

DECISION OF HEARING OFFICER

Petitioner, STUDENT (“Student”), by next friend, PARENT, Petitioner’s mother (“Parent”) and formerly named STUDENT, filed two complaints requesting expedited impartial due process hearings pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The complaints were received by the Texas Education Agency on December 12, 2017 and December 18. The Respondent is Lewisville Independent School District, (“District”). The complaints were consolidated on January 3, 2018.

On January 26, 2018, the pSpecial Education for District was present. Observing by agreement of the parties were Sandy Lowe, Kimberly Kovach and Delia Mims, hearing officers.

Issues for Hearing

The issues brought forth by Petitioner in its Request for Special Education Due Process Hearing and Required Notice are as follows:

1. Whether District failed to hold a manifestation determination review (“MDR”) within the required time frame under the IDEA;
2. Whether a December ***, 2017 discipline letter failed to contain Procedural Safeguards or a date for a MDR meeting;
3. Whether, following a ***, 2017 incident, District’s decision on December ***, 2017 to send Student to disciplinary school for 20 days constituted a change of placement;
4. Whether District’s communications with Student’s father interfered with Student’s right to a free, appropriate public education (“FAPE”) and was in violation of a court order giving Parent all decision making authority;

5. Whether prior to the *** incident, District violated its Child Find duties by its failure to evaluate Student;
6. Whether District failed to implement or revise Student’s §504 behavior intervention plan (“BIP”) and/or failed to develop a BIP when it determined eligibility for special education services under the IDEA; and
7. Whether District’s placement of Student in the *** (“****”) in lieu of the disciplinary alternative education program (“DAEP”) constituted a change of placement.

Requested Relief

Petitioner requested the following relief:

1. An order directing District to train administration in the IDEA rules and regulations including implementation of Student’s individualized education program (“IEP”);
2. An order directing District to resume Student’s prior placement at ***; and
3. An order directing District to remove the disciplinary incident from Student’s records.

Findings of Fact

Based on the documentary evidence and testimony of witnesses before this hearing officer, the following are findings of fact in the instant action. Citations to Petitioner’s Exhibits and Respondent’s Exhibits are designated with a notation of “P” or “R” respectively, followed by the exhibit number, and page number as appropriate and available. Citations to the transcript are designated with a notation of “T” followed by the page number.

1. Student is a *** grade child who resides with Father within the geographical boundaries of District. Student’s mother ***. District is responsible for the provision of special education and related services to those within its boundaries who are eligible for such services. P34;
2. Student attended *** (“****”) ***. Student began *** grade at *** and was dropped from enrollment ***, 2014 (***) grade) due to non-attendance. R2:3, 4;
3. In the fall, 2015 Student enrolled in District as a *** grader due to ***. The enrollment form did not indicate that Student had received §504, special education, ***, or *** services. Student had been attending ***. By the 2016 spring semester, Student had completed the necessary requirements to begin *** grade and ***. Student’s reading and comprehension was at ***. R1:1; R3; T 57-63; 319
4. During the 2015-2016 school year, Student had *** disciplinary offenses. R13
5. On February ***, 2016, District learned that Student had received services in *** either under §504 or the IDEA. District requested information from Father because it had nothing from

Student's previous school regarding services. Father was unsure whether Student was in special education or §504. R6:1-2; T 62-63

6. Student passed all spring semester classes except ***. Student *** during the 2016 summer school. With the exception of ***, Student's grade averages ranged from ***. Student passed the Texas state required *** tests for *** during the 2015/2016 school year. R37:1-6
7. On July ***, 2016, for the first time, District received Student's *** IEP. Student had qualified in *** for special education services as *** and other health impairment ("OHI"). Necessary information was not included. On July ***, District notified Father regarding the need for additional information. R8:2,3; R9:4; R11:2
8. On August ***, 2016, District contacted *** and requested additional information regarding Student's eligibilities. Records were transmitted to District the following day. The IEP was for the year of September ***, 2014-September ***, 2015 (***) grade year). The IEP did not require a BIP. The records included a neuropsychological evaluation dated April 2009 and an October, 2009 Reevaluation Summary Report. The *** IEP team determined that it needed additional information to determine whether other disabilities existed. R9:7; R10:1-29; R11:2, 6; T 768, 4-75; 232-233
9. Parent filed a due process hearing request on July 29, 2016. District provided a copy of the Procedural Safeguards on August 1, 2016. R9:1-2
10. On August ***, 2016, after receiving an email from Parent indicating that she ***, District requested ***. R9:14
11. Following Parent's request for due process hearing, District offered to conduct a full and individualized evaluation ("FIE") during a resolution meeting on August 25, 2016. District emailed a Notice and Consent for a Full and Individualized Evaluation along with a copy of the Notice of Procedural Safeguards. District wanted to evaluate in the areas of OHI, Autism, emotional disturbance ("ED"), and learning disability ("LD"). Parent did not provide consent to evaluate. R12:1-25; T 234-235, 379-380
12. Student withdrew from District September ***, 2016. Student enrolled in *** in *** (***) for Student's *** grade year. R15:1
13. In response to Student's behavior at parent's home, Student was ***. Student was diagnosed with ADHD, *** (***) and ***. *** attempted to obtain consent for assessment to determine special education eligibility in *** on September ***, 2016. Parent did not give consent. R16:4-8; R18:2

14. On February ***, 2017, Petitioner’s physician diagnosed Student with ADHD and ***. Another physician diagnosed Student with ADD, *** and ***. R16:1, 3
15. On March ***, 2017, Student transferred from *** to ***, both in ***. R20:1
16. On March ***, 2017, *** §504 team determined that Student was eligible for §504 services. The impairments were ADHD, ***, ***, Autism Spectrum Disorder, ***, and ***. Accommodations were put in place. The documentation indicated that Student had a health care plan. P32; R17:1-8
17. At Parent request, *** conducted a psycho-educational evaluation to determine if Student was eligible for special education services. P10:8-14 (hearing transcript)

BIP. Parent requested an evaluation for special education services including a homebound assessment. District recommended a referral for a full individual evaluation (“FIE”) to include homebound and psychological assessments. District provided Procedural Safeguards. Parent consented to the evaluations. P 5; R29; R30:1; T 22

25. Beginning September ***, 2017, Parent began to take issue with District’s statutory compliance in the implementation of Student’s §504 plan. P7; P8; P9; P10

26. Beginning October ***, 2017, Student was ***. Student returned on or about December ***. During that time, District provided instruction through the ***. ***. P34; R33:21; T 97-101

27. A physician completed and OHI evaluation report and diagnosed Student with *** and moderate ADHD, combine type. The doctor did not recommend homebound instruction. He recommended rest periods during the school day. R31

28. District provided Procedural Safeguards on November ***, 2017. R24:3

29. The initial FIE for OHI was reported November ***, 2017 and concluded that Student met requirements to be identified as a child with OHI. The report recommended access to *** classroom for *** instruction and/or ***. It recommended that the admission, review and dismissal (“ARD”) committee consider an assessment for emotional disturbance (“ED”) and a referral for special education counseling. P34; R32; T 237

30. The initial ARD committee meeting was held November ***, 2017. Procedural Safeguards were given Parent on October ***. The committee accepted eligibility of OHI for ADHD and ***. Behavior and study skills goals were developed. Student was to return to school December ***. Student would attend school for *** and complete ***. District members recommended *** support for *** minutes per week. Due to Student’s absences, District had been unable to conduct a psychological evaluation at that time. The committee members expressed their wish to complete the rest of the evaluation areas: psychological, including Autism, and counseling. Parent did not consent to more evaluation. The committee completed Student’s *** and reviewed Student’s Present Levels of Academic Achievement and Functional Performance (“PLAAFP”). The committee developed a goal for work completion. At Parent request, the group added a goal for ***. The committee did not determine a need for a BIP. The meeting ended in non-consensus and a reconvened ARD was scheduled for December ***. P34; R33:1-13, 21; T 238-242, 447, 449

31. At the reconvened ARD mee(an)2(R11.gt)-4.uSnu eed6onAtrpq2.9(ed)e.6(as s)-2.6(t) andi(d)2(enc2(p)2(rasw)6.

32. The IEP included the following accommodations: preferential seating, ***, ***; reminders to task; ***; breaks and water access as needed; extended time to make up work; ***; use of computer; access to technology; access to book when done; ensure clarity of instruction and expectations; extra time for tests; retake tests and quizzes for grades less than 70%; ***; *** and encourage/praise; verbal. P 35; R33:15
33. At the time of the ARD meeting, Student had received *** discipline referrals. P 34; R33:5
34. On November ***, 2017, while Student was absent ***, it was reported that Student ***. District emailed Parent and Father on December ***, 2017 and described the incident. District waited until Student had returned to school to complete its investigation and to allow Student's return to class to be smooth. P20; R24:9; T 425
35. On December ***, the Assistant Principal emailed Parent and Father of the incident and the need to address the violation of the student code of conduct. R24:9
36. On December ***, District interviewed Student ***. R36:3
37. On December ***, 2017, the Assistant Principal emailed Parent and Father that the diagnostician would send an official invitation for the MDR ARD. He also sent a letter informing Parent and Father of Student's assignment to the disciplinary alternative education center ("DAEP") for 20 days. He made no reference to the Procedural Safeguards in the body of the letter. District emailed new Procedural Safeguards to Parent on same day. P22; R24:10-12
38. Parent filed a Level One appeal of the disciplinary decision. P24
39. Parent filed the first request for expedited due process hearing on December 12, 2017.
40. . On December ***, 2017, District sent notice of an ARD meeting scheduled for December *** to conduct a MDR review and consider disciplinary assignment of Student. A copy of the December 2017 Explanation of Procedural Safeguards was included. P 36; R34:29
41. On December ***, 2017, District's Assistant Principal emailed Parent and Father of a change in Student's discipline from DAEP to ***. In the first week after the holiday break, the Assistant Principal walked Student to *** classroom. P26; P28; T 432
42. Parent filed the second request for expedited due process hearing on December 18, 2017.
43. At the December *** MDR meeting, Parent participated by phone. Father and Student were in attendance. The committee reviewed information from Parent, evaluations, teacher observations, classroom based assessments and observations, Student's placement, and discipline records, and a May ***

44. The committee conducted a FBA and developed a BIP for Student. Two behaviors were discussed: ***. The BIP addressed both behaviors. P36; R34:4-7
45. The ARD committee determined that Student's actions were not a manifestation of OHI by reason of ADHD. ***. The committee could not determine if the behavior was a manifest of *** due to lack of information and its inability to complete a psychological evaluation. Parent was not in agreement with further evaluation. Prior written notice was given December ***, 2017. P36; R34:8
46. The ARD committee discussed discipline and determined that Student's needs could not be met in the DAEP setting. District recommended the *** setting as Student's interim educational alternative setting. District clarified the supports of the *** environment. It reviewed Student's absences from ***. Also, ***. The committee determined that Student's behavior was not a failure to implement the IEP since the behavior occurred prior to determination of eligibility for special education services. Parent did not choose to indicate agreement with the BIP at that time. She was in disagreement with the discipline assignment to *** for *** days. Father was in disagreement, as well. The MDR form did not check whether the behavior was or was not a manifestation of Student's disability. Deliberations stated that District members agreed that Student's behavior was not a manifestation of ADHD. P36; R34:7-10
47. On January ***, 2018, District sent its Notice of Proposal or Refusal to Provide Services to Parent and Father. It continued to propose further evaluation, including a psychological to consider possible ED, Autism, and ***. It proposed the *** setting rather than DAEP in order to meet Student's educational needs and implement Student's IEP, among others. R35:2
48. Eight school days passed from the date of District's decision to change Student's placement for violation of a code of student conduct to the date of the MDR. R38:1
49. ***. ***. R37:9; T 92

Discussion

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise. 34 C. F. R. § 300.511(d). No agreement was made; thus, only those issues raised in the consolidated requests are considered in this decision.

Issues

pattern as described in the IDEA. 34 C. F. R. §300.536. District's decision to send Student to DAEP for 20 days constituted a change of placement; however, District had authority to implement up to 10 days of that assignment pending the timely MDR analysis. The MDR meeting occurred within 10 school days of the decision to change Student's placement for violation of the student code of conduct. 34 C. F. R. §530 (e). Petitioner failed to prevail on this issue.

#4 Did District's communications with Student's father interfere with Student's right to a free, appropriate public education ("FAPE") and did such communications *?**

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). The educational program must be meaningful, and reasonably calculated to produce progress as opposed to *de minimis* advancement. 20 U.S.C. § 1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982).

The Fifth Circuit further defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d at 253 (5th Cir. 1997).

FAPE for Student. Of the four factors for determining FAPE, Parent's argument may relate to the third factor that asks if the services provided in a coordinated and collaborative manner by the key stakeholders. Parent's evidence is insufficient to make such a finding. Prior to Student's eligibility for special education services, when District was notified of Parent's role in Student's life, it copied emails to Parent and Father. The Assistant Principal called Parent regarding Student. Parent was included via telephone at the §504 meetings. Parent attended the ARD meetings via telephone. Parent failed to carry the burden of proving that communications with Father interfered with Student's right to FAPE.

#5 Prior to the * incident, did District violate its Child Find duties by its failure to evaluate Student?**

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a FAPE. This is referred to as Child Find. 34 C.F.R. §300.111; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). Child Find is an affirmative duty of a school district that is triggered at the time a district has reason to believe that a student has a disability and suspects that special education services may be needed to address that disability. *Davonne B. v. Houston I.S.D.*, No. 327-SE-596 (Texas H.O. Dec'n, May 2, 1997). IDEA requires more than a diagnosis of a disability; it requires that a child exhibits symptoms of a qualifying disability *and* exhibits them to such a degree that they interfere with the child's ability to benefit from the general education setting. *Student v. Lake Travis Indep. Sch. Dist.*, No. A-07-CA-152-SS (W.D. Tex. Filed Aug. 10, 2007); *Alvin Indep. Sch. Dist. v. Student*, 46 IDELR 221(5th Cir. 2007).

In August 2016, District proposed conducting a FIE for possible OHI, Autism, ED, and Learning Disability. Parent refused to give consent for the evaluations. In April 2017, while Student attended ***, the IEP team considered Student for *** eligibility classification of *** and determined that Student did not meet eligibility for special education services. Student re-enrolled in District in August 2017 with a §504 plan. The Assistant Principal discussed possible special education evaluation with Parent who did not want to pursue special education. District developed its §504 plan and Student progressed under the plan. Following Student's ***, the §504 committee initiated a referral for a special education evaluation to include a psychological evaluation including Autism, OHI and ***. Parent gave consent. Due to Student's absence from school until December ***, District was able only to consider the disability of OHI. District wanted to start services as soon as possible and summarized the existing information in a report dated November ***, 2017. The ARD committee met and found Student eligible for special

education services as a child with OHI due to ADHD and ***, but recommended additional evaluation. Parent did not consent to the additional evaluation.

Petitioner believes that District's psychologist recommended a review of existing evaluation data ("REED") for Student on September ***, 2017. The email from the psychologist stated that she recommended REEDs going forward unless additional concerns were express by teach8.3(m)8.3(en)29 0 Td [(1)0eer"n.1

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, 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. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued Student's or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).