

DOCKET NO. 072-SE-1116

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

DECISION OF HEARING OFFICER

STUDENT (Student), b/n/f PARENT, (collectively, Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA).¹ Clear Creek Independent School District (District/Respondent) is the respondent to the Complaint. Petitioner alleges after the District received Petitioner’s request for an Independent Educational Evaluation (IEE) it unreasonably delayed in filing a due process complaint to show that the evaluation was appropriate. Petitioner also alleges the District denied Student a free appropriate public education (FAPE) because Student’s 2015 Full Individual Evaluation (2015 FIE) was incomplete and inaccurate; the District improperly relied upon the 2015 FIE in preparing the Student’s 2015 Individualized Education Program (2015 IEP); and the District failed to include appropriate and measurable goals and objectives in the 2015 IEP. The District denied Petitioner’s allegations and counterclaimed that the 2015 FIE met IDEA requirements and was appropriate and, therefore, Petitioner is not entitled to an IEE at public expense.

Based on the evidence and the applicable law, the hearing officer finds that Petitioner is entitled to an IEE at public expense because the District did not file a due process complaint to show that the evaluation was appropriate without unnecessary delay as required by 34 Code of Federal Regulations (C.F.R.) § 300.502(b)(2)(i). Therefore, the hearing officer finds that the District did not comply with the IDEA regulations in responding to Petitioner’s IEE request.

¹ 20 U.S.C. §§ 1400-1482.

The hearing officer further finds that, although the 2015 FIE was not inaccurate or incomplete, the District failed to provide Student with FAPE when it revised the 2015 IEP in June 2016, without further evaluation and without including the recommended accommodations in the 2015 FIE. It should be noted that these accommodations were, for the most part, reinstated in the November 2016 Individualized Education Program (IEP) and have helped Student. Nevertheless, Petitioner is entitled to compensatory services to address the denial of FAPE from the beginning of the 2016-2017 school year, through November ***, 2016.

I. PROCEDURAL HISTORY, RESOLUTION SESSION, AND STATUTE OF LIMITATIONS

A. Procedural History

Petitioner filed the Complaint on November 30, 2016. On December ***, 2016, the District filed a request for a due process hearing (Docket No. 077-SE-1216) seeking to establish the appropriateness of its 2015 FIE. On December 12, 2016, the District requested consolidation of both cases under Docket No. 072-SE-1116 because the cases involved the same parties and common questions of law. Petitioner agreed with the request and on December 13, 2016, the hearing officer issued an order consolidating Docket No. 077-SE-1116 into Docket No. 072-SE-1116.² Petitioner subsequently filed a motion for continuance that was unopposed. The motion was granted for good cause and the due process hearing rescheduled to February 14-15, 2017, and the decision due date extended to March 27, 2017.³ On January 24, 2017, the case was transferred to the undersigned hearing officer.⁴

The hearing was held February 14-15, 2017, before Catherine Egan, hearing officer, at the Challenger Columbia Stadium Complex in Webster, Texas. Lead counsel Holly Griffith

² Order No. 2 issued in Docket No. 077-SE-1116 (Dec. 13, 2016).

³ Order Nos. 4 and 5.

⁴ Order No. 7.

Terrell represented Petitioner.⁵ Attorney Amy Tucker represented the District. Dr. ***, the District's Executive of Special Services, appeared as the District's party representative.

At the close of the due process hearing, the parties agreed to keep the following post-hearing schedule set out in Order Nos. 5 and 8: the hearing transcript due February 27, 2017; the briefs due March 13, 2017; and the decision due March 27, 2017. On March 6, 2017, Petitioner filed a written request to extend the due date for the party briefs until March 24, 2017, with a corresponding extension of time for the decision due date. Petitioner explained that she had intended to work on the brief before she had to attend a special education conference, but was unable to do so because the transcripts did not arrive on February 27, 2017. In addition, the District agreed that a briefing due date of March 24, 2017, would be better for the District because its spring break was the week of March 13-17, 2017. On March 7, 2017, the hearing officer found good cause to grant the request to extend the due date for filing briefs to March 24, 2017, and to extend the decision due date to April 7, 2017.⁶ The decision was timely issued.

B. Resolution Session

A Resolution Session was held on December 15, 2016, but it was unsuccessful.

C. Statute of Limitations

The one-year statute of limitation applies to this proceeding.⁷

⁵ Advocate Louis Geigerman also appeared at the hearing for Petitioner, but after the District invoked Rule 164 of the Texas Rules of Evidence, Mr. Geigerman was excused from the hearing room because he was a potential witness. On February 15, 2017, the District determined that it was not going to call Mr. Geigerman as a witness so he was permitted to return to the hearing room as Petitioner's advocate.

⁶ Order No. 11.

⁷ 19 Tex. Admin. Code § 89.1151(c).

II. DISPUTED ISSUES, REQUESTED RELIEF, AND BURDEN OF PROOF

The disputed issues and relief requested set out in Order No. 10, and confirmed at the beginning of the due process hearing, are listed below.

A. Issues⁸

The disputed issues are:

1. Whether the District unreasonably delayed filing a due process complaint to challenge Petitioner's right to an IEE at public expense in accordance with 34 C.F.R. § 300.502(b)(2) and is therefore liable for the IEE. And if the District did not unreasonably delay its filing, whether Petitioner is entitled to an IEE at public expense.
2. Whether the Student's 2015 FIE was incomplete and inaccurate, and therefore failed to meet the evaluation requirements under IDEA.
3. Whether the District failed to provide Student with a free, appropriate public education (FAPE) because the December ***, 2015 and November ***, 2016 Admission, Review and Dismissal committee (ARDC) relied on the allegedly incomplete and inaccurate 2015 FIE in preparing the Student's IEP and failed to include appropriate and measurable goals and objectives.

The District filed a counterclaim asserting the FIE was appropriate, thus, Petitioner is not entitled to an IEE at public expense. The District also maintains that it provided and continues to provide Student with FAPE.

B. Relief

Petitioner requests that following relief:

1. The District pay for an IEE including a Psycho-educational and psychological evaluation; and evaluations for Assistive Technology, Speech and Language, and OTR-Occupational Therapy.

⁸ Order No. 10; Tr. at 17-18.

2. Provide Student compensatory educational services for failing to provide Student with FAPE.

The District requests a finding that its 2015 FIE was appropriate, thus Petitioner is not entitled to an IEE at public expense. The District also requests findings that it has provided Student with FAPE.

C. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.⁹ A party attacking the appropriateness of an IEP established by a school district bears the burden of showing why the IEP, and resulting placement, were inappropriate under the IDEA.¹⁰ However, when a parent requests an IEE at public expense, the school district must without unnecessary delay either provide the requested IEE or file a due process complaint for a hearing to show its evaluation is appropriate. Consequently, District bears the burden to prove that the 2015 FIE was appropriate and that it did not unnecessarily delay filing its due process complaint.¹¹

III. FINDINGS OF FACT

Background

1. The District is a political subdivision of the State of Texas and a duly incorporated independent school district responsible for providing Student a FAPE in accordance with the IDEA and the rules and regulations promulgated pursuant to IDEA.¹²

⁹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

¹⁰ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000) (referencing *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997)); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).

¹¹ 34 C.F.R. § 300.502(b)(2)(i).

¹² 20 U.S.C. §§ 1400-1482; 34 C.F.R. §§ 300.1-300.45.

2. Student, a ***-year-old *** grader, primarily resides with Student's ***. ***.¹³ Although Student's ***.¹⁴
3. Student is enrolled at a District *** school and receives IDEA special education and related services as a student with Autism Spectrum Disorder (ASD) and Speech Impairment.
4. Student was initially found eligible for special education services by the District when Student was ***-years old as a child with speech impairment.¹⁵ Student was enrolled in *** and received speech therapy services.¹⁶
5. The District reevaluated Student on April ***, 2009, and determined that Student no longer met the eligibility criteria for special education services so Student was dismissed from the special education program.¹⁷
6. During the fall of Student's *** grade (2012), Student's parents expressed their concerns that Student had problems with language and writing. The District performed an FIE to determine if Student met the criteria for a specific learning disability (SLD) or speech impairment.
7. Student received a *** standard score on the writing expression sub-test of the Woodcock Johnson III Achievement Texas (WJ-3) during the 2012 FIE.¹⁸ Student's cognitive and academic scores were within normal limits.¹⁹ The District's diagnostician evaluated Student's GLR (long-term retrieval) and GAs (auditory processing) and both were average.²⁰ Student's vision and hearing were also tested and both were within normal limits.²¹ Student's motor skills evaluation indicated that Student had some mild fine motor delays and sensory differences that did not interfere with Student's educational performance.²²
8. As a result of the 2012 FIE, the ARDC determined that Student did not meet the criteria for SLD or speech impairment.²³

¹³ Petitioner (Pet.) Ex. 6 at 10.

¹⁴ Tr. at 376.

¹⁵ Pet. Ex. 6 at 1, 18.

¹⁶ Pet. Ex. 6 at 1.

¹⁷ Pet. Ex. 6 at 1.

¹⁸ Tr. at 437.

¹⁹ Tr. at 242.

²⁰ Tr. at 243.

²¹ Pet. Ex. 6 at 4.

²² Pet. Ex. 6 at 1.

²³ Pet. Ex. 6 at 1.

9. In the beginning of Student's *** grade at a District *** school, Student's academic performance began to decline, and Student started having behavioral issues at school. Student's parents expressed their concerns that Student had trouble with writing and writing assignments as reflected by Student's poor performance in the English/Language Arts class (ELA).²⁴ The District determined that Student needed a FIE to evaluate whether Student had any SLDs and to recommend strategies to aid in Student's educational progress. Areas of suspected disability included Other Health Impairment (OHI) and ASD.²⁵
10. Student is currently participating in the District's *** program, a program designed for *** students.²⁶

2015 FIE

11. The District's six member multi-disciplinary evaluation team consisted of a licensed specialist in school psychology (LSSP), a speech language pathologist (SLP), an educational diagnostician, an occupational therapist (OT) and two general education teachers.²⁷
12. The multi-disciplinary team used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information from previous evaluations, Student's educational records, and from Student's teachers and parents.²⁸
13. Student was assessed in all areas of suspected disability, including OHI and ASD.²⁹
14. Writing is a non-preferred activity for Student and Student has a history of problems with writing assignments and writing aversion.³⁰

Occupational Therapy Evaluation

15. As part of the District's evaluation of Student, a District OT spent six to eight hours observing Student in the classroom, collecting work samples, completing the developmental tests for visual-motor integration, motor coordination, visual perception, the sensory processing measure, and the Decoste Writing Profile-Revised.³¹

²⁴ Tr. at 92.

²⁵ Pet. Ex. 6 at 1.

²⁶ Pet. Ex. 8 at 1.

²⁷ Pet. Ex. 6 at 29.

²⁸ Pet. Ex. 6 at 1-2, 29; Tr. at 177, 429-430.

²⁹ Pet. Ex. 6 at 1.

³⁰ Tr. at 226, 228-229, 369, 377-378, 389-390, 399.

³¹ Tr. at 122.

16. The OT has a Bachelor of Science in occupational therapy and a master's degree in education. She is licensed by the State of Texas as an OT and has worked as an OT for 30 years.³²
17. Although Student's *** than expected for Student's age, Student's fine motor skills are functional for school related activities.³³ When the written activity requires ***, such as ***, Student uses ***; otherwise, Student uses ***. Student has the mechanics of handwriting and has no mechanical difficulty writing.³⁴ Student is also able to use a standard keyboard, mouse, and headphones.³⁵
18. Student has accurate conventions of writing in punctuation, capitalization, spacing, left to right progression, and in Student's quantity of writing, but Student *** because Student struggles with planning and organizing Student's ideas, which interferes with Student's educational performance.³⁶
19. *** *** are typically able to ***. Student's ***, ***. However, Student is able to accurately ***.³⁷
20. Student *** when Student works on a challenging task or on assignments which do not interest Student. Student prefers to work in ***.³⁸
21. The sensory processing test items cover a wide range of behaviors and characteristics related to sensory processing, social participation and praxis.³⁹
22. When Student is interested in class, Student actively engages with Student's peers and contributes to discussion confidently. Otherwise, Student will disengage from Student's peers by reading.⁴⁰
23. Student is not ***, although Student was *** when Student was with certain evaluators.⁴¹
24. Student makes choices on whether to engage with peers in class depending on Student's interest in the subject. It is not dependent on the sensory environment.⁴²

³² Tr. at 153-154; Respondent (Resp). Ex. 27.

³³ Pet. Ex. 6 at 5.

³⁴ Tr. at 138-139.

³⁵ Pet. Ex. 6 at 5.

³⁶ Tr. at 136-137.

³⁷ Pet. Ex. 7 at 3.

³⁸ Tr. at 128, 130.

³⁹ Pet. Ex. 6 at 6.

⁴⁰ Pet. Ex. 6 at 6.

⁴¹ Tr. at 124.

25. Student had some sensory processing issues in the areas of social participation, tactile exploration, body awareness, balance and motion, and planning and ideas (organizing), but none rose to the level of a deficit requiring an accommodation.⁴³
26. Although the OT evaluated assistive technology and tried a word-prediction program to help with Student's spelling, the District did not need to perform a formal assessment for assistive technology because Student did not have a physical deficit that required special equipment or positioning for Student to participate in the classroom.⁴⁴
27. Student had moderate delays in sensory processing that impaired Student's participation and positioning in the classroom and Student's *** influenced the quantity of Student's written production. The OT recommended that the Student receive OT services, specifically *** minutes per nine week grading period.⁴⁵

SLP Evaluation

28. During the 2015 FIE, the District's SLP administered the Clinical Evaluation of Language Fundamentals-5 (CELF-5) to assess Student's general language abilities and to determine language and communication disorders.⁴⁶
29. The SLP obtained a Bachelor of Arts in Speech Pathology in 1995 and a Master of Arts in Speech Pathology in 1998. She worked for another Texas independent school district as a speech pathologist from August 1999-May 2007 and has worked for the District since January 2013.⁴⁷
30. On the CELF-5, Student scored in the average range in word class, formulated sentences, recalling sentences, semantic relationships, and core language scored. Student scored below average on the pragmatics profile, which is a checklist completed by the SLP with input from Student's parents and teachers who provide information to evaluate verbal and nonverbal contextual communication.⁴⁸
31. Student did not exhibit receptive or expressive language deficits, but Student did exhibit pragmatic deficits and needs the specialized services of a speech pathologist to progress in language skills. Accordingly, Student met the eligibility criteria for the disability condition of speech impairment.⁴⁹

⁴² Pet. Ex. 6 at 6.

⁴³ Pet. Ex. 6 at 2, 4-8; Tr. at 127.

⁴⁴ Tr. at 140, 142-144.

⁴⁵ Pet. Ex. 6 at 25; Tr. at 166-167.

⁴⁶ Pet. 6 at 2; Tr. at 191.

⁴⁷ Resp. Ex. 26.

⁴⁸ Pet. Ex. 6 at 3; Tr. at 171-173.

⁴⁹ Pet. Ex. 6 at 24-25.

32. Social skills and pragmatics are related because both involve eye contact, listening to the speaker, inferencing, drawing conclusions about what the person said, vocabulary, and using the language in a structured and syntactic way.⁵⁰
33. The SLP found that Student demonstrated impairment in the area of pragmatic language and recommended that the ARDC find Student meets the eligibility criteria for speech impairment and that Student receive the services of a speech pathologist.⁵¹

Diagnostic Evaluation

34. The District's diagnostician knew Student because she participated in Student's 2012 FIE as the educational diagnostician. She also reviewed Student's past evaluations and educational records, considered information from Student's parents and teachers, and observed Student.⁵²
35. For the past 31 years, the diagnostician has worked as an educational diagnostician. She obtained a Bachelor of Science in 1978 and a Master of Education in 1984. She is certified as a Lifetime Professional Educational Diagnostician, and holds Lifetime Provisional Language and/or Learning Disabilities, Lifetime Provisional Elementary-General, and Lifetime Provisional Elementary-Psychology certificates.⁵³
36. When Student is interested in something, Student is able to successfully use pragmatic skills,⁵⁴ and can be interesting and fun, particularly when communicating one-on-one with adults.⁵⁵
37. Student has a history of difficulty with ***.⁵⁶
38. Student's pragmatic language was properly evaluated as weak.⁵⁷
39. As part of the 2015 FIE, the diagnostician used the Weschler Intelligence Scale, fifth edition (WISC-5) and the Kaufman Test of Educational Achievement, third edition (KTEA-3).

⁵⁰ Tr. at 187.

⁵¹ Pet. Ex. 6 at 25.

⁵² Tr. at 206, 225-226, 241.

⁵³ Resp. Ex. 28; Tr. at 241-242.

⁵⁴ Tr. at 193.

⁵⁵ Tr. at 192.

⁵⁶ Tr. at 228.

⁵⁷ Tr. at 441.

40. The WISC-5 assessed five areas of cognitive ability, specifically crystallized intelligence (aka verbal comprehension), fluid reasoning, processing speed, and visual spatial and working memory.⁵⁸
41. The KTEA-3 assessed Student's math skills, reading skills, and written expression. The KTEA-3 written expression test measured Student's ability to construct sentences, to combine sentences into a more complex product, to evaluate grammar, and to edit by providing Student with several paragraphs where Student had to add the punctuation marks or missing words. At the end of the written expression test, Student was required to write an essay.⁵⁹
42. In the math portion of the KTEA-3, Student exhibited "well above average skills in Student's problem solving capabilities" in the math concepts and applications subtest and above average on the math computation subtest.
43. On the KTEA-3, Student's reading comprehension was average, Student's letter word recognition was average, and Student's written expression was average.⁶⁰
44. The KTEA-3 written expression contains a story appropriate to the student's grade level. As the student goes through the story the student is asked to do certain tasks, such as writing a sentence about what is happening, editing the text, and filling in words. Consequently, the student is required to write throughout the test.
45. During the KTEA-3 written expression test, Student wrote at least 94 words in formulating sentences, combining sentences, and editing. But, when Student was asked to write an essay about the story, without giving Student specific directions about what to write, ***. The essay accounted for about 14 points on the test.⁶¹
46. Because Student scored so well on the rest of the written expression test even though Student *** Student did extremely well.⁶² ***.⁶³
47. Student's *** is not a skill deficit because Student can do it as indicated by Student's performance on ***. It is a behavioral issue because Student simply ***.⁶⁴
48. It was unnecessary for the diagnostician to do a cross-battery analysis to determine if Student had a SLD for written expressions because Student's achievement tests results

⁵⁸ Pet. Ex. 6 at 19; Tr. at 207.

⁵⁹ Tr. at 436.

⁶⁰ Pet. Ex. 6 at 21-22; Tr. at 219, 458.

⁶¹ Tr. at 470-471.

⁶² Tr. at 220, 436.

⁶³ Tr. at 436.

⁶⁴ Tr. at 221-222.

- were average or above and were supported by both Student's grades and Student's *** grade STARR results.⁶⁵
49. Student does have some deficits in short-term memory, and *** than Student's peers, but those deficits do not rise to the level of an SLD in written expression. A deficit in processing speed is not associated with a SLD in written expression.⁶⁶
50. Student had more than a one standard deviation between the two verbal-comprehension tests, but because Student's performance on both tests was average and above average, it was unnecessary to run any further tests unless additional sources of data indicated that further testing was required, which it did not.⁶⁷
51. Student's writing sample score reflected in the 2012 FIE was consistent with Student's writing expression score in the 2015 FIE.⁶⁸
52. Student's spelling errors were phonetic and very readable, and were consistent with that of other students in Student's grade.⁶⁹
53. Student scored extremely high in fluid reasoning, high average in visual spatial, and average in verbal, but scored below average in working memory, short-term memory, and processing speed.⁷⁰
54. Student's intelligence quotient fell in the high-average range.⁷¹
55. In the spring of 2016, Student took the *** grade STAAR in *** and scored *** (***% accuracy) showing a consistency across time in ***.⁷²
56. Student did not have a deficit in spelling because on the KTEA-3 test protocol Student misspelled only *** words out of approximately 94 words—so Student's accuracy was about *** percent.⁷³ Most of the misspelled words were spelled phonetically so they did not affect the ability to understand what was written. On occasion, Student would misspell a word in one place, but spell it correctly later.⁷⁴

⁶⁵ Tr. at 215-216.

⁶⁶ Tr. at 454 -455.

⁶⁷ Tr. at 456.

⁶⁸ Tr. at 437.

⁶⁹ Tr. at 229.

⁷⁰ Pet. Ex. 6 at 19.

⁷¹ Pet. Ex. 6 at 20.

⁷² Pet. Ex. 8 at 1; Tr. at 437.

⁷³ Tr. at 433.

⁷⁴ Tr. at 434.

LSSP Evaluation

57. The LSSP holds a Bachelor of Science in Physical Education and a Master of Science in School Psychology and has completed the requirements to become a licensed specialist. He has worked under the supervision of another LSSP for two years and as an LSSP for the past nine years.⁷⁵
58. In evaluating Student, the LSSP considered information from Student's parents and teachers, classroom data sheets, and direct observations of Student in the classroom and while working with Student. The LSSP also employed the Autism Spectrum Rating Scales (ASRS) and performed a functional behavior assessment (FBA) using the Behavior Assessment System for Children-2nd edition (BASC-2).
59. Student's functional social skills were properly evaluated by the multi-disciplinary team.⁷⁶
60. Student has difficulty completing assignments that are open-ended or when Student fails to understand the purpose of the assignment. Student frequently ***.⁷⁷
61. Student is very observant, inquisitive, creative, and has a thirst for learning. Student ***. In areas that interest Student, Student is focused and will seek out information and ask questions.⁷⁸
62. When interacting with an adult one-on-one, Student is very engaged, friendly, and compliant. Student participated in conversations and maintained eye contact.⁷⁹
63. Student's difficulties in self-regulation, concentration, and sitting still are characteristics of both attention deficit and hyperactivity disorder (ADHD) and ASD and impede the ability to learn both of Student and students around Student.⁸⁰
64. ADHD is not by itself an IDEA eligibility criterion, but it may fall under an OHI eligibility category.⁸¹
65. The evaluation team considered whether Student's ADHD diagnosis should be the basis for recommending a third area of eligibility, OHI, but determined Student's needs would be met as a student with ASD.⁸²

⁷⁵ Resp. Ex. 29; Tr. at 281-282.

⁷⁶ Tr. at 442.

⁷⁷ Tr. at 257-258.

⁷⁸ Tr. at 286-287.

⁷⁹ Tr. at 288.

⁸⁰ Tr. at 266, 276.

⁸¹ Tr. at 465.

66. The teacher's rating scale of Student's BASC-2 profile showed that Student's ADHD characteristics were not prominent, but Student's autistic characteristics were. Therefore, it was not necessary for the District to conduct an OHI/ADHD assessment.⁸³
67. When Student transitions from one grade level to the next, Student has a history of having behavioral and academic problems until Student gets used to Student's teacher's expectations and the teacher adjusts to Student.⁸⁴ Transitioning from a *** in *** grade to the *** in the *** grade amplified the transitioning problems because of ***.⁸⁵
68. The more structure Student is provided in class, the better Student does and the fewer behavioral issues arise.
69. The LSSP assessed Student's executive functioning through the evaluations of Student's social behavior, metacognitions, attention skills, and self-regulation skills because all these areas are part of executive functioning.⁸⁶
70. Student's executive functioning was also measured by the WISC-5 which showed that Student had low scores in working memory and processing speed. This is a direct measurement of executive function involving the ability to focus attention and maintain information in the student's working memory, reorganize it, and to give a different answer. In addition, the BASC-2 measures some executive functions.⁸⁷
71. Student's writing problems related to the rigidity that is associated with ASD.⁸⁸
72. The multi-disciplinary team recommended to the ARDC that Student meets the eligibility criteria for autism and speech impairment and made several recommendations for OT services, speech pathology services, and academic and behavioral accommodations and strategies.⁸⁹

Appropriateness of FIE

73. The 2015 FIE was performed by a multi-disciplinary team,⁹⁰ the instruments used to evaluate Student were appropriate, the testing protocols were followed and the

⁸² Tr. at 446.

⁸³ Pet. Ex. 6 at 24; Tr. at 280.

⁸⁴ Tr. at 291.

⁸⁵ Tr. at 292.

⁸⁶ Tr. at 309.

⁸⁷ Tr. at 443-444.

⁸⁸ Tr. at 305.

⁸⁹ Pet. Ex. 6 at 25-26.

⁹⁰ Tr. at 429-430.

instruments scored properly, and that multi-method testing was utilized. The evaluators also reviewed multiple types of data and sources of information.⁹¹ The components of the FIE included language, physical, intellectual, emotional/behavioral, and educational assessments.⁹²

74. The members of the multi-disciplinary team who conducted Student's FIE are well-credentialed, trained, and experienced.
75. Student was evaluated using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by Student's parents and teachers, which enabled the multi-disciplinary team to determine Student's eligibility as a child with ASD and a speech impairment.
76. The 2015 FIE report was issued on December ***, 2017, but was not shared with Student's parents until December *** 2016, the day of the ARDC meeting.⁹³
77. The FIE provides the necessary information to develop Student's educational program.
78. The multiple assessments are well-recognized tests specifically chosen by Student's evaluators to provide an accurate assessment of Student's strengths and weaknesses in all areas to develop an appropriate educational program for Student.
79. Student was assessed in all areas of suspected disability and the FIE was sufficiently comprehensive to identify all of Student's educational and related service needs.

December *, 2015 ARDC Meeting⁹⁴**

80. Just prior to the December ***, 2015 ARD meeting, the OT, diagnostician and LSSP met with the parents to discuss the FIE.⁹⁵ Student's psychologist had previously diagnosed Student with Attention Deficit Disorder, but they were surprised when told that Student was autistic.⁹⁶

⁹¹ Tr. at 430-431.

⁹² Tr. at 432.

⁹³ Pet. Ex. 6 at 1; Tr. at 289-290, 414-415.

⁹⁴ Pet. Ex. 7.

⁹⁵ Tr. at 306, 379.

⁹⁶ Tr. at 305-308, 379, 414-415.

81. The 2015 ARDC consisted of the parents, a District representative, three general education teachers, a special education teacher/provider, the OT, the diagnostician, and the LSSP.⁹⁷
82. Based on the 2015 FIE and the information provided during the ARD meeting, the ARDC determined on December ***, 2015, that Student is eligible to receive special education and related services as a student with ASD and a speech impairment.⁹⁸
83. At the conclusion of the meeting, Student's parents signed below the statement that they understood and agreed with the ARDC decision and gave permission for the educational placement recommended for Student.
84. The ARDC developed an IEP with two goals to target Student's problematic behavior of failing to complete homework assignments and avoiding group participation.⁹⁹
85. The ARDC put in place several modifications to enable Student to be involved in and to progress in the general education curriculum for the period from December ***, 2015 to December ***, 2016. The modifications included, among others things: (1) *** (2) "****".¹⁰⁰
86. Student's parents signed the 2015 IEP because they understood that if they did not sign it Student would not receive any special education services and their consent for placement in special education was voluntary and could be revoked.¹⁰¹
87. When Student's parents signed the 2015 IEP, they did not represent that they agreed with the 2015 FIE.¹⁰²
88. At the end of *** grade, Student progressed to *** grade with *** As (in ***), *** B (in ***) and *** C (***).¹⁰³
89. The accommodations provided for in the 2015 IEP were appropriate to improve Student's behavioral and academic performance.

⁹⁷ Pet. Ex. 7 at 17.

⁹⁸ Pet. Ex. 7 at 1.

⁹⁹ Pet. Ex. 7 at 5.

¹⁰⁰ Pet. Ex. 7 at 6.

¹⁰¹ Pet. Ex. 7 at 17, 20; Tr. at 381. *See* 34 C.F.R. § 300.300(b).

¹⁰² Tr. at 37-44, 112; Pet. Ex. 7 at 18.

¹⁰³ Resp. Ex. 5 at 2.

June 2016 ARDC Meeting

90. The *** program is designed so *** learners will have *** skills as demonstrated through *** products that represent their individuality and creativity.¹⁰⁴
91. Student's mother wanted Student in the *** program so Student *** and because the program would be *** for Student.¹⁰⁵
92. Student's mother attended the June 2016 ARD meeting without Student's father. The purpose of the June 2016 ARD meeting was to consider changes to Student's accommodations.¹⁰⁶
93. Student's mother agreed to waive several of the accommodations set out in the 2015 IEP that the District maintained would affect the *** the *** program.¹⁰⁷
94. The June 2016 Revision to the Annual ARD noted that the 2015 ARD IEP misstated one of Student's accommodations. The accommodation that read "****" should have read ***. However, this accommodation was removed too.¹⁰⁸
95. The June 2016 ARDC decided Student would continue receiving the following four accommodations, out of the original 12 accommodations, while in the *** program: (1) ***; (2) ***; (3) ***; and (4) ***.¹⁰⁹ The ARDC also added the *** as an accommodation.¹¹⁰
96. The 2015 IEP accommodations that were removed during the 2016 June ARD meeting include: (1) ***; (2) provide time at school to complete homework assignments before, during, or after the school day; (3) ***; (4) ***; (5) clear and concise directions/expectations; (6) organizational checklist, (7) ***; and (8) ***.¹¹¹
97. The June 2016 IEP did not meet Student's behavioral and educational needs and it failed to follow the accommodations recommended in the 2015 FIE.

¹⁰⁴ Tr. at 355.

¹⁰⁵ Tr. at 411-412.

¹⁰⁶ Pet. Ex. 8 at 1.

¹⁰⁷ Pet. Ex. 8 at 1.

¹⁰⁸ Resp. Ex. 2 at 1.

¹⁰⁹ Resp. Ex. 2 at 2.

¹¹⁰ Resp. Ex. 2 at 2.

¹¹¹ Tr. at 400.

***** Grade**

98. In August 2016, Student participated in ***.¹¹²
99. On August ***, 2016, Student's *** grade ELA teacher wrote to the District Special Services Team Leader expressing concern that Student was unable to complete the work in the *** ELA class without the accommodations that were removed in the June 2016 revision to the 2015 IEP.¹¹³
100. Shortly after Student began *** grade, Student's ELA teacher expressed concern that Student was *** and was not being successful in class. Student received a failing grade on one of the written projects.¹¹⁴
101. Student's parents received a number of emails and telephone calls from the school regarding Student's writing and behavioral issues.¹¹⁵
102. At home, Student is a happy child who does Student's chores, reads, ***, and rides Student's bike. Problems occur when Student has to do a writing assignment at home. Then Student has difficulty ***.¹¹⁶
103. The ELA teacher filed a Student Discipline Report about Student on September ***, 2016, stating that Student ***. ***. ***. ***.¹¹⁷
104. Student's ELA teacher filed two Student Discipline Reports about Student on October ***, 2016; ***.¹¹⁸
105. On October ***, 2016, the ELA teacher sent an email to a special needs teacher because Student was struggling to complete assignments after school or at home and she was worried about Student's stress level associated with Student's writing issues.¹¹⁹
106. Student exhibits problems in ***.¹²⁰
107. The ELA teacher emphasized that Student ***.

¹¹² Tr. at 333.

¹¹³ Pet. Ex. 22; Tr. at 330-333.

¹¹⁴ Tr. at 331-336; Resp. Ex. 20 at 21.

¹¹⁵ Tr. at 410, 413.

¹¹⁶ Tr. at 409-410.

¹¹⁷ Pet. Ex. 23; Tr. at 335-336.

¹¹⁸ Pet. Ex. 23; Tr. at 335-336.

¹¹⁹ Pet. Ex. 19; Tr. at 337.

¹²⁰ Tr. at 131-132, 162-163, 409; Pet. Ex. 3 at 15; Pet Ex. 6 at 8-10.

108. In the *** program, ***% of the student's grade is based on written work.¹²¹
109. Student's mother believes the *** program has motivated Student to produce more work than Student produced the entire time Student ***. Student likes Student's ELA teacher.¹²²
110. Math is Student's strongest course, but recently Student has begun having problems in math because Student can no longer do the math problems in Student's head and ***.¹²³
111. On one occasion this school year, ***. ***.¹²⁴
112. Whether Student is in ***, ***, or ***, if Student has a writing assignment, Student is going to be unhappy and try to avoid doing the assignment.¹²⁵
113. Student failed the first nine weeks of *** and was placed on probation. Student was taken off probation the next nine weeks when Student earned a passing grade.¹²⁶
114. Student's performance has improved in written expression since the beginning of the year, but Student still has trouble organizing Student's thoughts and in deciding what Student wants to say.¹²⁷ Student's behavior is much better because the ELA teacher and Student can read each other better.¹²⁸
115. Student was given the graphic organizer in the ELA class, after which Student's ability to organize Student's thoughts improved because the organizer breaks down the assignment for Student. Student is more successful and comfortable with ELA assignments although Student still struggles with the upper level assignments.¹²⁹ Student's ability to take redirection over the course of the year has also improved.¹³⁰
116. Student's current behavior problems are usually precipitated by requests for written work and Student's effort at work avoidance.¹³¹ Both Student's work avoidance and Student's behavior problems can impede Student's ability to learn.¹³²

¹²¹ Tr. at 327.

¹²² Tr. at 411.

¹²³ Tr. at 412.

¹²⁴ Tr. at 413-414.

¹²⁵ Tr. at 399.

¹²⁶ Tr. at 330.

¹²⁷ Tr. at 327.

¹²⁸ Tr. at 328.

¹²⁹ Tr. at 362-364.

¹³⁰ Tr. at 365.

¹³¹ Tr. at 328.

117. Student has a ***, but the demands of the *** frustrate Student.¹³³
118. Student can write and can organize Student's thoughts once Student knows what Student wants to say. Student's spelling does not affect the readability of Student's work, and Student's handwriting is legible. Student had difficulty dealing with the synthesis, evaluation and analysis of the material in the *** class before producing it.¹³⁴

IEE Request

119. On October ***, 2016, the District's Director of Special Education Programs requested that the District begin the process to have Student undergo a Functional Behavioral Assessment (FBA) after Student's parents signed the consent for the evaluation. Later she learned that an FBA had been done the year before and Student's behavior had not changed so the new FBA was not performed.¹³⁵
120. On October ***, 2016, the District's Executive Director of Special Services; and the Director of Special Education Programs received an email from Student's *** stating that Petitioner disagreed with the 2015 FIE and requested an IEE at public expense for a psychological evaluation, an assistive technology evaluation, a speech and language evaluation, and an OT evaluation.¹³⁶
121. The parents did not file the IEE request earlier because they did not know that they had that option and Student's problems did not escalate until Student started *** grade.¹³⁷
122. The parents requested the IEE at public expense because Student's behavior and academic success deteriorated rapidly after the June 2016 revisions to the 2015 IEP were implemented when Student began *** grade and they felt something different needed to be done.¹³⁸
123. The same day, the email was forwarded to the District's Director of Special Education Support Services, who handled IEE requests for the District.¹³⁹

¹³² Tr. at 329.

¹³³ Tr. at 346.

¹³⁴ Tr. at 349-350.

¹³⁵ Pet. Ex. 28; Tr. at 67-68.

¹³⁶ Pet. Ex. 26; Tr. at 26, 59-60.

¹³⁷ Tr. at 383.

¹³⁸ Tr. at 416.

¹³⁹ Tr. at 26, 60, 102.

124. The District's Director of Special Education Support Services prepared a letter dated October ***, 2016, addressed to Student's mother and father ***, denying the request because Petitioner had agreed with the 2015 FIE at the December 2015 ARDC meeting and denying an IEE at public expense.¹⁴⁰
125. The copy of the letter in the District's files is unsigned even though the District's Director of Special Education Support Services routinely keeps a signed copy of IEE letters.¹⁴¹
126. Neither Student's mother nor father received this letter and the District presented no evidence that the United States Postal Service returned *** as undeliverable. The District did not mail ***.¹⁴²
127. Due to the one-year statute of limitations, Petitioner filed the request for a due process hearing on November 30, 2016.¹⁴³
128. On December ***, 2016, the District filed a due process claim asserting that the 2015 FIE was appropriate.¹⁴⁴
129. Forty-nine days lapsed between the time the District received Petitioner's IEE request and the time the District filed its complaint to show the 2015 FIE was appropriate.
130. Time was of the essence because Student was struggling academically in *** and Student's behavior in school was progressively getting worse.
131. The District did not try to work with Student's parents to resolve their concerns with the 2015 FIE.

November 2016 ARDC Meeting

132. In the pre-ARD form, the *** teacher documented that Student had trouble ***. All of these contributed to Student's difficulty in producing higher level *** in the time given. The pace of the *** course in *** is overwhelming to Student and Student had *** failing grades out of the *** for the first *** weeks.¹⁴⁵
133. In November 2016, Student still struggled with doing the *** of *** assignments and, if in a group, Student tried to get the other students to do the *** of the assignment for

¹⁴⁰ Pet. Ex. 9; Tr. at 29.

¹⁴¹ Pet. Ex. 9; Tr. at 106.

¹⁴² Tr. at 107.

¹⁴³ Tr. at 384.

¹⁴⁴ Tr. at 31.

¹⁴⁵ Tr. at 339-340; Pet. Ex. 17.

- Student. If the work was too in-depth and required creativity, Student became emotional and refused to do it.¹⁴⁶
134. The November 2016 ARD meeting ended in non-consensus.¹⁴⁷
135. The November 2016 ARDC created the second 2016 IEP and is based on the 2015 FIE and information provided about Student from school records, Student's teachers, and Student's parents, and included goals and objectives for Student. The duration of the November 2016 IEP was from November ***, 2016 to November ***, 2017.¹⁴⁸
136. The accommodations put in place for Student at the November 2016 ARDC meeting coupled with the OT and Speech consultations have been helpful to Student's academic performance and Student's behavioral issues.¹⁴⁹
137. Compensatory services that provide *** hours of individual tutoring by personnel trained in *** and ASD are necessary to address Student's failing performance in *** during the first *** weeks of the 2016-2017 school year.
138. The parties attended a resolution session on December 15, 2016, which was unsuccessful.
139. The due process hearing convened on February 14, 2017, and adjourned on February 15, 2017.

IV. IEE REQUEST

The purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education.”¹⁵⁰ At its core the IDEA is a “cooperative process . . . between parents and schools” in order to design an effective IEP.¹⁵¹ The IDEA provides students with disabilities and their parents a set of guaranteed procedural safeguards, including the right to obtain an IEE. In *Phillip C. v. Jefferson County Board of Education*, the court noted that “[w]ithout public financing of an IEE, a class of parents would be unable to afford an IEE

¹⁴⁶ Tr. at 342-343; Pet. Ex. 15.

¹⁴⁷ Pet. Ex. 8 at 26.

¹⁴⁸ Pet. Ex. 8 at 7-10.

¹⁴⁹ Tr. at 367-368.

¹⁵⁰ 20 U.S.C. § 1400(d)(1)(A)-(B).

¹⁵¹ *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

and their children would not receive, as the IDEA intended, a ‘free and appropriate public education’ as the result of a cooperation process that protects the rights of parents.”¹⁵²

Under the IDEA, a parent has a right to request an IEE at public expense “if the parent disagrees with an evaluation obtained by the public agency.”¹⁵³ In response, and “without unnecessary delay,” the school district (the public agency) must either file a due process complaint to request a hearing to show its evaluation was appropriate or ensure that an IEE is provided at public expense.¹⁵⁴ If the district files a complaint and establishes that its evaluation was appropriate, the parent may still obtain an IEE, but not at public expense.¹⁵⁵

A. Did the Parent’s Signature on the 2015 ARD/IEP Bar Their Right to Request an IEE at Public Expense?

The District argues that because Student’s parents were provided the IDEA procedural safeguards and then signed the 2015 ARD document (2015 IEP), Petitioner waived their rights to object to the 2015 FIE, and to request an IEE at public expense.¹⁵⁶

The District asserts that agreeing to an FIE is analogous to an agreement with a proposed IEP and cannot be rescinded without agreement or a due process hearing. Moreover, the District points out that parents who agree with an FIE initially are not left without recourse because the parent has the right to request a reevaluation or to obtain an IEE at their own expense.¹⁵⁷ The District urges that if Congress wanted to allow parents to rescind or revoke parental agreement to an FIE, it would have provided such language in the regulation in the same way Congress included language that allows revocation of parental consent to an evaluation.¹⁵⁸ In support of

¹⁵² *Phillip C., v. Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 693 (11th Cir. 2012) (quoting 34 C.F.R. § 300.502(b)(1)).

¹⁵³ 34 C.F.R. § 300.502(a), (b).

¹⁵⁴ 34 C.F.R. § 300.502(b)(2).

¹⁵⁵ 34 C.F.R. § 300.502(b)(3).

¹⁵⁶ Pet. Ex. 7 at 13, 17, and 20.

¹⁵⁷ 34 C.F.R. § 300.303.

¹⁵⁸ Respondent’s Closing Argument at 11.

this argument, the District relied on *Lauren W. v. DeFlaminis*.¹⁵⁹ In *Lauren*, the hearing officer found the parents agreed to the evaluation and were not entitled to an IEE at public expense. The 3rd Circuit agreed that the parents were not entitled to an IEE at public expense because “Lauren’s parents both checked ‘yes’ and signed the District’s evaluation, they indisputably agreed with it.”¹⁶⁰

However, the facts in the *Lauren* case are distinguishable to the facts in this case. Here, Student’s parents did not sign the 2015 FIE, did not expressly agree to the FIE, and notified District that they disagreed with the evaluation. Student’s parents signed the 2015 ARD document that included Student’s 2015 IEP, not the evaluation. Their signature appears on the attendance page of the 2015 IEP and on the last page of the document. The last page includes the statement, “[t]o obtain assistance in understanding this notice of ARD committee provisions, you may call Special Education Information Center at #1-855-SPEDTEX (1-855-773-3839) or Education Service Center, 713-462-7708.”¹⁶¹ The parents marked “yes” and signed under the following statements:

I have been fully informed in my native language and other mode of communication and understand the admission, review and dismissal (ARD) committee determination of eligibility of my child/me for special education, and the recommendation for the initial provision of special education and/or related services. I understand the ARD committee report dated 12/***/2015 that has been prepare for my child/me.

I understand and agree with the ARD committee’s decision and give my permission for the educational placement that has been proposed for my child.

I understand that my consent for placement is voluntary and may be revoked at any time. However, if I revoke consent after the initial provision of special education and related services to my child, my revocation is not retroactive.

¹⁵⁹ *Lauren W. ex. rel. James W & Jean W. v. DeFlaminis*, Civ. A. 03-CV-1526, 2005 WL 1353643, at *12 (E.D. Pa. June 2005, aff’d sub nom., *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d. 259 (3d Cir. 2007).

¹⁶⁰ *Lauren* at 275. *Lauren* appears to stand for the principle that a parent may waive the right to an IEE at public expense under certain circumstances. This principle has not yet been approved by the Fifth Circuit Court of Appeals.

¹⁶¹ Pet. Ex. 6 at 20.

These statements concerned the 2015 IEP and ARDC's recommended placement for Student, not whether Student's parent agreed with the 2015 FIE.

The hearing officer is not persuaded by the District's argument that agreeing to the initial provision of special education services and to the ARD's educational placement is an "undisputable agreement" to the FIE. To the contrary, while the District completed the 2015 FIE on December ***, 2015, the District did not share the FIE report with Student's parents until the day of the December ***, 2015 ARD meeting. The OT, diagnostician, and LSSP reviewed the 2015 FIE with Student's parents just before the 2015 ARD, but the 34-page FIE contained detailed information that Student's parents had little opportunity to absorb, research, or discuss. The mother's testimony that she did not understand the 2015 FIE until the evaluators testified at the due process hearing was very credible as was the father's testimony that he thought his *** would not receive special education services if he did not sign agreement with the 2015 FIE.

ARDC meetings are collaborative and oftentimes no individual obtains all that he or she desires. Compromises are made by all. Here, parents signed the ARD document to obtain special education for Student without further delay. Their signature did not indicate agreement with the FIE any more than it indicated agreement with everything discussed at the ARD committee meeting. Rather, Parents accepted the educational placement of Student recommended by the ARD, as well as the provision of special education and related services. The parents did not indisputably agree with the FIE as in *Lauren*, and their signatures on the 2015 ARD initial placement did not bar their right to request an IEE at public expense.

The evidence does establish that the parents' desire for an IEE began when Student started *** grade and Student's behavior and academics declined dramatically. During the first *** weeks of Student's *** grade year Student failed ***. It was then that Parents requested an IEE, nine months after the 2015 ARD. The District urged that this was too late for such a request.

The IDEA does not impose a specific deadline by which a parent must state his or her disagreement with a school district's FIE in order to request an IEE at public expense. A few cases have addressed this issue and the prevailing opinion is that such requests are controlled by

the state's statute of limitations.¹⁶² The statute of limitation in this case would be one year from the known or should have known date, December ***, 2015, when the FIE was first presented to parents. The request for an IEE was presented to the District on October ***, 2016, within the Texas one-year statute of limitations, as was Petitioner's complaint filed on November 30, 2016.

Accordingly, the hearing officer finds that Petitioner was entitled under 34 C.F.R. § 300.502(b)(1) to disagree with the 2015 FIE and to request an IEE at public expense.

B. Did the District Timely Respond To IEE Request?

It is undisputed that the District received Petitioner's IEE request on October ***, 2016, and that the District did not file a complaint to show its 2015 FIE was appropriate until December ***, 2017, 49 days later. When a district receives a request for an IEE, it must respond in one of two ways: (1) file a due process complaint and meet its burden of showing the FIE was appropriate; or (2) ensure that an IEE is performed at public expense, unless the district shows that an IEE already performed by the petitioner did not meet the district's criteria for an FIE.¹⁶³ Here, the District failed to comply with either option.

The law does not support the District's argument that if a school district determines that a parent is not entitled to request a publically-funded IEE, then the school district is not required to comply with 34 C.F.R. § 300.502(b)(2). Nothing in the regulations delegates this authority to school districts. Instead, the school district must file a complaint and present evidence to show that the evaluation was appropriate, absent very limited case law exceptions where parents have given an "undisputed expressed agreement" with the FIE or requested the IEE outside the statute of limitations. Neither of these situations is applicable here. Thus, based on 34 C.F.R. § 300.502(b)(2)(i), after the District received notice that Petitioner disagreed with the 2015 FIE and requested a publically-funded IEE, the District then had to either approve the request or file a complaint to establish the evaluation was appropriate.

¹⁶² *Beaumont Indep. Sch. Dist.*, 114 LRP 7471 (SEA TX 2013); *Ottis W. v. Brazos ISD*, 113 LRP 2098 (SEA TX 2012); *Atlanta Pub. Sch.*, 51 IDELR 29 (SEA Ga. 2008); *TP v. Bryan County Sch. Dist.*, 114 LRP 45 (S.D. Ga. 2014); and *Placentia-Yorba Linda Unified Sch. Dist.*, 112 LRP 41903 (SEA CA 2012); all denying a request for an IEE based on the statute of limitations, 1-year in the Texas cases.

¹⁶³ 34 C.F.R. § 300.502(b)(2).

The issue then becomes whether the District filed its complaint without unnecessary delay. The term “without unnecessary delay” is not defined in IDEA or the IDEA rules. Whether a delay is unnecessary turns on the facts specific to each case. OSEP has indicated that the lack of a definition allows for a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements of, an IEE.¹⁶⁴ A delay may be appropriate while a school district and the student’s parents actively work on a resolution to the issues. However, in this case the District did not communicate with Student’s parents about their concerns over the 2015 FIE. Even after the parents inquired about their IEE request during the November ***, 2016 ARD meeting, the District did not promptly file a complaint or engage in negotiations. Rather, it was only after Petitioner filed a request for a due process hearing against the District, that the District filed its complaint asserting the 2015 FIE was appropriate.

The District argues that it sent Petitioner a letter on October ***, 2017, advising Petitioner that Student was not entitled to an IEE, and was unaware Student’s parents had not received the letter until the November ***, 2016 ARD meeting. As reflected in the findings, while the District prepared the letter, it was never sent. Moreover, this letter, even if the District had sent it, did not excuse the District from complying with 34 C.F.R. § 300.502(b)(2) to either ensure that the IEE was provided to Petitioner at public expense or file a complaint to show its evaluation was appropriate.

The hearing officer thus looks to several factors in determining whether the District’s delay was unreasonable. These include the length of the delay, the reason for the delay, and the substantial effect of the delay on Student. Addressing the length of the delay, the Fifth Circuit Court in *Seth B. v. Orleans Parish School Board* distinguished between a request for an IEE at public expense and the subsequent request for reimbursement after the IEE is completed.¹⁶⁵ The court emphasized under § 300.502(b)(2)(i) the school district “must ‘file’ a complaint and ‘request’ a hearing if it wishes to decline reimbursement on the ground that its own evaluation

¹⁶⁴ *Letter to Anonymous*, 56 IDELR 175 (OSEP 2010).

¹⁶⁵ *Seth B. ex. rel. Donald B v. Orleans Parish School Board*, 810 F.3d 961, 968 (5th Cir. 2016).

was appropriate.”¹⁶⁶ The court noted, § 300.502(b)(2)(ii) has no such requirement because the school district is not required to pay for an IEE if the IEE does not meet the school district’s criteria. In *Seth*, the court explained:

“[w]hen a parent first requests an IEE, the school placement or educational plan for the child may be contingent on the outcome of the IEE. A months-long delay before even starting the process of holding a due process hearing on the need for an independent evaluation is a significant amount of time when compared to the length of the school year. In contrast once the IEE has been completed, school officials can consider it immediately before reimbursement issues are resolved. Thus, the IEE’s function is not vitiated when only reimbursement is delayed.”¹⁶⁷

Moreover, the District failed to provide a reasonable explanation for the 49-day delay between the time Petitioner’s requested the IEE and the time the District filed its complaint. And finally, throughout this time period, Student was struggling in *** despite the efforts of the *** teacher and Student’s parents. Time was of the essence because Student’s behavior and academic success was rapidly deteriorating culminating in a failing grade for ***. Throughout this period, Student’s parents and the *** teacher asked for assistance from the District to help Student so it is clear that the District was aware that Student’s educational success was in peril. Based on the evidence provided, the hearing officer finds that the District unnecessarily delayed in filing its complaint to show that its evaluation was appropriate; therefore, Petitioner is entitled to the IEE requested at public expense.

V. THE 2015 FIE

Each public agency must conduct a FIE, in accordance with 34 C.F.R. §§ 300.301, 300.304 through 300.311, before the agency may provide special education and related services to a child with a disability under the IDEA provisions.¹⁶⁸

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 971-972.

¹⁶⁸ 20 U.S.C. § 1414(a); 34 C.F.R. § 300.301.

A. Was the 2015 FIE Inaccurate and Incomplete?

The District's multi-disciplinary team used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student to determine Student's disability and to create Student's 2015 IEP. The qualified evaluators included an educational diagnostician, an OT, a SLP, a LSSP, and two of Student's educational teachers. The multi-disciplinary team observed Student in class, in the cafeteria, during P.E., and during one-on-one meetings. The team also reviewed Student's prior educational history (including Student's 2012 FIE) and existing evaluations, and obtained information about Student from Student's parents and teachers which they then incorporated into the evaluation. At least nineteen different broad sources of data, including information from Student's parents, were utilized to assess areas of suspected disability.¹⁶⁹ The multi-disciplinary team also observed Student for almost 20 hours.¹⁷⁰

According to Petitioner's expert, students with SLD have trouble formulating ideas they have to write down, have slow handwriting speeds, and commit spelling errors.¹⁷¹ Petitioner maintains that the 2015 FIE provided superficial information regarding Student's written expression skills given Student's history of writing issues and the OT's finding that Student had *** than other students Student's age. In addition, Petitioner's expert opined that the District did not adequately investigate the cause of Student's spelling errors or Student's *** to determine if Student has a SLD in written expression. Petitioner's expert submits that further evaluation was warranted to identify any SLDs that might underlie Student's frustration with, and avoidance of, these writing tasks.¹⁷² The District disagreed.

In order to have a SLD, Respondent's expert clarified, the student must have an academic

¹⁶⁹ Pet. Ex. 6 at 1-2; Tr. at 284.

¹⁷⁰ Tr. at 443.

¹⁷¹ Petitioner's expert has a Bachelor of Arts in Psychology, a Master of Clinical Psychology, and a Ph.D. in clinical psychology. She is a licensed psychologist and a licensed specialist in school psychology. Tr. at 73, 78-79; Pet. Ex. 1.

¹⁷² Pet. Ex. 2.

deficit that is supported by multiple sources of data.¹⁷³ Student did not have an academic deficit in written expression. Student received an average standard score on the written expression subtest of the KTEA-3, passed STAAR in *** grade, and teacher reports.¹⁷⁴ Regarding Student's spelling, Student wrote approximately *** words on the KTEA-3 on the written expression test, and only misspelled *** words. Most misspellings were phonetic spelling errors. Student would also misspell a word in one place on the test, but correctly spell it later. In addition, Student was evaluated for a SLD in the 2012 FIE and none were found. The diagnostician confirmed she would have re-evaluated Student for an SLD had Student exhibited any academic deficits.¹⁷⁵

Based on the preponderance of the evidence, the hearing officer finds that the 2015 FIE appropriately evaluated Student for SDL in written expression.¹⁷⁶ The multi-disciplinary team considered various sources of data in evaluating whether Student has a SLD in written expression. The evaluators observed Student in the classroom, in the cafeteria, during PE and while with Student one-on-one. The evaluators also reviewed Student's prior evaluations, Student's education record, reviewed Student's work, and obtained information from Student's parents and teachers. The multi-disciplinary team considered a sufficient variety of data to appropriately assess whether Student has a SLD in written expression and determined Student does not.

Petitioner's expert also criticized the evaluator's failure to administer two sub-tests in each academic area to determine if Student had a SLD. While this was the standard protocol prior to 2013, Respondent's expert testified, it was not the standard in 2015.¹⁷⁷ In 2015, if the student had an average score on an academic subtest that is supported by additional data, such as the student's grades or STAAR exam score, then it was unnecessary to administer another sub-test in the same academic area.¹⁷⁸ Based on the evidence, it was not necessary to administer two-subtests in each

¹⁷³ Respondent's expert has a bachelor's degree in psychology, a master's degree in counseling with a minor in education, and a Ph.D. in school psychology. She is a licensed specialist in school psychology, and is a licensed psychologist. She has worked in the education field for 35 years. Tr. at 427-428; Resp. Ex. 25.

¹⁷⁴ Tr. at 433.

¹⁷⁵ Tr. at 217.

¹⁷⁶ Tr. at 434.

¹⁷⁷ Tr. at 434-435

¹⁷⁸ Tr. at 434-435.

academic area given the totality of information available to the evaluators.

According to Petitioner's expert, when evaluating for a SLD, the "best practices" is to evaluate seven areas of intelligence, but the 2015 FIE only evaluated five areas of cognitive ability. The 2015 FIE did not evaluate Student's auditory processing (GA) nor long-term storage and retrieval (GLA), both of which were evaluated in Student's 2012 FIE and found to be average. Because Student had a significant weakness in pragmatic language and ASD, Petitioner's expert opined that the District should have evaluated Student's pragmatic language abilities, including Student's ability to make inferences, problem solve social situations/difficulties, predict the outcome of a social problem, and understand the cause for social difficulties.

To evaluate whether Student had a SLD, Respondent's expert testified that the evaluation initially had to determine whether Student had an academic deficit. Because Student did not have an academic deficit, only a processing deficit, the assessment appropriately considered Student's strength and weakness from a cognitive perspective.¹⁷⁹

GA concerns the ability to process sounds and is directly related to basic reading skills. Student is an exceptional reader and coupled with the fact that Student had an average score on the GA in the 2012 FIE, the hearing officer finds it was unnecessary to re-evaluate. The GLR relates to long term storage and retrieval—the ability to store new information and how quickly it can be retrieved.¹⁸⁰ This test relates to issues such as fluency in reading and math, both subjects Student does well in to date. Again, the GLR was measured during the 2012 FIE and Student's score was average. The hearing officer finds that the omission of the GA and GLR tests did not affect the validity of the 2015 FIE nor whether it was an appropriate evaluation.

Regarding pragmatic language, the multi-disciplinary team did evaluate Student's pragmatic skills using several different methods, including the Autism Spectrum Rating Scale, the BASC, and observations by the evaluators of Student's ability to communicate both one-on-one and in the

¹⁷⁹ Tr. at 438.

¹⁸⁰ Tr. at 439.

classroom setting. Additionally, the sub-tests on the CELF-5 measured Student's inferential thinking skills. It was unnecessary for the multi-disciplinary team to use additional methods to assess Student's pragmatic language.

Although Petitioner's expert also contends that the 2015 FIE evaluation of Student's functional social skills was cursory, the evidence established otherwise. During the evaluation, the OT observed Student in the classroom, in the cafeteria, at recess, and during P.E. The diagnostician and LSSP also spent sufficient time observing and interacting with Student. Coupled with the information obtained from the assessments, and Student's parents and teacher, the 2015 FIE appropriately evaluated Student's functional social skills. Similarly, Student's executive function was appropriately evaluated through the WISC-5, the BASC and the ASRS.¹⁸¹

Contrary to Petitioner's allegations, the hearing officer finds that the multi-disciplinary team did evaluate whether Student's ADHD characteristics rose to the level of another disability condition under OHI. The characteristics of ADHD were not the prominent characteristics affecting Student's educational performance, but were subsumed under the ASD classification.¹⁸² The teachers' ratings on the BASC profile show that Student's autism characteristics were severe and dominant.¹⁸³

In conclusion, the evidence shows that the 2015 FIE met the IDEA requirements and was not inaccurate or incomplete.

B. Was Student denied FAPE?

A free, appropriate public education includes special education, related services, and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order for the child to receive a meaningful educational benefit. The IEP is

¹⁸¹ Tr. at 443.

¹⁸² Tr. at 445-446.

¹⁸³ Tr. at 446.

the means by which school districts tailor the special education and related services to the child's unique needs.¹⁸⁴ The instruction and services must be provided at public expense and comport with the child's IEP.¹⁸⁵ In a recent case, the Supreme Court clarified that a school district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁸⁶

In this jurisdiction there are four factors applied in order to determine whether the IEP as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit under the IDEA. These factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated and collaborative manner by key stakeholders; and
- There are positive academic and non-academic benefits demonstrated.¹⁸⁷

There is no requirement the four factors be considered or weighed in any particular way. Instead the factors are merely indicators of when an IEP meets IDEA requirements.¹⁸⁸

1. Individualized Program

The evidence showed that 2015 IEP goals and objectives incorporated the majority of accommodations recommended in the 2015 FIE. These goals and objectives and Student's placement, were individualized on the basis of Student's assessment and performance as well as the results of the 2015 FIE. As implemented through the end of Student's *** grade year, the

¹⁸⁴ *Endrew et rel. Joseph F. v. Douglas Cty Sch. Dist. RE-1*, No. 15-827, 2017 WL 10662601, at *10 (U.S. Mar. 22, 2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982).

¹⁸⁵ 20 U.S.C. § 1401(9)(A)-(D); See *Endrew*, 2017 WL 1066260, at * 10; *Rowley*, 458 U.S. at 181.

¹⁸⁶ *Endrew*, 2017 WL 1066260 at *10.

¹⁸⁷ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

¹⁸⁸ *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009).

2015 IEP was successful as reflected in Student's performance, Student's end of the school year grades, and Student's score on the ***-grade STARR.

Student's problems began after the ARDC revised the 2015 IEP in June 2016 (June 2016 IEP revisions). The ARDC did not conduct any new evaluations or assess Student's performance when it withdrew the majority of Student's accommodations. Other than to admit Student into the *** program, the ARDC presented no other reason to revise Student's 2015 IEP. When Student began *** grade with the June 2016 IEP revisions, Student's *** teacher and Student's parents noticed a marked decline in Student's academic and behavioral performance at school.

The evidence established that the June 2016 IEP revisions to the 2015 IEP were not specifically designed to meet Student's unique needs so Student could benefit from the educational instructions, particularly ***. Moreover, the 2016 IEP revisions failed to include appropriate and measurable goals and objectives. Although the June 2016 IEP revisions state that no changes to the goals and objectives were made, the evidence shows this was not the case. The 2015 IEP's goals and objectives incorporated most of the accommodations recommended in the 2015 FIE. For instance, in the 2015 IEP, the first Measureable Annual Goal stated:

***¹⁸⁹

However, this 2015 IEP annual goal was changed dramatically in the June 2016 IEP revisions. The majority of the accommodations noted above were removed. In contrast to the 2015 IEP, the June 2016 IEP revisions did not follow the recommendations of the 2015 FIE and wholly failed to provide appropriate and measurable goals and objectives.

2. Academic and Non-Academic Benefits

In addition, the June 2016 IEP revisions, negatively affected Student's academic performance, particularly in the *** class. From the beginning of the school year, the ***

¹⁸⁹ Pet. Ex. 7 at 5.

teacher became so concerned that Student could not be successful without Student's special education accommodations that she notified the District's special services department of her concerns.¹⁹⁰ During the first nine weeks, Student was unable to produce the majority of Student's work assignments in *** and Student's behavioral issues escalated. Student failed *** the first *** weeks. Student also began to struggle in math class because the problems were becoming too complicated for Student ***. Student became so stressed that Student's *** teacher grew concerned for Student's emotional well-being. As a result of the June 2016 IEP revisions, Student no longer experienced positive academic and non-academic benefits, particularly in subjects that required Student write.

The District noted Student's mother agreed to the removal of Student's accommodations so her *** could participate in the District's *** program for *** students. However, the hearing officer finds that unless the modifications and accommodations fundamentally altered an integral part of the *** program—and the evidence fails to establish as much—conditioning Student's participation in *** on the forfeiture of Student's necessary special education services was inappropriate.¹⁹¹ It amounted to pressuring the mother into a difficult decision of giving up Student's necessary accommodations or returning Student into ***. The Office for Civil Rights addressed this issue in a ***, Dear Colleague Letter, stating, “***.”¹⁹²

For these reasons, the hearing officer finds that although the 2015 FIE was appropriate, the June 2016 IEP revisions did not follow the recommendations made in the 2015 FIE and failed to provide Student with FAPE by removing the accommodations Student needed to succeed and by failing to provide appropriate and measureable goals. As a result, between the beginning of the 2016-2017 school year, until November ***, 2016, when the ARDC met and implemented the 2016 IEP, Student's academic performance declined and Student's behavioral issues escalated. As a result, Student was denied FAPE.

¹⁹⁰ Pet. Ex. 22.

¹⁹¹ The accommodations were allowed starting in November 2016, after Student had great difficulty without them, so the District can hardly now claim they interfered with an integral part of the *** program.

¹⁹² ***, ***, ***, ***

3. Least Restrictive Environment and Collaborative Manor

Petitioner did not dispute that the IEP was being provided in the least restrictive environment. The District included student's Parents in the 2015 ARD/IEP and the November 2016 ARD meeting. Although Petitioner and District did not reach consensus, the services have been provided in a collaborative manner.

C. 2016 IEP

The hearing officer further finds that at the November 2016 ARD meeting, the District followed the 2015 FIE and considered observations, a review of Student's records, and information from Student's teachers and parents in the development of the November ***, 2016 IEP. The November 2016 IEP included appropriate and measureable goal and objectives. After the 2016 IEP was implemented on November ***, 2016, Student began experiencing improvement in Student's academics performance and in Student's behavior at school.

VI. CONCLUSIONS OF LAW

1. The District is a local educational agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Petitioner is eligible as a student with a disability for special education and related services under the IDEA as a student with ASD and OHI. 34 C.F.R. §§ 300.8 (a), (c); 4)(8)(9). 19 Tex. Admin. Code § 89.1151(c).
3. Petitioner bears the burden of proof on all issues raised in the proceeding, except for the District's counterclaim. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 62; 126 S. Ct. 528, 537.
4. The 1-year statute of limitations applies to this proceeding. 19 Tex. Admin. Code § 89.1151(c).
5. Petitioner is entitled to obtain an IEE for Student at public expense. The District denied Petitioner's request for an IEE but unreasonably delayed requesting a hearing to prove its evaluation was appropriate. 34 C.F.R. § 300.502(b).

6. The District met its burden of proof showing that the 2015 FIE was appropriate. 20 U.S.C § 1414(a); 34 C.F.R. §§ 300.301-300.311.
7. The 2015 IEP was appropriately developed and implemented from December 2015 to June 2016, and during this time Student was provided a FAPE. 20 U.S.C § 1401(9); 34 C.F.R. § 300.17; *Andrew ex. rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827, 2017 WL 1066260, at *10 (U.S. Mar. 22, 2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982); *Houston Indep. Sch. Dist. v. Bobby R.* 200 F.3d 341, 3478 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).
8. The 2016 revisions to the 2015 IEP were not appropriate and the 2015 IEP was not appropriately implemented from June 2016 to November 2016. Thus, during this time period, the District failed to provide Student with a FAPE. 20 U.S.C § 1401(9); 34 C.F.R. § 300.17; *Andrew ex. rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827, 2017 WL 1066260, at *10 (U.S. Mar. 22, 2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982); *Houston Indep. Sch. Dist. v. Bobby R.* 200 F.3d 341, 3478 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).
9. The necessary special education accommodations for Student were returned to Student's IEP in November 2016, as were appropriate and measureable goals and objectives. Thus, the District again provided Student with a FAPE after November 2016. 20 U.S.C § 1401(9); 34 C.F.R. § 300.17; *Andrew ex. rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827, 2017 WL 1066260, at *10 (U.S. Mar. 22, 2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982); *Houston Indep. Sch. Dist. v. Bobby R.* 200 F.3d 341, 3478 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).
10. Petitioner is entitled to compensatory relief for the District's 4-month failure to provide FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 31 F.3d 1489 (9th Cir. 1994).


ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the hearing officer hereby orders as follows:

1. The District shall authorize Petitioner to have an IEE at public expense that includes a psycho-educational and psychological evaluation, an assistive technology evaluation, speech and language evaluation, and occupational therapy evaluation.
2. The District shall provide Student 45 hours of compensatory services educational services with individual tutoring by personnel trained in written expression and ASD.

All other relief from either party is denied.

SIGNED April 7, 2017.



Catherine C. Egan
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision 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 the district court of the United States.¹⁹³

¹⁹³ 20 U.S.C § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).