is unclear as to whether Parent actually agreed to the 2014 IEP at an ARDC given that Student was not

going to attend ECISD during the 2014-2015 school year. The last clearly agreed upon IEP was the 2013 IEP, even more remote in time.

Thus, the evidence clearly demonstrates that Student did not have a "current educational placement" in effect. As a Student eligible for IDEA services, but without a current educational placement or evaluation, ECISD's obligation was to offer Student a FAPE based on the available information pending completion of its evaluation. In other words, the propriety of Student's placement pending the completion of ECISD's evaluation is governed by the standards pertaining to FAPE and not by stay-put.

Stay-put's inapplicability to this factual scenario is also made clear by the procedural posture of this case: the question raised by Petitioner is what Student's placement should be *pending reevaluation*, not pending resolution of litigation about an appropriate placement. Both parties agree (and so stipulated) that insufficient data exists to determine Student's ultimate placement. Stay put could apply if the litigation concerned the merits of a placement proposed by ECISD and the preliminary issue was where to educate Student pending resolution of the litigation, but Petitioner has repeatedly stated that the issue in the instant cause solely concerns stay-put and what it requires as an interim placement.

The Appropriateness of The District's Initial Offer of FAPE

Although Petitioner explicitly has not challenged Respondent's Initial Offer of FAPE as an inappropriate placement; but rather, has solely argued that it violates the stay-put provision, both parties presented some evidence related to the substantive appropriateness of the IEP and placement developed at the September ARDC. Petitioner challenges the IEP and placement as violating the least restrictive environment provision of IDEA, while Respondent argues the IEP and placement were appropriate given Student's demonstrated needs for support.

The weight of the limited evidence provided this Hearing Officer demonstrates that Respondent's September 2015 IEP and placement of Student was appropriate *on an interim basis* based on the information available to Respondent at that time. (JX 12, 13). As both parties have acknowledged, whether the September 2015 IEP and placement is ultimately appropriate for Student is not ripe for adjudication and must be determined after careful consideration of the results of reevaluation, Student's present levels of performance, and the important mandates of the least restrictive environment.

Respondent's Removal of Student To Self-Contained Classroom Prior to ARDC Meeting/Parental Participation In Decision Making

Petitioner complains of Respondent's decision to remove Student from the Week 1 Schedule and place Student into the self-contained classroom without parental consent and without the decision of the ARDC. Respondent counters that placement in the self-contained classroom was initially for diagnostic purposes in preparation for the ARDC and was communicated to Parent as such.

Assuming, without deciding, that Respondent's removal of Student to the self-contained classroom prior to the ARDC was a procedural violation of IDEA, there is no evidence in

the record to demonstrate that this procedural violation impeded Student's right to a FAPE or caused a deprivation of educational benefits. *34 C.F.R. § 300.513(2)*. The placement was made for *** prior to the ARDC, insufficient time to result in educational deprivation to Student. Further, as discussed above, the placement was appropriate based on available data and did not violate the stay-put provision of IDEA.

Petitioner also argues that making this placement decision without Parental input, along with denying Parent the right to observe Student in Student's classroom setting[2], significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE to Student in violation of 34 C.F.R. § 300.513(2)(ii).

IDEA guarantees Parents the right to fully and effectively participate in the IEP process and ensures those rights through provisions requiring notice of ARDC meetings and genuine consideration of parent input when making decisions. *34 C.F.R. § 300.321, 300.322.* The evidence indicates that Parent was provided the opportunity to participate fully in the decision-making process at the ARDC meetings on September *** and ***, 2015. The recordings of the ARDC meetings reflect substantial discussion between the parties and detailed sharing of viewpoints by both school personnel and Parent about the provision of FAPE to Student, including Parent's request to observe Student in the classroom. The first ARDC on September *** lasted for approximately 40 minutes and the reconvene ARDC on September *** lasted approximately 2 hours, with participation by an educational advocate who assisted Parent.

Although the parties did not reach agreement about what an appropriate FAPE for Student would be pending the completion of Student's reevaluation, the evidence is clear that Parent was afforded the opportunity to fully participate in the process. The law is clear that disagreement alone does not form the basis for a finding of lack of participation. *Blackmon v. Springfield R-XII Sch. Dist., 31 IDELR 132 (8th Cir. 1999).*

Conclusion

The issue of Student's IEP and placement pending the completion of Respondent's evaluation is a question of appropriate placement and not one of stay-put. Student did not have a "current educational placement" to revert to at the time this dispute arose; rather, Student was returning to the District in the context of the challenging circumstance of requiring a FAPE, but not having current data to develop an appropriate IEP or placement. Under such circumstances, the District's obligation is to provide a FAPE based on available information until better information can be obtained. In this case, Petitioner has not challenged the District's provision of FAPE based on substantive grounds although the parties submitted evidence relevant to this question, which I have considered to conclude the Respondent's interim IEP is appropriate based on existing data. Respondent's Initial Offer of FAPE does not violate the stay-put provisions of IDEA.

[2] The issue of observation of Student in Student's classroom was raised at the ARD meeting in September 2015. It has since been resolved, as Parent has been granted access to observe. The District's failure to allow parental observation prior to the ARDC meeting did not deprive Parent of meaningful participation in the ARDC meeting.

Respondent's removal of Student to the self-contained classroom *** the ARDC met on September *** was not a procedural violation that resulted in a denial of FAPE pursuant to *34 C.F.R. § 300.513*.

For the reasons set forth herein, Petitioner's request to place Student in the general education setting with special education supports pending completion of the reevaluation of Student pursuant to IDEA's stay-put provision is hereby **DENIED**.

II. Provision of OT As A Related Service

Petitioner alleges that Respondent has wholly failed to provide Student with OT services despite the recommendation in the 2012 FIE that Student receive OT services. Petitioner argues that Student is entitled to recover for all OT due to Student in the one-year period prior to the date of filing, i.e. from September 17, 2014 forward. Petitioner further argues that Student is entitled to OT services even though Student was not enrolled at ECISD because Student was not a private school student or facility as defined by 34 C.F.R. § 300.137 and 19 T.A.C. § 89.1096. Respondent counters that any claims related to the 2012-2014 IEPs' failure to include OT services are time barred by the one-year statute of limitations. Respondent further argues that it had no legal duty to provide OT services to Student when Student was not enrolled at ECISD or a private or home school within the District's boundaries, and that there is no evidence to indicate a denial of FAPE to Student as a result of not receiving OT.

I concur with Respondent that claims related to the 2012-2014 IEPs' failure to provide OT services for Student are barred by the statute of limitations. These claims were known to Student by April 2014 at the latest. The one-year statute of limitations in Texas would thus require any legal challenge to those IEPs to be filed no later than April 2015, well before this action was filed on September 17, 2015. As such, these claims are time-barred. *34 C.F.R. § 300.507; 19 T.A.C. 89.1151*.

Student claims that Student is nonetheless entitled to compensatory OT services for the year preceding the date of filing, i.e. from September 17, 2014 through the present, even though Student was not enrolled at ECISD until August 2015. Assuming without deciding that Petitioner is correct in Petitioner's calculation of the statute of limitations (the look back approach), Student had no legal entitlement to the related service of OT prior to Student's enrollment on August ***, 2015. As a child residing in ECISD who was not enrolled at the District or in a home school/private school, and who was ***, the District had no obligation under *34 C.F.R. § 300.137* to provide Student with services.

The IEP developed by ECISD for Student in September 2015 does provide OT services for Student. The record is not clear whether Student has received the services delineated in Student's September 2015 IEP or not, and it is unclear whether Petitioner alleges a failure to provide these services given that Petitioner has disagreed with and objected to the implementation of the IEP. As such, I reach no conclusion about the provision of OT services for the current school year.

In summary, I find no violation for the District's failure to provide OT services prior to the date of Student's enrollment at ECISD in August 2015. Petitioner's request for compensatory OT services is hereby **DENIED**.

III. District's Timely Reevaluation of Student

Petitioner argues that Respondent had a duty pursuant to the Child Find provisions of IDEA to reevaluate Student by August ***, 2015, the date Student's three-year reevaluation was due, even though Student was not enrolled in ECISD. Respondent counters that ECISD had no obligation to re-evaluate Student when Student was not enrolled in the District or in any private school or home school within the boundaries of ECISD. Relying on *Student v. Hutto, 113 LRP 1874 (SEA, TX 2012)*, Respondent argues that it has no duty to provide FAPE or any special education and related services to a special education student who is unilaterally unenrolled by a parent, except as provided by the Child Find provisions which require such services for students who are enrolled in private schools within the boundaries of the district. Respondent further asserts that the procedural violation of beginning the evaluation 24 days after its due date did not impede Student's right to a FAPE or cause a deprivation of educational benefits.

The evidence is clear that Parent rejected ECISD services for the 2014-2015 school year by unilaterally withdrawing Student from school. Student did not attend private school and was not homeschooled during the 2014-2015 school year, and was not ***. As such, Student's status prior to August 2015 when Parent informed Respondent that Student would return to the District was simply a *** child who was entitled to receive a FAPE because of Student's disability, but who rejected the District's offer of services. Under this set of facts, the provisions pertaining to Child Find obligations or proportionate share services for students with disabilities in parentally placed private schools or home schools do not apply.

In conclusion, the District's failure to initiate reevalution of Student before Student returned to ECISD did not constitute a violation of its legal duty to Student under IDEA.

IV. Respondent/Cross-Petitioner's Request to Override Lack Of Consent To Reevaluate Student

The parties stipulated that evaluation of Student is needed. Petitioner initially provided consent to evaluate, but withdrew consent because of the disagreement over placement. Indeed, Petitioner seeks evaluation of Student as an element of the relief requested in this action.

Given the stipulation of the parties and the evidence of record, it is abundantly clear that reevaluation of Student is both warranted and required. Respondent attempted to reevaluate Student, but has been unable to complete the reevaluation due to lack of parental consent. Respondent has the option under 34 C.F.R. § 300.300(c)(1)(ii) to use the consent override procedures of IDEA, including a due process hearing request, to obtain parental consent so that it can complete the reevaluation of Student.

Petitioner argues that Petitioner seeks evaluation from Respondent, but yet has withdrawn consent because of a disagreement about placement. Petitioner has created a "catch-22" in that both parties agree that reevaluation is needed to develop an appropriate IEP and placement for Student, but Respondent is unable to complete that process due to the lack of consent.

Under these circumstances, Respondent has met its burden of proof to demonstrate that reevaluation of Student is required by IDEA in order to provide a FAPE to Student, that ECISD has attempted to provide such reevaluation of Student, and that Parent has not provided consent for such reevaluation despite agreement that it is needed. As such, Respondent/Cross-Petitioner's request to override lack of parental consent to reevaluate is **GRANTED**. Further, Respondent is directed to complete its reevaluation of Student so that an appropriate IEP and placement can be developed based on current assessment data.

CONCLUSIONS OF LAW

1. Respondent Edinburg CISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Edinburg CISD was Student's resident district under IDEA at all times relevant to this action. ECISD had the legal obligation to make FAPE available to Student. *34 C.F.R. § 300.101*.

2. Respondent did not violate the stay-put provisions of IDEA by implementing Student's IEP and placement developed at the September 2015 ARDC meetings. *34 C.F.R. 300.518(a).*

3. Respondent's IEP and placement of Student as developed at the September 2015 ARDC meetings is appropriate under IDEA pending completion of its reevaluation of Student. *34 C.F.R. §§ 300.114, 300.116, 300.320, 300.324*.

4. Respondent's actions in moving Student from the general education classroom with special education supports to the self-contained classroom with daily general education time *** prior to the ARDC meeting of September ***, 2015 did not constitute a procedural violation of IDEA that resulted in a denial of FAPE to Student. *34 C.F.R. § 300.513(2)*.

5. Student's claims for compensatory Occupational Therapy as a related service arising from the failure to include OT in Student's 2012-2104 IEPs are time barred by the statute of limitations in Texas. *34 C.F.R. § 300.507; 19 T.A.C. 89.1151*.

6. Student had no legal entitlement to receive special education and related services from Respondent upon Student's withdrawal from ECISD, prior to Student's reenrollment in August 2015, including the related service of occupational therapy or a reevaluation prior to August ***, 2015. *34 C.F.R. § 300.137*

7. Respondent met its burden to show that reevaluation of Student is required in order to properly serve Student under IDEA and that relief to override Parent's refusal to consent is appropriate. *34 C.F.R. § 300.300(c)(1)(ii).*

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner/Cross-Respondent is **DENIED**. The relief sought by Respondent/Cross-Petitioner is **GRANTED** as follows:

This Order shall override the Parent's lack of consent to Respondent's reevaluation of Student. Petitioner is ordered to cooperate fully with the District in the conduct of the reevaluation, to provide necessary information for the evaluation within ten (10) school days of the date requested by Respondent, and to present the student for such an evaluation. Respondent is ordered to complete the full reevaluation of Student in all areas of suspected disability no later than twenty (20) business days from the date that Petitioner provides the requested parent information to Respondent's staff.

The District shall convene an ARDC meeting within ten (10) school days of the completion of the reevaluation, unless the parties mutually agree to extend the timeline for holding the ARDC meeting, to review the results of the assessment, develop an appropriate IEP and placement for Student that addresses all areas of Student need, including consideration of Student's least restrictive environment under IDEA.

It is further **ORDERED** that all other items of relief not specifically awarded herein are **HEREBY DENIED**.

SIGNED and **ENTERED** this 10th day of December 2015.

/s/ Lynn E. Rubinett
Lynn E. Rubinett
Attorney at Law
Special Education Hearing Officer for the State of Texas

NOTICE TO THE 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; 34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n).*

STUDENT bnf PARENT AND PARENT	§	BEFORE A SPECIAL EDUCATION
Petitioner/Cross-Respondent	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
EDINBURG CONSOLIDATED	§	
INDEPENDENT SCHOOL DISTRICT	§	
Respondent/Cross-Petitioner	§	THE STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent improperly changed Student's placement at the start of the 2015-2016 school year by removing Student from the general education environment and placing Student in a special education environment without the decision of an ARD committee and without parental consent?

Held: For the District. Respondent's placement of Student in the special education classroom *** prior to the ARDC meeting did not result in a denial of FAPE to Student.

Cite: 34 C.F.R. § 300.513(2).

Issue: Whether Student's placement in the special education environment violates the Stay-Put provisions of IDEA, i.e. is Student's Week One Schedule in the general education classroom with special education supports Student's proper stay-put placement pending Student's reevaluation?

Held: For the District. Stay-put does not apply to this Student, as Student did not have a "current educational placement" to implement.

Issue: Whether the District violated IDEA by failing to provide Student with proper supports so that Student could be successful in the general education environment at the start of the 2015-2016 school year?

Held: For the District. Respondent's interim provision of FAPE to the Student is appropriate based on the evidence, but the substantive propriety of Respondent's IEP and placement is not ripe for adjudication and is not at issue; Petitioner solely argues that the placement is not Student's proper stay-put placement.

Cite: 34 C.F.R. §§ 300.114, 300.116, 300.320, 300.324.

Issue: Whether Respondent violated IDEA by denying the Student's parents meaningful participation and collaboration in the child's decision making process by failing to allow reasonable access to observe the Student in Student's classroom setting and by failing to allow parental input before changing the child's placement?

Held: For the District. Parent fully participated in the ARDC meetings that developed Student's IEP and placement. Respondent's actions did not violate IDEA.

Cite: 34 C.F.R. § 300.513(2).

Issue: Whether the District violated IDEA by failing to provide Student with Occupational Therapy as recommended by the District's August 2012 FIE?

Held: For the District. Student's claims for compensatory Occupational Therapy as a related service arising from the failure to include OT in Student's 2012-2104 IEPs are time barred by the statute of limitations in Texas.

Cite: 34 C.F.R. § 300.507; 19 T.A.C. 89.1151.

Issue: Whether Respondent violated IDEA by failing to provide Student with occupational therapy during the one year prior to the filing of this action even though Student was not enrolled in the District and whether the District violated IDEA by not conducting Student's reevaluation by August ***, 2015 even though Student was not enrolled in the District?

Held: For the District. Student had no legal entitlement to receive special education and related services from Respondent upon Student's withdrawal from ECISD, prior to Student's reenrollment in August 2015, including the related service of occupational therapy or a reevaluation prior to August ***, 2015.

Cite: 34 C.F.R. § 300.137

Issue: Whether it is appropriate for the Hearing Officer to override the lack of parental consent to re-evaluate Student, compel a full and individual re-evaluation of Student, and compel Student's parents' full cooperation in providing the information necessary for the District to properly re-evaluate Student.

Held: For the District. Respondent met its burden to show that reevaluation of Student is required in order to properly serve Student under IDEA and that relief to override Parent's refusal to consent is appropriate.

Cite: 34 C.F.R. § 300.300(c)(1)(ii).