

STUDENT, B/N/F PARENT & PARENT	§ § §	BEFORE A SPECIAL EDUCATION
VS.	§ §	HEARING OFFICER
WAXAHACHIE INDEPENDENT SCHOOL DISTRICT	§ §	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

STUDENT, by next friend and parent *** (hereinafter “Petitioner” or “the student”), filed a request for hearing on March 9, 2017, and an amended request for hearing on October 3, 2017. Petitioner alleged that the Waxahachie Independent School District (hereinafter “Respondent” or “the district”) failed to provide the student with a free, appropriate public education (“FAPE”) as required pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, et seq., and related statutes and regulations. (Petitioner made other claims related to other statutes in its requests for hearing, but those claims were dismissed for want of jurisdiction under IDEA without objection.)

The case was set for hearing and re-set on a number of occasions for good cause. The hearing in this matter was held on the order of the Hearing Officer and the agreement of the parties on May 9 and 10, 2018, in the offices of the Waxahachie Independent School District in Waxahachie, Texas. Both parties filed written closing arguments and agreed that this decision would be timely issued on July 17, 2018.

Petitioner was originally represented by other attorneys but at the hearing Jordan McKnight, an attorney from Little Elm, Texas, represented Petitioner. Nona C. Matthews and Jennifer M. Carroll from the Irving office Walsh, Gallegos, Treviño, Russo & Kyle, P.C., represented the district.

Petitioner alleged that the district denied the student a free appropriate public education and requested relief. Petitioner's claims included assertions that:

- The district failed to develop and implement an appropriate individual education plan ("IEP") for the student;
- The district failed to educate the student in the least restrictive environment ("LRE");
- The district failed to conduct a timely functional behavioral assessment ("FBA") for the student;
- The district failed to provide a meaningful opportunity for the student's parent to participate in the development and implementation of the student's educational program;
- The district failed to train its staff adequately to educate the student in an appropriate manner;
- The district failed to follow required procedures in restraining the student; and
- The district failed to provide appropriate social skills training as part of the student's educational program.

As relief, Petitioner sought:

- An order requiring the district to provide independent educational evaluations ("IEE") in all areas of suspected disability of the student;
- Reimbursement for services privately obtained for the student by the student's parent including costs of *** and counseling;
- Reimbursement to the parent for the costs of a summer program for the student in 2018;

- Compensatory education services by private tutoring;
- Applied Behavior Analysis (“ABA”) therapy for the student;
- Counseling for the student;
- Reimbursement for fees for Petitioner’s representation in pursuing its claims in this matter; and
- Damages of uncertain nature.

The hearing officer has no jurisdiction to award fees for representation or damages. The remaining relief requested is addressed in this order.

Respondent denies the allegations made by Petitioner and maintains that the student and the student’s parents were afforded appropriate educational services as required by law. Respondent claims that Petitioner is not entitled to independent evaluations at the district’s expense.

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

1. The student was originally evaluated for special education eligibility while in *** in October 2013. The student was residing with the student’s parent in the Waxahachie Independent School District. [Respondent’s Exhibits 1 & 2; Transcript Pages 16 & 60]

2. The district determined that the student met eligibility criteria for special education services as a student with autism (“AU”) and ***. The student sometimes was physically aggressive with school personnel and eventually was placed in a *** setting with *** and ***. In the *** grade, the student’s behavior was problematic at times and included *** and damaging school property. [Petitioner’s Exhibits 8 & 13; Respondent’s Exhibits 1 & 2; Transcript Pages 22-23 & 60]

3. When the student was in the *** grade in the fall of 2015, an admission, review and dismissal (“ARD”) committee for the student met in October for an annual review of the student’s progress and educational programming. The district conducted a “REED” – or review of existing educational data – because the student had been evaluated in 2013, just two years prior, and the required three-year evaluation was not due for another year. The student’s parent, though provided timely notice of the meeting, did not attend the meeting. [Respondent’s Exhibit 2; Transcript Page 67]

4. At the ARD meeting in October 2015, the committee noted that the student was making good academic progress and did not require a behavior improvement plan (“BIP”). The committee adopted new goals and objectives in the student’s IEP for adaptive behavior focusing on compromise negotiation, verbal techniques, learning how to be a good loser, and how and when to call for help. The committee developed accommodations for the student including positive behavior supports, positive reinforcements, and frequent breaks. The student’s educational placement was determined to be in what the district calls “****” – or *** – for English, language arts, and reading (“ELAR”), as well as instruction in other core subjects and social skills. The student was placed in regular education for some math instruction and “****” classes for ***. The ARD committee provided speech and language therapy and consultation and staff training in occupational therapy and behavior management. The committee called for additional evaluation in speech, vision and hearing, intellectual/cognitive achievement, autism and occupational therapy for consideration at the next ARD meeting in October 2016. [Respondent’s Exhibit 2; Transcript Pages 67, 144 & 288-292]

5. The district’s three year re-evaluation of the student was completed in October, 2016. The evaluation included a number and variety of assessment tools and strategies with evaluation by competent professionals in their lines of expertise as well as input from the student’s

parents and teachers. The district's licensed specialist in school psychology ("LSSP") noted progress in behavior by the student since the initial evaluation in 2013. The student's IQ was determined to be *** (below average) and the student's academic achievement was below average. The student continued to meet eligibility for special education based upon autism and a speech impairment. [Respondent's Exhibit 5; Transcript Pages 60-69 & 104-106]

6. The district's evaluation was presented to the student's ARD committee on October ***, 2016. The district's witnesses testified credibly at the hearing that the evaluation was conducted in accordance with applicable statutes and implementing regulations. The full individual evaluation ("FIE") provided relevant information on the student's functioning, educational development, and academic and non-academic progress. The assessment tools and strategies provided the necessary information to develop educational goals, objectives, and strategies to provide the student access to an educational program which could provide both academic and non-academic benefit. The evaluation utilized standardized assessment instruments which are considered valid and reliable and were performed by highly trained and experienced personnel with expertise in the areas of their assessment. [Respondent's Exhibits 5, 6 & 31; Transcript Pages 64-66 & 511-518]

7. In the 2016-2017 school year, the student attended the *** grade. The student's special education teacher from August 2016 into October 2016 worked with the district's behavior specialist who provided her with training in ABA and consulted with her on behavioral issues involving the student. The teacher had been trained in restraint through the Crisis Prevention Institute ("CPI"). [Respondent's Exhibit 31; Transcript Pages 239-245 & 284]

8. The student's behavior during this period was inconsistent but included an incident on ***, 2016, where the student was non-compliant and *** endangering the student. The student

was properly restrained, sent home, and suspended for one day. [Respondent's Exhibit 3; Transcript Pages 167-168]

9. The ARD committee for the student conducted its annual review and consideration of the student's three-year re-evaluation at the meeting on October ***, 2016. The student's parent, though notified of the meeting, did not attend. The committee found that the student remained eligible for special education as a student with autism and **. The committee developed an IEP based on the student's present levels of academic achievement and functional performance. Academic goals and objectives were developed along with adaptive behavior and speech goals. The committee determined that the behavior challenges for the student were generally caused by the student's frustration in academic performance. In light of the challenges, the committee considered the least restrictive environment factors for the student's educational placement. The committee determined that the student would be placed in ** in special education for all subjects except for ** classes provided in regular education. The IEP included training for support staff, behavior management training, and strategies in nonviolent crisis intervention. Also included were consultations in the areas of speech and language therapy and occupational therapy. [Respondent's Exhibit 6; Transcript Pages 68-70, 88 & 294-305]

10. After the ARD meeting in October 2016, the student began attending another ** class with a different teacher for part of the day for reading and math. [Transcript Page 277]

11. From mid-October 2016 through January 2017, the student's behavior was generally not problematic with the exception of an incident in ***. The student received a discipline referral for ***. The student was disciplined by losing the privilege of attending *** for the day. [Respondent's Exhibit 7; Transcript Pages 70 & 305-306]

12. The student's behavior at school began deteriorating in February 2017. The student was suspended for a day because of non-compliant behavior ***. The student ***. On three other days, the student ***. The behaviors were considered threats of imminent serious physical harm to others and the student was properly restrained. [Respondent's Exhibits 8-11; Transcript Pages 375-380 & 389]

13. On ***, 2017, the student ***. The student was restrained *** times that day in accordance with appropriate procedures. [Respondent's Exhibit 12; Transcript Pages 390-391]

14. On February ***, 2017, the district initiated a request to conduct an FBA and develop a BIP. The student's parent verbally consented to the FBA on March ***, 2017, but did not provide written consent for the FBA. [Respondent's Exhibits 13 & 18; Transcript Pages 51-56, 75-76, 111-112 & 391-393]

15. The student's behavior on ***, 2017, so alarmed the student's teacher that the teacher, on her own initiative and not pursuant to any educational plan of the district for the student, ***. ***. The teacher reported that she believed the *** was necessary because the incident could escalate to a situation beyond the capacity for school staff to contain. The teacher did not inform any other school personnel that she decided to ***. [Respondent's Exhibit 14; Transcript Pages 268-269]

16. ***. ***. ***. ***, and the student's parent was called and came to pick up the student. The incident of the intervention was ***. [Petitioner's Exhibits 27, 28 & 29; Respondent's Exhibits 14 & 15; Transcript Pages 268-269; 319-321, 358-368 & 437-438]

17. Petitioner's parent took the student home and then to a physician. The parent testified that the student was vomiting, distraught, and frightened. The physician, however, reported that the student was cooperative, pleasant, and not acutely distressed. [Respondent's Exhibit 27; Transcript Pages 41-42]

18. On ***, March ***, 2017, the district provided the student's parent notice of an FIE, calling for an FBA, a proposal for the development of a BIP, evaluation for parent training, and a counseling evaluation. The parent did not return written consent to the district for the evaluations. [Respondent's Exhibit 21; Transcript Pages 73-79]

19. On ***, March ***, 2017, the district sent a notice of an ARD committee scheduled for March ***, 2017. [Respondent's Exhibit 18; Transcript Page 75]

20. Petitioner's original request for hearing was filed on March 9, 2017.

21. An expert retained by Petitioner, Dr. *** who is a physician and ***, testified in this matter by video deposition. Dr. *** has extensive experience in children with autism and intellectual disabilities. Dr. *** testified credibly that a timely functional behavior assessment can be an effective tool for the development of effective behavior strategies for students such as the Petitioner. [Respondent's Exhibits 32 & 35; Transcript Pages 124-230]

22. Dr. *** reviewed documents concerning the student prior to her testimony. She did not evaluate the student and did not speak with anyone within Waxahachie ISD. In her review of the district's documents, she found that the district's behavior goals in the student's IEP were generally appropriate but believed that they were insufficient. [Respondent's Exhibit 35; Transcript Pages 80-81, 89-92 & 97]

23. The student's parent ***. ***. The student was diagnosed and treated for issues related to *** and ***. The student required *** and continued to require ***. ***. [Respondent's Exhibit 28; Transcript Pages 32-33, 114, and 479]

24. When the student returned to school, the student continued to exhibit troubling behaviors. On ***, 2017, the student **. The district concluded that in this instance sending the student home could reinforce the problem behaviors. Instead the student was removed to an alternative educational setting. The setting was located in **. The district called for an ARD meeting to make a manifestation determination review (“MDR”) to consider whether or not the student’s behavior had a substantial relationship to the student’s educational disabilities. The ARD committee was duly constituted and convened on May ***, 2017, and determined that the behavior had such a relationship to the disabilities. The student’s parent did not attend the meeting. The committee developed a BIP based on collected data and observations. The committee determined that the student’s behavior escalated during challenging academic work and when peers were present. The committee developed behavior supports for the student, strategies to deal with the behavior, reviewed levels of the student’s performance, and generated strategic goals to benefit academic achievement and performance. The ARD maintained the student’s ** (**) placement with ** instruction as well as access to peers in ** classes. [Respondent’s Exhibit 21; Transcript Pages 79 & 384-395]

25. Though the student’s parent did not participate or cooperate in the determinations made by the district on May ***, 2017, the district implemented a timely new IEP for the student. The student had shown academic and non-academic success and mastered goals for related services in speech. The student’s behaviors did not require any further restraints or discipline referrals for the remainder of the school year. [Respondent’s Exhibits 23 & 24; Transcript Pages 408-409]

26. Petitioner was represented by counsel and a lay advocate who were in communication with the district after the filing of the request for hearing. The parties and their representatives were unable to agree on how to proceed with the student’s educational placement

and disagreed about the utilization of procedures under district policies and the requirements of applicable laws and regulations for the development and implementation of the student's program. The parties also disagreed about the propriety of the program. Though a finding of fault would be of no consequence, the difficulties caused by the disagreement of the parties' representatives exacerbated the unfortunate situation for both parties and inhibited a resolution of the issues in question. [Respondent's Exhibits 18 & 19; Transcript Page 75]

27. The student's parent enrolled the student in the *** Independent School District for the 2017-2018 school year. The student has continued to exhibit problem behaviors in the new district. [Respondent's Exhibits 29, 30, 32 & 35; Transcript Pages 94-95 & 102]

Discussion

IDEA provides for an entitlement of a free appropriate public education for all students who are eligible for special education services. The United States Supreme Court has defined what such an educational plan is to be in Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982). The Court further addressed the standard in Endrew F. v. Douglas County School District, 137 S.Ct. 988 (2017).

Petitioner bears the burden of proof to show that the Respondent did not fulfill its obligations under the law.

The Fifth Circuit has addressed the meaning of the Rowley standard in light of the Supreme Court's recent decision in Endrew F. While Rowley sets the floor of opportunity for an eligible student, the Fifth Circuit concluded that the Endrew F. decision does not displace or differ from the Circuit's own standard set for in Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), 34 CFR 300.300, and 19 T.A.C. §89.1055. (See C.G. v. Walter Independent School District, No. 16-20439, 2017 WL 2713431 [5th Cir. June 22, 2017]).

Counsel for both parties agreed in their closing arguments that this case must be analyzed in accordance with the holding in Michael F. The Court in Michael F. determined that a student's IEP is reasonably calculated to provide meaningful educational benefit when:

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

Petitioner argues that the district failed in each essential element in Michael F.

The credible evidence at the hearing showed that the district's provision of special education for the student – during the applicable statute of limitations (one year prior to the filing of the request for hearing) – was based upon a full individual evaluation completed by the district in October 2016. Petitioner believes the student's behaviors had demonstrated that they interfered with the student's capacity to benefit from the student's educational programming, but the evidence showed that the behaviors (while troubling) had not at the time so incapacitated the student that the student was not receiving educational benefit.

Petitioner contends that the district denied the parent a meaningful opportunity to participate in the development and implementation of the student's special education program.

The evidence showed, however, that the parent did not attend key ARD meetings even when properly noticed of the meetings, failed to provide consent for evaluations and an FBA, and refused amendments to the student's IEP providing additional supports. While the parties continued to disagree about how to go forward after litigation was initiated, the evidence did not

show that the district failed to provide opportunities for the parent to work in meaningful collaboration.

Petitioner further avers that the student was not educated in the least restrictive environment, but the credible evidence at the hearing demonstrated that the LRE standards were met in compliance with the requirements of Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). The student was educated to the maximum extent possible in regular education by being included with non-disabled peers in *** classes. The student was also educated in a *** class for core academic classes when additional help was needed and because the student needed to be prevented from distracting other students in regular education classes.

Finally, Petitioner argues that positive academic and non-academic was not demonstrated in the educational program. The evidence at hearing proved otherwise. The student's behavior was managed so as to allow the student to pass all classes and meet educational goals and objectives. Also, the student showed progress on the student's behavioral goals.

Taken as a whole, the evidence shows that the district met the standards required under all four prongs of the standards of Michael F. Petitioner did not prevail on its claims.

The district presented and proved up its claims that the district's educational evaluations of the student met the requirements of IDEA and its implementing regulations. Petitioner is not entitled to additional independent evaluations at public expense.

Conclusions of Law

1. The student resided with the student's parent in the Waxahachie Independent School District.
2. The Waxahachie Independent School District is responsible for compliance in delivering special education and related services for eligible students under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations; 34 CFR §300.552.

3. Petitioner bears the burden of proof to show why the district's actions did not comply with the provisions of IDEA and applicable law. Schaffer v. Weast, 126 S.Ct. 528 (2005); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir.), cert.denied, 531 U.S. 817 (2000).

4. The district's educational program offered to the student met the requirement of Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), 34 CFR §300.300, and 19 TAC §89.1055. The student was provided a free appropriate public education. 20 U.S.C. §1412(a) and (b).

5. Petitioner failed to prove that Petitioner is entitled to independent evaluations at public expense. 34 CFR §300.502(b)(3).

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED, and all claims of Petitioner are DISMISSED with prejudice.

SIGNED this 17th day of July, 2018.

/s/ Lucius D. Bunton
Lucius D. Bunton
Special Education Hearing Officer