

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

DECISION OF THE HEARING OFFICER

Statement of the Case

STUDENT, by next friend and parents *** and *** (hereinafter “Petitioner” or “the student”), brought a complaint, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, et seq., complaining of the Pearland Independent School District (hereinafter “Respondent”, “the district”, “Pearland ISD”, or “PISD”).

The case was filed on June 7, 2017, and originally assigned to Cathy Egan, a hearing officer with the State Office of Administrative Hearings. On July 27, 2017, the matter was reassigned to another hearing officer - Sherry Wetsch – who was an independent hearing officer with the Texas Education Agency. And, later the case was reassigned to the undersigned Hearing Officer on August 29, 2017.

Petitioner was represented at the hearing by Sonja Kerr and Devin Fletcher from the Austin office of the Cuddy Law Firm. Respondent was represented by Merri Schneider-Vogel and Jessica Witte of the firm Thompson & Horton.

By agreement of the parties and order of the Hearing Officer, the matter came on for hearing in the offices of the district in Pearland on October 10 and 11, 2017. Both parties filed written closing arguments and agreed that this decision would be timely issued on December 8, 2017.

Petitioner alleged that the district failed to comply with its Child Find obligations pursuant to 20 U.S.C. §§1412(3) and 1412(10), 34 C.F.R §§300.140(b) and 300.131. Petitioner further alleged that the district, at the hearing, did not prove up a statute of limitations defense and that its claims are not barred by the provisions of U.S.C. §1415(B)(6)(b) and the one-year limitation in Texas set forth in 19 T.A.C. §89.1151(c).

As relief, Petitioner seeks a finding that the district did not meet its obligation under Child Find to locate, identify, and serve the student with a free appropriate public education (“FAPE”). Petitioner seeks reimbursement for costs associated with private evaluations, reimbursement for tuition and related expenses at a private school, compensatory educational services, and prospective relief in providing private services until the student can be served appropriately within the district.

When Petitioner filed for hearing, Petitioner also filed against the Houston Independent School District (“HISD”) for alleged violations of special education laws. The claims against HISD were addressed in an order granting summary judgment for HISD in Docket No. 248-SE-0617 on October 24, 2017.

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

Findings of Fact

1. Student is *** year old student with *** (“****”) who resides with the student’s parents in the Pearland Independent School District. [Petitioner’s Exhibit 43; Respondent’s Exhibit 19; Transcript Page 338]

2. Student ***. [Petitioner’s Exhibits 15, 19 & 37; Respondent’s Exhibits 3, 6, 9, 14, 16 & 17; Transcript Pages 318-320]

3. When the student and the student's parents resided in HISD, during the school years beginning in 2009-2010, the student first attended public school in *** during the 2009-2010 school year. [Petitioner's Exhibit 3; Transcript Page 336]

4. In Houston, the parents unilaterally placed the student in private school for the school years 2010-2011 and 2011-2012 for *** programs. The student attended *** (2012-2013) and *** (2013-2014) privately placed by the student's parents at ***. [Petitioner's Exhibit 7; Transcript Pages 388-402]

5. The student and the student's parents moved into the Pearland Independent School District in *** 2014. The student was placed by the parents into *** for *** grade (2014-2015) and *** grade (2015-2016). [Petitioner's Exhibits 6-14 & 32-34; Transcript Pages 395-397]

6. The student was privately placed by the student's parents for the *** grade (2016-2017) at ***. The parents did not seek to enroll the student within the Pearland Independent School District. (Petitioner's Exhibits 31 & 32; Transcript Pages 348-358, 396-403, 463-478 & 516-526)

7. Prior to moving to Pearland, the student was evaluated by HISD while being served there in November 2009. The student's parents were provided with a notice of procedural safeguards. The safeguards included information about the legal requirements at the time for students and parents concerning filing requests for due process, disagreeing at admission, review and dismissal ("ARD") committee meetings, and private placements at public expense. [Respondent's Exhibits 2 & 4; Transcript Pages 352-355]

8. One of the student's parents *** testified that the safeguards were provided to them but the parent only read "parts" of them. [Transcript Pages 352-355]

9. In July 2015, the parents had the student evaluated at ***. The school referred the parents to ***. [Petitioner's Exhibit 12; Transcript Page 340]

10. In October 2015, the student was evaluated at ***. [Petitioner's Exhibit 15; Transcript Page 320]

11. The student was also evaluated in January 2016 by a neuropsychologist, Dr. **. Dr. ** recommended an individual education plan ("IEP") for the student if returning to public school, ** evaluation, a ** by a **, and an assistance technology assessment. [Petitioner's Exhibit 19; Transcript Pages 320-321]

12. The student attended private schools chosen by the parents for the 2014-2015 and 2015-2016 school years. The parents made their first contact to Pearland ISD in an email addressed jointly to **, a special education supervisor in Pearland at the time, and to ** at HISD. The email was dated January **, 2016. It read:

"Dear Dr. ** and Ms. **:

Good morning. We received your contact information from **. We have ** year old **, ** that is **. [Student] attends a private school in Houston, but we live in Pearland. We are interested in having [Student] receive ** services, but do not know how to go about doing so and which school district would be able to help.

We had ** evaluated at ** this past summer and they highly recommend ** evaluation and ** for the classroom. If either or both of you could advise us how to move forward we would greatly appreciate your assistance.

Warm regards,

(Signed ** and **)"

[Petitioner's Exhibit 21]

13. The parents did not receive a response from Ms. ***. No evidence was presented at the hearing showing that the email was ever received by Ms. *** or read by anyone. [Transcript Pages 341 & 360]

14. The student's parents sought evaluation of the student during the student's enrollment in private schools, and they inquired about services for the student based upon information from the evaluators. The *** in May 2016 directed the parents to HISD as the district responsible for providing services for the student while enrolled in private school. The student's private school is geographically located within the bounds of HISD. [Petitioner's Exhibit 26; Transcript Pages 377-379]

15. Pearland ISD seeks to satisfy its responsibilities under Child Find through its presence on the district's webpage, preparing brochures identifying its Executive Director as the district's contact person to answer questions about Child Find, placing notifications in local newspapers, providing parent training sessions which are advertised on the district's webpage, posting on Facebook, holding disability fairs, meetings with private schools, and notifying employees of the district about evaluations. Child Find information and specific contact information has been on the district's webpage since at least 2015. [Respondent's Exhibit 1; Transcript Pages 34-36]

16. *** provided a consultation in September 2016 for the student and the student's parents and made recommendations for the student's *** services, *** and educational programming. *** made recommendations for assistive technology ("AT") and the use and maintenance of *** such as *** used by the student. [Petitioner's Exhibit 37; Transcript Page 410]

17. The student attended *** in the *** grade for the 2016-2017 school year. The *** serves only students with educational disabilities, has small classes, many social clubs on campus,

and divides students based on their skill levels. *** speech pathologists work with the students. [Petitioner's Exhibit 30 & 31; Transcript Pages 87-98]

18. *** does not provide *** services, ***, or occupational therapy services. School personnel are not familiar with other students with ***. The school does no training for its personnel for working with students with ***. The student is currently having difficulty in *** but no one at the school is trained to support ***. The school does not provide adaptive physical education. School personnel are unfamiliar with AT which the student uses for ***. [Transcript Pages 87, 110-129 & 141-144]

19. When the student's parents did not receive a response from PISD to their 2016 email, the parents followed up with a contact person at HISD and HISD provided an evaluation of the student. The testimony from the parent indicated "this is the path we took". The parents made no other effort to contact Pearland ISD until emailing Pearland ISD on May ***, 2017, in a message to ***, Pearland ISD's Executive Director. [Transcript Pages 352-360, 380 & 412]

20. When *** received the email from the parents on May ***, 2017, she tried to determine if anyone in her department had received the parents' email in January 2016 to Ms. ***. She found no one in the department who was familiar with the parents' inquiry and determined from the district's IT department that the email had not been forwarded to anyone else within the district. Ms. *** resigned from Pearland ISD in March 2016. [Transcript Page 38]

21. Ms. *** responded to the student's parents the next day on May ***, 2017, informing them that she had not seen their email from January 2016. She also informed them that the district has a *** teacher, *** specialist, and provides AT services. She told them that if an ARD committee determined that the student needed such services, the district would provide them. A time was arranged for a meeting with the parents. The parents brought no documents to the meeting and were asked to sign a release of information so that the district could obtain information

about the student. Credible evidence shows the meeting was not an ARD meeting, was not intended to be an ARD, and was not represented to the parents as an ARD. The parents did not sign a release at the time. Ms. *** understood that the parents would send information including evaluations of the student to the district, then the district would seek consent from the parents if a determination was made that further testing was necessary, and an ARD committee meeting would be scheduled. [Respondent's Exhibit 5; Transcript Pages 39-43]

22. PISD personnel, including a *** teacher and *** specialist, met again with the parents on June ***, 2017. The parents expressed concern that HISD had previously found the student ineligible for services. PISD personnel discussed services which could be available for an eligible student, educational programming and class size. PISD personnel asked the parents if they were going to enroll the student because the student had been attending a private school within HISD. PISD personnel testified credibly that no one told the parent that the student must be enrolled before an evaluation could be evaluated. [Transcript Page 39]

23. On June ***, 2017, the parent emailed Ms. *** expressing confusion because evaluation completed by HISD stated the student was eligible for services but ARD paperwork and prior written notice ("PWN") from HISD indicated the student was not. The parent had provided Pearland ISD with the evaluation showing eligibility. PISD asked for the ARD notice and PWN to be sent to them. The parent did not send them. [Transcript Pages 43]

24. The parents filed a request for a due process hearing that same day – June 7, 2017.

25. The evaluation establishing eligibility for the student was provided to the parents by HISD at public expense as an independent educational evaluation ("IEE"). The evaluator was ***, ***. Ms. *** is an employee of Pearland ISD but was not identified as a PISD employee on the list of independent evaluators provided to the parents. An ARD committee at HISD authorized the evaluation in January 2017. Present at the meeting was Pat Freeze, a lay educational advocate

for the parents. No one at the meeting, including Ms. Freeze, informed the parents that they could seek services from PISD. [Transcript Pages 151-152, 293-300 & 329]

26. After the request for hearing was filed, the parties held a resolution meeting on June 20, 2017. The district agreed that the student was eligible and an agreement was executed calling for the district to conduct additional assessment and obtain records from ***, ***, ***, and Dr. ***, the neuropsychologist who evaluated the student. Consent forms were returned to the district for some of the information on July ***, 2017. Consent forms for information from *** and *** were not returned until July ***, 2017. [Respondent's Exhibits 9 & 11; Transcript Pages 48-49]

27. An ARD committee for the student was held on August ***, 2017. The committee reviewed assessment and evaluation. An expert retained by the parents, ***, stated that the district's *** evaluation was fair and spoke of no concerns about the evaluation or its recommendations. Assessments for AT, occupational therapy, speech, and *** were presented. The parents did not express any disagreement with the evaluations. The district offered to perform an adaptive PE evaluation for the student whether or not the student enrolled. Records sent from *** were sent for consideration by the committee but a representative from *** was not able to attend the meeting. [Respondent's Exhibits 23, 25-28, 30 & 32; Transcript Pages 50-57 & 560-571]

28. The ARD committee meeting on August ***, 2017, did not complete its work and the meeting ended because one of the student's parents had to leave. The committee reconvened on August ***, 2017, and ended in disagreement. The parties accepted a ten-day recess and the committee reconvened on September ***, 2017, when a representative of *** could be present. [Respondent's Exhibits 27, 28 & 34; Transcript Page 59]

29. The district offers a placement for the student at ***. The district will provide instruction ***, the use of the ***, *** instruction, and social skills instruction. The district wants

to assist the student in *** to the campus and provide appropriate aid during transition. The student can begin with immediate access to ***, and occupational therapy services. [Respondent's Exhibits 28, 31 & 32; Transcript Pages 201-205, 467-486, 552 & 620-621]

30. ***, an expert witness retained by Petitioners, is employed at *** University in the teacher preparation program for teachers of students **. Mr. *** is a credible witness. Mr. *** testified that the services provided in the IEP for the student at Pearland are appropriate. [Transcript Pages 242 & 274]

Discussion

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

The Fifth Circuit has addressed the rulings in the *Rowley*, *supra*, and *Endrew F.*, *supra*, cases. While *Rowley* sets the floor of opportunity for a student, the Fifth Circuit says that the *Endrew F.* decision does not displace or differ from the standard set forth for analysis of special education placement decisions in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), 34 C.F.R. 300.300, and 19 T.A.C. §89.1055.

Ultimately, the provisions of FAPE by the district must be judged on the standard of *Michael F.*, *supra*.

In considering, the controversy presented by Petitioners and addressed by Respondent, the timeliness of Petitioner's filing determined the extent of relief which could be granted if Petitioner prevails on its claims. Petitioner's request for hearing was filed on June 7, 2017.

IDEA requires that a due process complaint must be made within two years of the date the Petitioner knew or should have known about the alleged action giving rise to the claims. 34 C.F.R §300.511(e). In Texas, the party filing for a due process hearing must request the hearing within one year of the day the party knew or should have known about the actions giving rise to a claim. 19 T.A.C. §89.1151(c).

Petitioner raises many claims arising before June 7, 2016. Petitioner also asserts that the Texas statute of limitations is inconsistent with federal law and seeks a determination that the Texas statute does not apply. The law is well-settled and Petitioner's argument has no merit. A one-year statute applies. *D.C. v. Klein Indep.Sch.Dist.*, 711 F.Supp.2d 739 (S.D. Tex. 2010).

IDEA does provide for two limited exceptions in the timeliness of bringing claims. If a parent is prevented from filing a due process complaint due to either: 1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the due process complaint, or 2) the local educational agency's withholding of information from the parent that was required under this part (of the law) to be provided to the parent.

Though Petitioner makes arguments supporting equitable factors in considering the limitations period, the law does not permit them. Respondent's arguments are well-supported in cases cited by them in their written argument: *D.C. v. Klein Indep.Sch.Dist.*, *supra*; *P.P. v. West Chester Area Sch.Dist.*, 557 F.Supp.2d 648 (E.D. Pa. 2008); and *Krawletz v. Galveston ISD*, 69 IDELR 207 (2017).

The evidence in the hearing does not show that any misrepresentation was made to the parents that any problems which formed the basis for the complaint were resolved. The evidence also does not show that the district withheld information which it was required to provide. Instead, the evidence shows that the parents were informed of and furnished with procedural safeguards for special education legal matters as early as 2009. Though a parent testified that the parent read

only “part” of the procedural safeguards, one parent ***. The parents knew or should have known of the actions they could take to bring a claim against the district. In applying the controlling statute of limitations, Petitioner’s claims for relief time are barred until one year prior to filing.

Petitioner insists that this matter is based squarely on the violation of the Child Find requirements of IDEA. Petitioner argues that the district clearly did not meet its duty to locate, identify, and serve the student after the student moved into the district. Petitioner argues that it should prevail because the student was not found, identified, and offered an IEP under the requirements of *Forest Grove v. T.A.*, 557 U.S. 230 (2009). The evidence shows, though, that the district’s ignorance of the presence of a potential student in need of services cannot be justly blamed on the district. The parents knew or should have known of their rights to seek services several years before moving into the district. The parents knew that their child could possibly be afforded services because of the dealings with HISD in the years prior to the move. The parents did not enroll, seek enrollment, or seek evaluation until May 2017. The district’s information on Child Find and special education was readily available. The information they had received from HISD was relevant to their position in the matter and their experience. Their use of a lay advocate and their own personal experience *** belie their claims. The law was not written to be used to seek years of reimbursement for private placement for a student who never sought services while living in the district when the unique family circumstances and experiences undermine their own claims.

Further, the evidence shows that the district did what was required of it when the student and the student’s parents eventually sought appropriate interaction with the district. The district endeavored to evaluate, program for, and serve the student with an IEP that meets the requirements of *Michael, Rowley*, and *Andrew*. The district has developed a program 1) individualized on the basis of the student’s assessment and performance, which 2) can be implemented in the least

restrictive environment (“LRE”); and 3) provides services to be coordinated in a collaborative manner by key stakeholders; and which 4) confers positive academic and non-academic benefits.

Petitioner’s assertion that reimbursement should be ordered for previous private placements and prospective private placement are not meritorious. Prior to the student’s placement at ***, the parents did not give the district clear notice that they were seeking an IEP from Pearland Independent School District. Because the district had no opportunity to timely develop an IEP for the student, the district is not responsible for the private placement costs of their unilateral placement. *Dallas Indep.Sch.Dist. v. Woody*, 865 F.3d 303 (5th Cir. 2017).

Conclusions of Law

1. The student resides with the student’s parents in the Pearland ISD.
2. The Pearland 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.; 34 C.F.R. §300.552.
3. Petitioner bears the burden of proof to show why the district’s actions involving the student do 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. 2000).
4. Respondent proved that the one-year statute of limitations in this action applies. No evidence supports an exception to the statute. Petitioner’s claims prior to June 7, 2016, are time barred. 19 T.A.C §89.1151 (c).
5. The district’s educational program offered to the student now meets the requirements of *Michael F.*
6. Petitioner failed to prove any violation by the district of its Child Find obligations under 20 U.S.C. §§1401(9)(d) and 1414(d).

7. Petitioner is not entitled to reimbursement for costs of private placement for the 2016-2017 school year for the student because Petitioner did not prove the student was denied a FAPE prior to enrollment in private school or prove that the unilateral private placement is appropriate. *Stevens v. New York City Dept. of Educ.*, 54 IDELR 84 (2010).

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 are DISMISSED with prejudice.

SIGNED this 8th day of December, 2017.

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

DOCKET NO. 249-SE-0617

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

SYNOPSIS

ISSUE #1: Whether Petitioner's claims are barred by the status of limitations.

TEXAS CITATION: 19 T.A.C §89.1151 (c)

HELD: For Respondent

ISSUE #2: Whether the district violated Child Find.

HELD: For Respondent.

ISSUE: Whether the district is responsible for reimbursement for private placement, private services, and private evaluations and compensatory services.

HELD: For Respondent.