

DOCKET NO. 120-SE-1218

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, by next friends Parent and Parent (Student or, collectively, Petitioner), brought this action against the Brownsville Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations.

Petitioner requested a due process hearing on December 21, 2018, with notice issued by the Texas Education Agency the same day. Petitioner filed a First Amended Petition and Request for Special Education Due Process Hearing on February 4, 2019. Respondent filed a Response to
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includes Student was provided a FAPE by the District. Petitioner's
nied.

II. DUE PROCESS HEARING

The due process hearing was held on October 29-31, 2019 and was recorded and transcribed by a certified court reporter.

Petitioner was represented by Petitioner's legal counsel, Holly Terrell and Daniel Garza of Cirkiel and Associates. Fernando de Urioste, an advocate at the same firm, assisted as part of the legal team. Student's parents attended the hearing.

Respondent was represented by its general counsel, Baltazar Salazar. ***, School Board Chair, participated as the party representative. ***, Mr. Salazar's paralegal, also attended.

III. ISSUES D 0 v

EVALUATION: Whether the District failed to timely evaluate student in all areas of suspected disability.

FAPE: Whether the District misrepresented information to Student's parents concerning Student's educational needs.

FAPE: Whether the District failed to develop and implement an appropriate *** for Student.

FAPE: Whether the District failed to provide Student Extended School Year (ESY) services.

B. Petitioner's Requested Relief

1. An Individualized Educational Evaluation (IEE) in all areas of disability and need;
2. An order directing the District to convene an Admission, Review, and Dismissal (ARD) Committee meeting to address the findings of the IEE;
3. An evaluation for leisure activities and the opportunity for Student to participate in both academic and non-academic programs;
4. An appropriate ***;
5. An order directing the District to retain an expert consultant to address Student's educational and non-educational needs;
6. An order directing the District to invite the expert consultant to all of Student's ARD Committee meetings for the next two years;
7. Training by the expert consultant for all District staff who interact with or may interact with Student for the next two years;
8. Supervision by the expert consultant of District personnel responsible for implementing Student's IEP and Student's ARD Committee;
9. Ongoing and compensatory speech therapy services;
10. Ongoing and compensatory OT services;
11. Ongoing and compensatory PT services;
12. Ongoing and compensatory counseling services;
13. Ongoing and compensatory psychological services;

2. Student's diagnoses include *** and ***. Student's physical condition has deteriorated since 2016 ***. ***.²
3. The District conducted a full and individual evaluation (FIE) in January 2010, a Review of Existing Evaluations and Data (REED) in January 2013, and an FIE in November 2016 that assessed Student's related service needs. Student is eligible for special education as a student with ***, ***, and speech impairment. Student communicates in ***. Student requires constant supervision at school and assistance with most activities of daily living,

collaborative process of gathering feedback from instructors and reviewing grades and progress reports to determine the proper content of a particular goal. An IEP goal should consist of four elements: timeframe, behavior, condition, and measurability. An IEP may include functional goals not tied to a particular curriculum or assessment, or other long-term goals that repeat over time, with mastery measured differently as the student advances
***.⁸

9. The amount of direct or indirect related services a student requires depends on his or her needs and the provider's service guidelines. When an ARD Committee determines a student requires a particular related service, it should develop a goal in that area. Related service personnel provided present levels of academic achievement and functional performance (PLAAFPS) to Student's case manager, who developed PLAAFPS statements in academic areas, ***.⁹
10. PLAAFPS are individualized performance assessments that drive formulation of a student's IEP goals and objectives and the services he or she receives. PLAAFPS should

pencil and paper tasks, so assessing progress includes class participation.¹²

13. ESY services may be recommended for a student who will regress if not provided summer instruction, as determined by teacher observations and/or lack of progress on goals and objectives and recorded on a District form.

technology: a computer, ***, and *** that allows District personnel to hear *** Student.¹⁸

19. The District does not have a student pain management policy. Pain management needs at school are determined by the parent(s), school nurse, and appropriate outside medical providers. A medical provider has not prescribed a pain regimen for Student pprn2Td ()g ha

would participate in ***

the general education curriculum included ***, ***, speech therapy, and ***. The ARD Committee reviewed PLAAFPs in ***.³⁷

38. The October 2018 ARD Committee reviewed PLAAFPs in related services, including speech, OT, and PT. In speech, Student communicated ***. Student had been declining to ***, and dismissal from speech services at the next annual meeting was recommended.³⁸
39. Student's OT services were aimed at improving functional writing skills. Student could ***. Student needed assistance selecting words ***. Student's mother expressed a goal of being able to ***. Student could ***. Because Student performed and completed tasks as presented with modifications, the ARD Committee recommended a reduction in OT services from direct to indirect (consultative) one time every six weeks.³⁹
40. PT services focused on ***. Teachers were instructed ***. The October 2018 ARD Committee discussed Student's recent *** at home and the possibility Student may start to use it at school, recommending continued indirect PT services one time every six weeks for 15 minutes.⁴⁰
41. The ARD Committee reviewed ***, including student interviews in November 2016 and November 2017; parent interviews in October 2016 and October 2017; teacher interviews in November 2016 and November 2017; *** dated October ***, 2018; student and parent questionnaires in October 2018; *** in November 2016 and November 2017; and a *** assessment checklist.⁴¹
42. Student's *** goal *** was *** focused on gaining maximum social communication, ***. To further *** goals, Student ***

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- clearing and effectively for a variety of audiences, with an objective of identifying prewriting strategies to generate ideas, develop voice, and plan. An *** goal (***) focused on identifying the conventions and mechanics of written English, including grammar, with an objective of identifying accurate spelling and correct use of punctuation and capitalization. An *** goal (***) focused on comprehending selections read aloud, with an objective of learning new vocabulary, including numbers, shapes, colors, and directions. An *** goal (***) focused on responding to texts, with an objective of asking and asking relevant questions and contributing in small group discussions.⁴⁴
45. A *** goal (***) focused on learning to access school and community health services, with an objective of how understanding how technology impacts the health of individuals, families, and communities. An *** goal focused on improving *** skills, with an objective of using ***.⁴⁵
46. A Math goal (***) focused on identifying the mathematical process standards and algebraic methods to solve equations, with an objective of identifying math solutions to everyday problems. A Math goal (***) focused on identifying *** figures, with an objective of identifying and selecting tools to solve problems.⁴⁶
47. A Science (***) goal focused on identifying the significance of plants in the environment, with an objective of identifying of identifying plan systems and subsystems. A Science (***) goal focused identifying the sources and flow of energy through an environmental system, with an objective of identifying source, use, quality, and conservation of water. A Social Studies and *** goal (***) focused identifying distribution patterns and characteristics of different cultures, with an objective of identifying changes in technology, transportation, and communication affect patterns of economic activities. A Social Studies and *** goal (***) focused on identifying historical points of relevance, with an objective of identifying major eras in world history.⁴⁷
48. The October 2018 IEP called for progress reports to Student's parents every six weeks.⁴⁸
49. The October 2018 IEP did not include goals in speech, OT, or PT. The IEP also did not include goals to address ***, or use of ***.⁴⁹
50. The IEP called for *** instructional modifications, including specialized *** instruction. ***, Student required emphasis on major points; specialized curriculum; shortened instructions; visual aids; teacher checks for understanding; directi

ways; directing to specific information; reading support; and scaffold steps. Other modifications included ***; access to equipment; encouraging class participation; exemption from reading before peers; opportunities to respond orally with extra time; special projects in lieu of assignments or alternate assignments; participation-based grading; exemption from ***; opportunities to leave class for specialized assistance; multiple choice tests; preferential seating; private discussions about behavior; and supervision during transitions.⁵⁰

51. Student would take the STAAR***, and the October 2018 IEP listed allowable modifications.⁵¹
52. The October 2018 ARD Committee recommended continued placement in ***. Student's Schedule of Services called for 225 minutes per week per subject in ***. Student would participate in *** for 225 minutes a week in the general education classroom.⁵²

D. March 2019 FIE

53. Student's ARD Committee convened on December 6, 2018. A REED determined more information was need

and *** evaluations were recommended.⁵⁶

57. An occupational therapist evaluated Student's OT needs at school, recommend

SOAH DOCKET NO. 120

FAPE within two years of the date the parent knew or should have known about the alleged action forming the basis of the complaint. 20 U.S.C. § 1415(b)(6)(B); 34.C.F.R. § 300.507(a)(1)(2).

The two year limitations period may be more or less if a state has an alternate time limitation for requesting a hearing, in which case state timelines apply. 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Texas regulations require a parent to request a hearing within one year of the date He or she knew or should have known (i.e. discovered) of the alleged action(s) forming the basis of the petition. 19 Tex. Admin. Code § 89.1151(c).

Petitioner alleges Student was deprived a FAPE beginning on December 21, 2017, or one year prior to filing Student's hearing request.⁷⁶ The District raised the one year statute of limitations as an affirmative defense.⁷⁷

Student's causes of action accrued when Student's parent knew, or had reason to know, of the injury forming the basis of the complaint. See, *Doe v. Westerville City Sch. Dist.*, 50 IDELR, 132, p. 5-6 (D.C. Ohio 2008). Here, the discovery date – and thus the relevant time period for the litigation – was settled in advance of the hearing when the parties entered into an agreement under T.R.C.P Rule 11 dated November 21, 2017 specifying Student was provided a FAPE by the District.⁷⁸

Petitioner's claim the District failed to remediate the educational impact of Student's alleged *** that are the subjects of pending federal court litigation during the relevant time period is a proper subject for ~~to~~

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Cir. 1993); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). The burden of proof is on Petitioner to show the District did not provide Student a FAPE.

D. Individualized Education Program Requirements

In developing an IEP, the ARD Committee must consider strengths, parental concerns for enhancing the student's education, results of the most recent evaluation data, and academic, developmental, and functional needs. The IEP must include a statement of PLAAFPs, including how the student's disability affects involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1)(i). For a student whose behavior impedes his or her learning or that of others, the IEP must consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i).

The ARD Committee must review, at least annually, a student's IEP, and make any needed revisions to address lack of expected progress based on re-evaluations, parental information, or the student's anticipated needs, including behavioral

- x The program is delivered in the least restrictive environment;
- x Services are provided in a coordinated, collaborative manner by the key stakeholders; and
- x Positive academic and non-academic benefits are demonstrated.

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

These factors are indicators of an appropriate program, guiding the fact-intensive inquiry required to evaluate the educational program offered, and are not given any particular weight or applied a particular way. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009). See also, *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F. 3d 390, 397 (5th Cir. 2012).

1. Individualized on the Basis of Assessment and Performance

First, the evidence showed Student's program was individualized on the basis of assessment and performance.

A school district must conduct an FIE that meets certain requirements, and that determines whether the student has a disability, and his or her educational needs. 20 U.S.C. §§ 1414(a)(1)(A); 1414 (a)(1)(C)(i)(I)-(II); (b)(2)(A-C). Assessments and other evaluations must assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B).

An FIE must be completed within 60 days of parental consent or, if the state has its own timeframe, within that timeframe. 20 U.S.C. § 1414(a)(1)(C)(i)(I); 34 C.F.R. § 300.301(c)(1)(i)-(ii). Texas requires completion on an FIE not later than the 45th school day after the school district receives consent. 19 Tex. Admin. Code § 89.1011(b).

ARD Committees may conduct a REED, and as part of any reevaluation, must consider alongside qualified professionals, as appropriate, evaluations and information provided by the parent(s); current, classroom-based, local or state assessments and classroom-based observations; observations by teachers and related service providers; and on the basis of that review, to include input from the student's parent(s), identify what additional data, if any, is needed to determine:

Related services may be required to assist a student with a disability with benefitting from special education. 34 C.F.R. § 300.34(a). Student received speech, PT, and OT from qualified related service providers in the recommended amount, duration, and service type (direct versus indirect) in evaluations by qualified related service providers, including the March 2019 FIE.

The April 2018 and April 2019 IEPs called for indirect (consultative) and direct related services in speech, PT, and OT. Modification to the scope of Student's OT services were recommended to account for increased *** needs as Student ***. The weight of the credible evidence shows Student's related service needs were based on identified needs and delivered as directed by Student's IEP.

The April 2018, October 2018, and April 2019 ARD Committees reviewed Student's PLAAFPs, as required. The discussion included attendees familiar with Student and Student's educational needs and PLAAFPs were sufficiently detailed to help inform ARD Committee decisions about how Student's disability impacts involvement and progress in the general education curriculum and the educational placement required to meet Student's academic and non-

The IDEA expresses a strong preference for inclusion of students with disabilities, and requires them to be educated with students without disabilities to the maximum extent appropriate and in the least restrictive environment appropriate to meet their needs. Special classes, separate schooling, or other removal from the regular educational environment may occur only when the nature or severity of a student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(1)(2)(i)-(ii); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009).

b. Least Restrictive Educational Environment

Students with disabilities must be educated with students without disabilities to the fullest extent possible, and consideration of a student's least restrictive environment includes an examination of the degree of benefit the student will obtain from an inclusive education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). A presumption in favor of the educational placement established by an IEP exists and the party challenging it by

maximum extent appropriate. *Daniel R.R.*, 874 F.2d at 1045. Consideration of several factors is required to resolve these inquiries, including:

- x The nature and severity of the student's disabilities;
- x Student's academic achievement;
- x The non-academic benefits of regular classroom placement;
- x The overall experience in the mainstreamed environment balancing the benefits of regular education and special education to the student; and
- x The effect of the student's presence on the regular class, specifically whether the student's

Student's IEPs also each included PLAAFPs developed by relevant ARD Committee members

SOAH DOCKET NO. 120-SE-1218