

**DOCKET NO. 099-SE-1218**

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

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student, \*\*\*, b/n/f/ \*\*\* (Parent) (collectively “Petitioner” or “Student”) brings this action against the Conroe Independent School District (“Respondent,” or “the District”) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 et seq. (IDEA) and its implementing state and federal regulations.

**A. Legal Representatives**

Student has been self-represented by Parent throughout this litigation. The District has been represented throughout this litigation by its legal counsel, Amy C. Tucker of Rogers, Morris, and Grover, L.L.P.

**B. Resolution Session and Mediation**

The resolution session in this case was set to occur on December 21, 2018. The Parties agreed in writing to waive the resolution session on December 11, 2018. Pursuant to 34 C.F.R. § 300.510(c)(1), the 30-day resolution period ended on December 12, 2018, accelerating the 45-day statutory decision due date. Pursuant to 19 Tex. Admin. Code § 89.1186(a), Respondent moved for an unopposed continuance and extension of the decision due date to keep the original

settings established in Order No.1, the initial scheduling order, and having found good cause the unopposed motion was granted on December 14, 2018. Mediation was not attempted.

### **C. Continuances**

Two unopposed continuances were granted in this case. The first was at Respondent's request to keep the original settings after the Parties waived the resolution session. The second was also at Respondent's request seeking a continuance and extension of the decision due date to permit the Parties additional time to prepare their final briefs with the benefit of the hearing transcript.

## **II. DUE PROCESS HEARING**

The due process hearing was conducted on January 17, 2019. Petitioner continued to be self-represented by Student's Parent. Respondent continued to be represented by its legal counsel Amy C. Tucker. In addition, \*\*\*, District Director of Special Education attended the hearing as a party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing the parties requested the record remain open in order to allow submission of written closing arguments on the designated issue in this case. Those arguments were originally due on February 15, 2019. Petitioner was granted an opposed extension of time to file final briefs and final briefs were timely submitted by both parties. The parties agreed to extend the deadline for the Hearing Officer's decision until March 1, 2019, to allow the Hearing Officer time to complete a review of the record on file in this case, conduct the requisite legal research, and to consider the written closing arguments in preparing the decision.<sup>1</sup>

---

<sup>1</sup> Order No. 4.

### III. ISSUE

#### A. Petitioner's Issue

Petitioner submitted the following issue: Whether the District failed to provide Student with a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) within the one year statute of limitations period that applies in Texas; and specifically: Did the District fail to provide Student a FAPE by refusing to permit Student to make up or re-do class assignments, quizzes, and tests as a necessary individualized education program (IEP) accommodation and in violation of District policy?<sup>2</sup>

#### B. Respondent's Legal Position and Additional Issues

District policy only allows for grade remediation on major tests in classes in which Student is currently enrolled; the issue was properly considered by the ARD Committee.

### IV. REQUESTED RELIEF

#### A. Petitioner's Requested Relief

Petitioner requests the following relief: An order mandating that the District permit Student to re-do homework, quizzes, and tests as an IEP accommodation necessary to provide Student with a FAPE.

#### B. Respondent's Requested Relief

Respondent requests Petitioner's requested relief be denied.

---

<sup>2</sup> Order No. 3 at 2.

## V. FINDINGS OF FACT

1. Student is a \*\*\*-year-old eligible for special education services from the District as a student with \*\*\* (\*\*\*)<sup>3</sup>.
2. Student was evaluated and identified for special education in January 2016 as student with \*\*\* and is currently due for a reevaluation.<sup>4</sup>
3. Student's January 2016 full individual evaluation FIE concluded that Student's emotions and behavior are what impede Student's learning. Student tends to get frustrated when Student feels Student has a lot of school work. Student gets overwhelmed which, in the past, has caused Student to act out. Student has demonstrated improvement in regulating Student's emotions and using appropriate coping skills.<sup>5</sup>
4. Student is in the \*\*\* grade and attends \*\*\*.<sup>6</sup>
5. During the first and second \*\*\* grading periods in the current 2018-2019 school year, Student has maintained an overall \*\*\* average; however, Student \*\*\*, \*\*\*, \*\*\* during the second \*\*\* grading period.<sup>7</sup>
6. Student participates \*\*\* but is precluded from participating in \*\*\* until Student receives passing grades \*\*\*.<sup>8</sup>
7. Student's IEP contains numerous accommodations. One such accommodation is that Student is to receive "1 retest opportunity on a quiz per \*\*\* grading period (per subject)."<sup>9</sup>
8. The IEP allows Student an extra five days from the assigned due date to turn in Student's assignments as an accommodation. This accommodation has had the unintended consequence of causing Student to fall behind in Student's school work. It has negatively impacted Student's academic progress and performance, because Student misses assignments or turns assignments in late for partial credit.<sup>10</sup> Furthermore, permitting Student to turn in assignments five days after the original due date does not include

---

<sup>3</sup> Respondent's Exhibit (RE)-11 at 24-25.

<sup>4</sup> RE-11.

<sup>5</sup> Tr. at 203.

<sup>6</sup> RE-1 at 1, 7.

<sup>7</sup> RE-12 at 1; Petitioner's Exhibit (PE)-5.

<sup>8</sup> Transcript (Tr.) at 33-34.

<sup>9</sup> RE-2 at 4.

<sup>10</sup> RE-3 at 2; RE-4 at 2; Tr. at 98, 156-57, 202-07.

additional time for taking quizzes or tests. Implementation of the accommodation resulted in Student being tested on course content Student had not completed.<sup>11</sup>

9. Despite failing to achieve a grade of 70 in \*\*\* classes during the second \*\*\* grading period, Student still maintains an overall \*\*\* grade point average in the current 2018-2019 school year.<sup>12</sup>
10. The District's policy on Guidelines for Grading (the policy) requires "each campus" to develop teacher grading guidelines that are clearly communicated to students and parents.<sup>13</sup> The policy pertains to all students; it is not limited to students in special education.
11. The guidelines were not "clearly communicated" to Parent and there is uncertainty among relevant District staff as to which campus personnel are responsible for drafting and communicating grading guidelines (*i.e.*, the campus, the academic department, or the individual teacher).<sup>14</sup>
12. The policy mandates, "The District *shall* permit a student who meets the criteria detailed in the grading guidelines a reasonable opportunity to redo an assignment or retake a test for which the student received a failing grade (emphasis added)."<sup>15</sup>
13. Parent seeks to have the policy applied to Student as a necessary IEP accommodation.<sup>16</sup>
14. The Admissions, Review and Dismissal (ARD) Committee proposed an IEP revision that reduces the number of extra days Student is permitted to turn in assignments and adds \*\*\* Study Skills \*\*\* to provide structured time to complete assignments. Parent opposes \*\*\* Study Skills \*\*\* because Student \*\*\* and Parent believes it will not benefit or assist Student.<sup>17</sup>
15. Despite disagreement, the Parties were able to collaborate on a number of items related to Student's IEP and placement. Parent was an active participant in ARD Committee meetings.<sup>18</sup>

---

<sup>11</sup> Tr. at 131-32, 145-46, 150, 202-05; RE-1 at 2, "Teachers feel that the accommodation of redoing all homework will get \*\*\* [Student] further behind;" RE-3 at 2, "\*\*\* [Student] currently has an Extra time for up to 5 days. Teachers are seeing that the 5 days is causing the grades to fail because the quizzes and tests are not pushed back. So {Student} is missing material and is causing the grades to get worse;" PE-5 (grade report reflecting zeros for missed assignments and partial credit for late assignments).

<sup>12</sup> RE-12 at 1.

<sup>13</sup> PE-1.

<sup>14</sup> Tr. at 105-10, 123, 125-26, 182.

<sup>15</sup> PE-1.

<sup>16</sup> Complaint; Order No. 3 at 2.

<sup>17</sup> Tr. at 202-05, 209-10, 221-22, 238.

<sup>18</sup> RE-1 at 1-2; RE-3 at 1-3.

## VI. DISCUSSION

### A. Jurisdiction

In Texas, the authority of a Hearing Officer to preside over special education contested administrative due process hearing is strictly limited to “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child” arising under the IDEA. 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a); 19 Tex. Admin. Code § 89.1151(a).

Therefore, in this case, the Hearing Officer’s authority is limited to determining whether the District’s general policy of making up or redoing assignments must be extended, as a necessary IEP accommodation, to permit Student an opportunity to re-do every homework or in-class assignment, along with tests and quizzes, in order to provide Student a FAPE. The evidence presented demonstrated the opposite; Student’s current accommodation (permitting Student to turn in assignments five days after the assigned due date) is not academically beneficial because Student tends to fall behind in course content mastery. This is the result of assignments not being turned in or being turned in late for only partial credit. Furthermore, teacher testimony established the accommodation of permitting Student to turn in assignments five days after the original due date does not include additional time for taking quizzes or tests. Implementation of the accommodation resulted in Student being tested on course content Student had not completed.

The District’s general education policy of allowing students to re-do or make up assignments and tests is not an issue involving the identification, evaluation, or educational placement of the child, or the provision of a FAPE. The policy appears to have a statutory basis. *See* Tex. Ed. Code § 28.0216(3) (requiring districts to have a grading policy and giving districts the discretion to allow a reasonable opportunity to make up or redo a class assignment or an examination a student failed).

Whether the District is properly implementing a general education policy that applies to all students is beyond the Hearing Officer's authority under the IDEA. Furthermore, the evidence showed Student does not require the opportunity to re-do all assignments, quizzes, and tests as an IEP accommodation in order to receive a FAPE. As the United States Supreme Court has noted:

“If [an] accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot—even though the dispute is between a child with a disability and the school she attends. There might be good reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might *require* the accommodation on one of those alternative grounds. See *infra*, at 754 – 755. But still, the hearing officer cannot provide the requested relief. His role, under the IDEA, is to enforce the child's “substantive right” to a FAPE. And that is all.” *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 753 (2017) citing *Smith v. Robinson*, 468 U.S. 992, 1010 (1984).

The evidence demonstrated the policy is not a necessary accommodation for Student to receive a FAPE. The evidence showed that Student does not need an opportunity to make-up or redo every assignment, quiz, and test nor does Student need 5 additional days to complete Student's assignments, but instead needs other supports—like a Study Skills \*\*\*—so Student does not fall behind in Student's school work.

## **B. Duty to Provide FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). Under the IDEA, the District has a duty to provide a FAPE to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. 34 C.F.R. § 300.101(a). The evidence demonstrated Student was a child with a disability residing within its jurisdiction and thus the District had the duty to serve Student under IDEA.

The seminal issue in this case is whether the District failed to provide a FAPE during the relevant time period by refusing to permit Student to make up or redo class assignments, quizzes, and tests as a necessary IEP accommodation.

A FAPE is special education AND related services, through specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order for the child to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

### **C. IEP**

In meeting the obligation to provide a FAPE, the school district must have in effect an IEP for each child with a disability at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, a child's IEP also includes a description of the related services, supplementary support and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, and, the duration and frequency of the services and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

### **D. Burden Of Proof**

Petitioner bears the burden of proving by a preponderance of the evidence that, to receive a FAPE, Student requires an IEP accommodation that permits an opportunity to re-do all homework assignments, along with the opportunity to retest on a quiz per \*\*\* grading period, per subject.<sup>19</sup> Petitioner did not meet that burden because the preponderance of the evidence shows

---

<sup>19</sup> *Schaffer v. Weast*, 546 U.S. 49, 57–58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (“In an administrative hearing under the IDEA, the burden of persuasion is properly placed on the party seeking relief, the plaintiff”); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252-53 (5th Cir. 1997); *Houston ISD v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000). *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003). “Therefore the party challenging the appropriateness of an IEP during the due process hearing bears the burden of showing why the IEP and resulting placement were inappropriate under the statute.” *Id.*; The Fifth Circuit has further held that “at the district court level, as at the administrative level, the party challenging the IEP bears the burden of showing that the IEP and



Student's current IEP provides a FAPE. *Schaffer v. Weast*, 546 U.S. 49, 57–58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *Rowley*, 458 U.S. 176 (1982). *Andrew F. v. Douglas Cnty. Sch. Dist. Re-I*, 137 S.Ct. 988 (2017).

## **E. FAPE**

### **1. The Four Factors Test**

In Texas, the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA requirements; however, that four factor test is not reached unless the contested issue falls within the limited subject matter jurisdiction of the Hearing Officer to resolve under the IDEA. Under the IDEA the Hearing Officer has the authority to decide whether the policy, as advanced by Parent, should have been specifically included as an accommodation in Student's IEP and whether, without it, Student was denied a FAPE. Petitioner failed to prove by a preponderance of the evidence that Student requires the opportunity to re-do Student's assignments and tests to receive a FAPE. Petitioner's claim must fail after applying the Fifth Circuit's Four Factor Test. The 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, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

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

---

the resulting placement are inappropriate under the IDEA." *Richardson ISD v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir.2009).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009). Application of the four factors to the evidence in this case supports the conclusion that the District's program was appropriate.

First, there is no evidence to suggest the District's program is not individualized on the basis of Student's assessment and performance. Student received a FIE on January \*\*\*, 2016, and was identified for special education as a student with \*\*\*.<sup>20</sup> Student's IEP attempted to accommodate Student's \*\*\* by providing Student an additional 5 days to turn in assignments and one retest opportunity on quizzes per \*\*\* grading period, per subject. The testimony of teachers, the guidance counselor, and the Licensed Specialist in School Psychology (LSSP) established the effectiveness of these accommodations is now in doubt, but they were unquestionably individualized and based upon Student's assessment.

Second, the District's program is presumed to have been delivered in the least restrictive environment (LRE).<sup>21</sup> Placement and LRE were not pled or designated as hearing issues. Petitioner did not introduce any evidence to challenge Student's placement or LRE.

Third, the services were provided in a coordinated, collaborative manner. The ARD Committee deliberations admitted into evidence reflect disagreement between Parent and the school members of the Committee. However, the deliberations demonstrate the Parties were able to collaborate on a number of aspects of Student's educational program and Parent was able to meaningfully participate in the educational decision making process.<sup>22</sup> *See P.F. and S.F. v. Board of Educ. of the Bedford Cent. Sch. Dist.*, 67 IDELR 148 (S.D.N.Y. 2016) (finding a lack of

---

<sup>20</sup> RE-11.

<sup>21</sup> *Klein Independent School Dist. v. Hovem*, 745 F.Supp.2d 700, 705 (S.D. Tex. Sep. 27, 2010): "The Fifth Circuit has held that the IDEA creates a presumption in favor of the school district's IEP, *aff'd* 690 F.3d 390 (5th Cir. 2012).

<sup>22</sup> RE-1 at 1-2; RE-3 at 1-3.

collaboration due to the District's predetermination of the student's educational program and failure to consider alternative programs and services); *E. and C.E. v. Chappaqua Cent. Sch. Dist.*, 2016 WL 1181712 (S.D.N.Y. 2016).

Fourth, the record contains insufficient evidence to conclude that Student's IEP did not provide Student an educational benefit. *Schaffer v. Weast*, 546 U.S. at 57–58; *Rowley*, 458 U.S. at 188-89. Despite failing to achieve a grade of 70 in three classes during the second \*\*\* grading period, Student still maintains an overall \*\*\* grade point average in the current 2018-2019 school year.<sup>23</sup> The evidence demonstrates that Student is making meaningful academic progress. The recommendation to modify/amend Student's current accommodations to reduce the number of days Student may take to turn in an assignment past the original due date is supported by Student's evaluation and classroom performance. The testimony of Student's guidance counselor succinctly summarized the perception of District staff concerning Student's academic performance and progress:

“Just watching [Student] as [Student] has been with us this -- so far this semester up through now, I feel like, and I think that most of the teachers would agree, [Student] really has come a long way and we're super proud of [Student] and where [Student] is.”<sup>24</sup>

For these reasons this Hearing Officer concludes the District's program was reasonably calculated to provide Student with the requisite opportunity to make educational progress given Student's unique circumstances and was therefore appropriate. *See Andrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 137 S.Ct. at 992. Petitioner did not meet Petitioner's burden of proof that the District's refusal to extend its Grading Guidelines policy to Student as an IEP accommodation denied Student a FAPE or caused any other educational harm.

#### **F. Other Requested Relief**

---

<sup>23</sup> RE-12 at 1.

<sup>24</sup> Tr. at 150.

Petitioner did not request any additional relief.

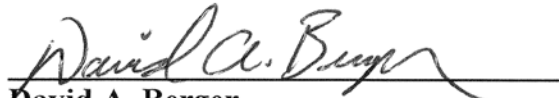
### VII. CONCLUSION OF LAW

1. During the relevant time period, Respondent provided Petitioner with a free, appropriate public education. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Community Schools*, 137 S.Ct. 743 (2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 188-189, 200-201, 203-204; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d at 245; 34 C.F.R. §§ 300.22, 300.323(a); 19 Tex. Admin. Code § 89.1055(e).
2. Petitioner did not meet Petitioner's burden of proving the District's general Grading Guidelines must be extended as an IEP accommodation necessary for Student to receive a FAPE. *Schaffer ex. rel. v. Weast*, 546 U.S. at 52.
3. The Hearing Officer does not have jurisdiction to determine whether Respondent properly implemented or applied Respondent's general Grading Guideline policy at issue. 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. 300.507(a).

### VIII. ORDERS

Based upon the foregoing findings of fact and conclusion of law Petitioner's requests for relief are **DENIED**. Any other request for relief not specifically stated in this Order is hereby **DENIED**.

**SIGNED February 28, 2019.**

  
David A. Berger  
Special Education Hearing Officer  
For the State of Texas

**IX. NOTICE TO 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 (i)(2); 19 Tex. Admin. Code Sec. 89.1185 (n).