
DOCKET NO. 097-SE-1206

STUDENT BNF PARENT
PETITIONER

vs.

LAGO VISTA INDEPENDENT
SCHOOL DISTRICT
RESPONDENT

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner (hereafter “parents”), as next friends and on behalf of their son (hereafter “student”), brought this action against Lago Vista Independent School District (hereafter “Lago Vista ISD”) pursuant to the Individuals with Disabilities Education Improvement Act (hereafter “IDEA”), 20 U.S.C. §1400 et seq. complaining that Lago Vista ISD failed to provide him with a free appropriate public education during his 2004-2005 and 2005-2006 school years. His parents seek, among other relief, tuition reimbursement and costs of the student’s private school placement.

Procedural History

The parents filed this request for a due process hearing with the Texas Education Agency (hereafter “TEA”) on December 6, 2006. The hearing in this matter was initially set for January 18, 2007.

The following eight issues were raised by the parents in their due process complaint:

1. Whether Lago Vista ISD failed to implement the student's IEP during the 2004-2005 and 2005-2006 school years?
2. Whether Lago Vista ISD created a hostile educational environment for the student as evidenced by alleged continuing animosity displayed by staff toward the student by treating the student as a discipline problem instead of a special education student and through other actions taken against him from November 2005, through May, 2006?
3. Whether Lago Vista ISD failed to properly monitor, supervise or train staff in the implementation of the student's IEP during the 2004-2005 and 2005-2006 school years?
4. Whether Lago Vista ISD failed to assess the student in all areas of his suspected disability?
5. Whether Lago Vista ISD failed to acknowledge TEA's investigative findings of fact and implement TEA directives regarding TEA complaint on student's behalf?
6. Whether Lago Vista ISD failed to disclose all pertinent information to the October 24, 2006 ARD Committee to ensure a collaborative process?
7. Whether Lago Vista ISD failed to develop an appropriate IEP in which the student could access educational benefit during the 2004-2005 and 2005-2006 school years?
8. Whether Lago Vista ISD provided the student with an appropriate educational placement?

In response to these issues, Lago Vista ISD raised as an affirmative defense, the one year statute of limitations.

At the prehearing conference on January 9, 2007, Petitioner requested and was granted a continuance of the due process hearing. The hearing was rescheduled and held on March 1, 2, 27 and 28, 2007, and the decision due date in this matter was extended by the parties to April 27, 2007.

Based on the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law. Certain findings of fact and conclusions of law may also be contained in the discussion section of this decision:

Findings of Fact

1. The student is ** years old, in the *th grade and resides with his parents within the jurisdictional boundaries of Lago Vista ISD.

2. Lago Vista ISD is a duly incorporated school district under the laws of the State of Texas and is the local educational agency responsible for providing the student with a free appropriate public education.
3. The student was first determined eligible for special education services in the ** grade as a student with a learning disability in the area of reading and with speech impairments. [Petitioner's Exhibit 24, hereafter P. Exh. ____].
4. The student was also determined to be dyslexic and received instruction from a reading specialist. [P. Exh. #11].
5. The student is currently eligible for special education services with learning disabilities in written expression and basic reading. His most recent full individual evaluation (FIE) completed ***, 2004 confirmed that the student had average intelligence but had been very slow to acquire basic word decoding skills, and that he had weak sight word recognition and labored when sounding out words. As for written expression, he was found to suffer from a loss of train of thought, awkward phrasing, and poor recall of rules. The student also performed poorly when processing visual material. Because learning often involves a combination of routine information (such as reading) and complex information (such as reasoning), his weakness in the speed of processing routine information made tasks of comprehending novel information more difficult and time-consuming for the student. Emotionally and behaviorally, the student was cooperative and compliant with teachers request, accepted responsibility for his own actions, adapted to new situations without getting upset, resisted becoming discouraged by difficulties or minor setbacks, made and kept friends at school, had a happy disposition, tended to handle difficulties and minor setbacks in a resilient manner, and handled criticism graciously. However, he also occasionally had difficulty working cooperatively with others, was somewhat reluctant to initiate academic work or ask for help when needed, and had difficulty working independently. [Respondent's Exhibit #3, hereafter R. Exh. ____].
6. The parents received a copy of the Explanation of Procedural Safeguards when the student was first referred for special education testing in 2001. They received the Guide to the Admission, Review, and Dismissal Process in December, 2002. The parents have received copies of the Explanation of Procedural Safeguards at least annually at the ARD meeting. The father testified that he had not fully read the Procedural Safeguards. [R. Exh. #37; Hearing Transcript, pages 421-422, 426-427, hereafter T. ____].
7. During the student's 6th grade year, he was placed in all general education classes with instructional accommodations and modifications. During the school year his parents became concerned about the lack of implementation of the instructional accommodations and modifications contained in his IEP. His parents complained and an ARD Committee meeting was held to discuss their concerns. [R. Exh. # 2].
8. An ARD Committee meeting was convened on ****, 2004. The ARD Committee reviewed the progress of the student and revised his IEP to change the instructional accommodations and modifications. The student remained in all general education classes with an IEP requiring mastery of the Texas Essential Knowledge and Skills (TEKS) for the 6th grade and a goal to address his reading deficits. The ARD Committee also noted a reduction in the amount of dyslexia

- services provided to the student from 90 minutes per week to 60 minutes per week. There had been a reduction in the number of reading specialists and this prompted the reduction in amount of dyslexia services. [R. Exh. #2].
9. Toward the end of the student's 6th grade year, his parents again became concerned about the lack of implementation of the instructional accommodations and modifications in the IEP. In particular, the math teacher was giving the student the option of using the accommodations of a calculator and taking oral tests in another room and the parents felt this it was inappropriate to leave this decision to the student. [T. 170].
 10. The student's sixth grade math teacher implemented his modifications to the best of her ability, but toward the end of the school year the student refused the accommodations of use of a calculator and oral testing. The teacher encouraged the student repeatedly to take advantage of these accommodations, and she also e-mailed his parents about his refusal. [T. 305-315].
 11. The student was to have received 90 minutes per week of dyslexia services at the start of the *th grade with a reduction to 60 minutes in a group setting after the November 2004 ARD Committee meeting. There had been a reduction in the number of reading specialists and this prompted the reduction in amount of dyslexia services. However, the student did not receive the full amount of dyslexia services during his *th grade year. In the *th grade, the student began receiving individualized dyslexia services from the reading specialist. [R. Exh. #2].
 12. Although the schedule of services in the student's IEP listed the amount of dyslexia services to be provided to the student, such services are provided as part of the general education instruction, not special education and were not a component of the student's IEP. However, his IEP also included a goal in the area of reading which was to be implemented by all his teachers, including the dyslexia specialist. [R. Exh. #16].
 13. In the *** grade, the student's received passing grades in all of his academic classes and was promoted to the *h grade. He took the SDAA II in reading and achieved a ** level, indicating he was developing knowledge and skills related to the TEKS at the ** grade instructional level. He took the Texas Assessment of Knowledge and Skills (TAKS) test for ** grade math, but did not pass. [R. Exh. #12].
 14. In ***, 2004, the parents notified the school principal that they were hiring a tutor to assist the student in reading. The parents believed the student was regressing and needed additional assistance. The student did not access the free tutoring services offered by the school district. The parents did not request that the Lago Vista ISD pay for the private tutoring. [T. 429; R. Exh. #11].
 15. The parents requested a meeting with the student's teachers at the beginning of his *th grade year to discuss his learning difficulties and ideas for helping him be more successful. His parents believed this was an ARD Committee meeting instead of a parent-teacher conference. However, no ARD Committee record or report was created. [R. Exh. #14, 20].
 16. An annual ARD Committee meeting was held on November 2, 2005 to review and revise the student's educational program. Teachers reported that the student

was making passing grades, but he wasn't turning in all of his assignments, and he was not using opportunities to improve his test scores by re-taking tests. The ARD Committee, at the request of the parents, decided that if the student did not complete his assignment notebook, he would be assigned to lunch detention the next day. The parents agreed with this plan, as well as all other decisions made by the ARD committee. [R. Exh. #16].

17. The student's instructional modifications contained in the November 2, 2005 IEP were as follows:

Alter Assignments by Providing:

1. Assignment notebook

Adapt Instruction by Providing:

2. Frequent checks for understanding
3. Verbalization of steps needed to complete task
4. Auditory aids (tapes)
5. Modify Tests: reduce/shorten lengthy, written work
 - i. Provide word banks
 - ii. Divide into short segments
6. Oral exams, as needed
7. Minimal auditory distractions
8. Provide written class notes

Adapt Materials by Providing:

9. Study aids/manipulatives

Manage Behavior by Providing:

10. Positive reinforcement of student efforts
11. Preferential seating

Required Equipment/Assistive Technology

12. Calculator

These instructional accommodations and modifications were not fully implemented by the student's teachers. The student was rarely provided with the opportunity to take oral examinations, and was not provided with written class notes by all of his teachers. Moreover, the student refused to accept many of the accommodations offered and no actions were taken to remedy this problem. [R. Exhs. #17, 18, 19, 20, 21; T. 333, 655-656, 693].

18. The November 2, 2005 IEP as designed for implementation during the 2005-2006 school year was appropriate and provided the student with a meaningful educational benefit. [R. Exh. #16].
19. The November 2, 2005 IEP was partially defective in that it was annual IEP designed for the 2005-2006 school year, yet it purported to also cover part of the 2006-2007 school year, through November 2, 2006. However, the IEP for the fall of 2006 was incomplete. The IEP lists as its duration for the annual goals and short-term objectives the period from November 2, 2005 to November 2, 2006. However, its primary goal was for the student to master TEKS at the *th grade level in all of his academic classes. When school ended in May, 2006, the student had met this goal by mastering the TEKS at the *th grade level as shown by his grades and scores on the alternative state assessment examinations, yet no ARD Committee was convened to propose a new IEP for the student for *th grade. Additionally, the instructional modification page contained in the IEP was limited to the school year 2005-2006, which ended in May, 2006. There was no indication in the IEP that these instructional modifications were to have continued through November 2, 2006. Moreover, the schedule of services listed the areas of instruction the student would receive in the Fall of 2005 and the Spring of 2006. It did not contain a schedule of services for the Fall of 2006. Therefore, the IEP was not individualized on the basis of the student's assessment and performance, nor could it be anticipated to provide positive academic and nonacademic benefits to the student during the 2006-2007 school year. [R. Exh. #16].
20. The student's final grades for *th grade were all passing, except for homeroom, which was not an academic class. His failing grade in homeroom reflected the fact that he was not filling out his assignment calendar. His report card shows he made higher grades on his final exams than he did in the courses as a whole, generally reflecting mastery of the course curricula. His final exams were administered orally to the student, after the parent had complained about this modification not being implemented. The student's grades did deteriorate during the second semester of the 2005-2006 school year. He received failing grades in several classes during the second cycle of the spring semester of the 2005-2006 school year, but was able to obtain overall final passing grades. [R. Exh. #22].
21. On the state mandated alternative test assessing the student's knowledge and skills (SDAA II), the student achieved a level ** in math, indicating he was proficient in and met the *th grade TEKS in that curriculum. In reading, the student also received a level **, indicating he was proficient in and met the *th grade TEKS in that curriculum. In writing, the student received a level **, indicating that he had moderately achieved the skills in that curriculum. It also indicated that this was the level of his expected achievement. [R. Exh. #22].
22. The student's reading teacher administered the Qualitative Reading Inventory (QRI) to student between 2004 and 2006, and discussed her data at an ARD committee meeting held on October 24, 2006. The QRI results show that the student made progress in his reading skills during this time, and he was reading on grade level at the end of his *th grade year. [R. Exh. #32; T. 707-710].
23. Two incidences occurred during the 2005-2006 school year that traumatized the student. His homeroom teacher pulled a chair out from under him causing him to

- fall to the ground. He became very upset, cussed, and had to be removed from the classroom to calm down. Thereafter, he lost respect for this teacher and had significant difficulties in her class, including refusing to complete his assignment notebook, which caused him to receive a failing grade in homeroom. In another incident, an assistant football coach, who was also one of the student's teachers, informed him that he had been uninvited to play football. Football was a motivating sport for the student and he was devastated by this event.
24. Lago Vista ISD did not create or place the student in a hostile educational environment.
 25. The incident in which the teacher moved the student's chair and he fell on the floor was an accident, and she did not intend to harm the student. This incident did not cause or create a hostile educational environment.
 26. The teacher's actions in occasionally calling students "retard," "moron," or "idiot", in allegedly dressing in a sexually provocative manner, and using words such as "suck" and "crap" in class, although inappropriate, did not cause or create a hostile educational environment.
 27. A football coach's statement that the student was "unvited" to participate in football the next school year did not cause or create a hostile educational environment.
 28. The student's father met with the Principal and Superintendent on **, 2006, to discuss his concerns that IEP modifications were not being implemented. He discussed his decision to place the student in a private school in the 2005-2006 school year. He did not request an ARD Committee meeting nor request the District to pay for the private school placement. [R. Exh. #23].
 29. The parents did not notify Lago Vista ISD that they were requesting reimbursement for private school services and for private tutoring until they filed a local district complaint on August 24, 2006, after the student had enrolled in ****, a private school. [R. Exh. #24].
 30. The parents failed to provide Lago Vista ISD with proper and timely notice of their intent to privately place the student. The parents did not request an ARD Committee meeting prior to withdrawing the student from school and enrolling him in the private school and did not raise the issue of a private school placement during the last ARD Committee meeting on November 2, 2005. Additionally, the parents did not furnish Lago Vista ISD with 10 business day's prior written notice that they were rejecting the placement proposed by the school district to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense.
 31. The parents filed a formal complaint with TEA on August 22, 2006. TEA investigated the complaint and determined that Lago Vista had not fully implemented the modifications contained in the student's IEP during the 2004-2005 and 2005-2006 school years. Although Lago Vista ISD disagreed with the findings of TEA, it complied with all directives from TEA and the matter was closed. [R. Exh. #27-36].
 32. The student was placed by his parents in ****, a private school for students with dyslexia, at the beginning of the 2006-2007 school year. At the time of hearing he continued to attend school at *****.

33. The cost of tuition for the **** private school for the 2006-2007 school year was \$17,000.00.
34. The parents were informed by school staff at the ARD Committee meetings held in 2004 and 2005 that the student's IEP was being implemented correctly.
35. General comments made by school staff to parents during ARD Committee meetings that the student IEP's were being properly implemented do not constitute specific misrepresentations from Lago Vista ISD that it had resolved the problems forming the basis of the parent's complaint.
36. The student's IEP during 2005-2006 school years was substantially implemented and any lack of implementation of the accommodations and modifications of instruction were due, in part, to the refusal of the student to accept the accommodations offered. Additionally, those failures of his teachers to fully implement accommodations and modifications on a regular basis were de minimus.
37. The parents filed this due process complaint with TEA on December 6, 2006.
38. The earliest parents knew or should have known the Lago Vista was not fully implementing the student's IEP was during the 2004-2005 school year. In applying the one year statute of limitations to the issues raised in this proceeding, those issues which accrued prior to December 6, 2005, are time-barred.

Discussion

Statute of Limitations

Texas applies a one year statute of limitations to claims brought pursuant to the IDEA. See 19 TEX. ADMIN. CODE §89.1151. This due process complaint was filed on December 6, 2006. Lago Vista ISD raised the one year statute of limitations as an affirmative defense claiming it limits the time frame of the issues raised in this proceeding to those which accrued on or after December 6, 2005. The first step in analyzing whether parents' claims are time-barred is to determine when they knew or should have known about the alleged IDEA violation. The parents admitted it became obvious to them in the 2004-2005 school year that the student's IEP's were not being implemented and testified they complained to school administrators and teachers but their complaints were ignored. Based on this admission, the earliest the parents knew or should have known of the alleged IDEA violation regarding lack of IEP implementation was during the 2004-2005 school year.

However, parents claim applicability of one of the two IDEA exceptions to the statute of limitations. This exception occurs when parents are prevented from requesting a hearing due to “specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint.” 20 U.S.C. §1415(f)(3)(D). To invoke this exception, the parents must establish by a preponderance of the evidence that school personnel made “specific misrepresentations” that they had resolved the problem forming the basis of the complaint and that the specific misrepresentation “prevented” them from timely initiating the due process hearing.

In this proceeding, parents’ due process complaint included eight separate issues. Accordingly, to invoke the IDEA’s exception to the statute of limitations required parents to establish that specific misrepresentations prevented them from timely filing any issue that accrued more than one year prior to the filing of the due process complaint.

The only issue for which the limitations defense was raised by the parents involves whether Lago Vista failed to implement the student’s IEP during the 2004-2005 and 2005-2006 school years. Regarding this issue, parents testified that they were informed by school staff at the ARD Committee meetings held in 2004 and 2005 that the student’s IEP was being implemented correctly. Parents claim that these statements constituted specific misrepresentations that prevented them from otherwise timely requesting the hearing.

Under the facts of this case, I find that general comments made by school staff to parents during ARD Committee meetings that the student IEP’s were being properly implemented did not constitute specific misrepresentations from Lago Vista ISD that it had resolved the problems forming the basis of this complaint. First, the statements do not purport to resolve the problems raised by the parents regarding the lack of implementation of the IEP. Instead, these statements by school officials deny the existence of any problem. Secondly, the statements made by school personnel were not specific misrepresentations. As is more fully

discussed in this decision, the student's IEP during 2005-2006 school years were being substantially implemented and the lack of implementation of the accommodations and modifications of instruction were due, in part, to the refusal of the student to accept the accommodations and modifications offered. Additionally, those failures of his teachers to fully implement accommodations and modifications on a regular basis were *de minimus*, and did not result in a denial of a free appropriate public education to the student during the 2005-2006 school year. See *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Accordingly, I find that the one year statute of limitations is applicable to the issue of whether Lago Vista ISD failed to implement the student's IEP and bars those alleged failures which occurred before December 6, 2005. Additionally, I find that the one year statute of limitations bars all other issues in this proceeding with claims accruing prior to December 6, 2005, including allegations of a denial of a free appropriate public education during the 2004-2005 school year.

Tuition Reimbursement

The parents seek reimbursement of the tuition and costs they incurred for the student's private school eighth grade placement during the 2006-2007 school year.

The IDEA allows for reimbursement of private school placements by parents in limited circumstances. Specifically, the statute provides:

“(ii) Reimbursement for Private School Placement: If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” See 20 U.S.C. §1412(a)(10)(C)(ii).

The IDEA also places limitation on reimbursement as follows:

“The cost of reimbursement described in clause (ii) may be reduced or denied –

(I) if –

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

...

(III) upon a judicial finding of unreasonableness with respect to the action taken by the parents.” See 20 U.S.C. §1412(a)(10)(C)(iii).

The IDEA provides the following exceptions to the potential reduction or denial of reimbursement:

“Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement

(I) shall not be reimbursed or denied for failure to provide such notice if –

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or hearing officer, not be reduced or denied for failure to provide such notice if –

(aa) the parent is illiterate or cannot write in English;
or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.” See 20 U.S.C. §1412(a)(10)(C)(iv).

Accordingly, to be entitled to reimbursement for tuition and costs of the student’s private school placement, the parents must prove by a preponderance of the evidence, not only that Lago Vista ISD failed to make available to the student a free appropriate public education in a timely manner, but also that they timely and properly notified the school district of their intent to privately place the student at public expense.

I find that the parents established by a preponderance of the evidence that the agency had not made a free appropriate public education available to the child in a timely manner prior to his enrollment in the private school placement.

In *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997), the court summarized the standard of a “free appropriate public education” as set forth in the U.S. Supreme Court decision in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982). An IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually

designed to provide educational benefit." Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be "likely to produce progress, not regression or trivial educational advancement." In short, the educational benefit that an IEP is designed to achieve must be "meaningful."

A party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and resulting placements were inappropriate under the IDEA. *Id.*

In *Cypress-Fairbanks*, the court set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and nonacademic benefits are demonstrated. 118 F.3d at 253.

In applying these standards to the facts of this case, I find that the student's individualized educational program, developed at the November 2, 2005 ARD Committee meeting, and to be implemented through November 2, 2006 was incomplete and therefore not individualized on the basis of the student's assessment and performance, nor could it be anticipated to provide positive academic and nonacademic benefits to the student. The IEP was defective in that it was annual IEP developed in November 2005 and designed for the 2005-2006 school year, yet it purported to also cover the a portion of the fall semester of 2006, through November 2, 2006. However, the IEP for the fall of 2006 was incomplete. The IEP lists as its duration for the annual goals and short-term objectives the period from November 2, 2005 to November 2, 2006. However, its primary goal was for the student to master TEKS at the 7th grade level. When school ended in May, 2006, the student had met this goal by mastering the TEKS at the 7th grade level as shown by his passing grades and scores on the

alternative state assessment examination, yet no ARD Committee was convened to propose a new IEP for the student for 8th grade. Additionally, the instructional modification page contained in the IEP was limited to the school year 2005-2006, which ended in May, 2006. There was no indication in the IEP that these instructional modifications were to have continued through November 2, 2006. Moreover, the schedule of services listed the areas of instruction the student would receive in the Fall of 2005 and the Spring of 2006. It did not contain a schedule of services for the Fall of 2006. Accordingly, when the parents unilaterally placed the student privately, there was no appropriate IEP proposed or in effect for the student for the 2006-2007 school year. Consequently, the IEP in effect at the time of the student's private school placement was not reasonably calculated to provide the student with a meaningful educational benefit.

To be entitled to private school placement reimbursement, parents must also show that they timely provided the necessary prior notification to the school district or fall within one of the statutory exceptions. As for the prior notice requirement, I find that the parents failed to meet their evidentiary burden. The parents failed to establish that they provided Lago Vista ISD with proper and timely notice of their intent to privately place the student as required by the IDEA. The parents did not request an ARD Committee meeting prior to withdrawing the student from school and enrolling him in the private school and did not raise the issue of a private school placement during the last ARD Committee meeting on November 2, 2005. Additionally, the parents did not furnish Lago Vista ISD with 10 business days prior written notice that they were rejecting the placement proposed by the school district to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense. The evidence confirms that the parents gave school officials prior oral notice of their concerns of their intent to withdraw the student from school and place him in a private school for the eighth grade, but they did not put it in writing or indicate they would be seeking payment for the private school placement from the school district.

Parents argue they were misled by the school principal when told no notification was required for withdrawing their child from school. I do not find this to be the case. The parents had not previously informed the principal that they intended to seek public funding of this private school placement. Parents have the right to place their children in private schools at their own cost and expense. Consequently, the principal responded correctly to the question when indicating that no notice was required to withdraw a student from school. Moreover, the record affirmatively establishes that the parents had been informed and provided notice of their procedural safeguard rights on numerous occasions prior to the student's unilateral placement in the private school. Although the actual procedural safeguard notices provided to the parents were not made a part of the record of this proceeding, without any evidence to the contrary, it is presumed that such notices included the IDEA's reimbursement requirements for private school placements¹.

¹The procedural safeguard notice required to be provided parents at least once a year and upon the first occurrence of the filing of a complaint under subsection (b)(6) is to include, among other information, the requirements for unilateral placement by parents of children in private school at public expense. 20 U.S.C. §1415(d)(1) and (2).

Accordingly, I find that the parents failed to comply with the IDEA's notice requirements for obtaining public reimbursement for the student's private school placement. However, this finding does not end the inquiry as the IDEA leaves it to the discretion of the hearing officer to determine whether the cost of reimbursement should be reduced or denied. Under the facts of this case, and in applying equitable principles, I find that cost of reimbursement should be reduced and limited to the duration of the IEP in effect at the time of the student's private school placement. Accordingly, I am awarding parents the costs of the student's private school placement through November 2, 2006. The underlying justification for limiting this award to the duration of the IEP is that the IEP provided to the student during the 2005-2006 school year, as discussed herein, was appropriate and provided the student with a free appropriate public education and

accordingly, an updated IEP of a similar nature for the 2006-2007 school year would also have been reasonably calculated to have provided the student a free appropriate public education. Since this was an annual IEP, it is reasonably anticipated that this updated IEP would have been in place by November 2, 2006.

Lastly, Parents argue that the IDEA's discretionary exception to the reduction of the costs of reimbursement relating to "serious emotional harm to the child" applies to this case. I find no evidence that any "serious emotional harm" would have occurred to the student as a result of parents' timely providing prior notice to the school district of their intent to privately place the student. This exception would be limited to those rare circumstances where a student requires immediate removal from a public school and placement in a private facility to prevent serious emotional harm to the student. This situation did not exist in this case. The student was placed privately by his parents at the beginning of the school year. Consequently, the student was not attending public school at the time. Nothing prevented the parents from requesting an ARD Committee meeting or providing the 10 business day advance notice to the school district of their intent to privately place the student and seek reimbursement from the school district. Additionally, no expert testimony was presented establishing "serious emotional harm." The testimony of the reading expert and parents relating to the emotional harm suffered by the student was not persuasive in this context. Neither the reading expert nor the parents had the medical expertise to render such an opinion, nor did their lay opinions establish that the student would have suffered any "serious emotional harm" during the period in which prior notice was to have been provided to the school district.

2005-2006 IEP

Parents contend that the IEP in place for the 2005-2006 school year was not properly implemented and that Lago Vista ISD failed to properly monitor, supervise or train staff in implementation of the student's IEP. The primary complaint was that the accommodations and instructional modifications were not

fully implemented by school staff as evidenced by a complaint finding by the Texas Education Agency.

The instructional modifications in issue are those contained in the November 2, 2005 IEP. They include the following:

Alter Assignments by Providing:

1. Assignment notebook

Adapt Instruction by Providing:

1. Frequent checks for understanding
2. Verbalization of steps needed to complete task
3. Auditory aids (tapes)
4. Modify Tests: reduce/shorten lengthy, written work
 - i. Provide word banks
 - ii. Divide into short segments
5. Oral exams, as needed
6. Minimal auditory distractions
7. Provide written class notes

Adapt Materials by Providing:

1. Study aids/manipulatives

Manage Behavior by Providing:

1. Positive reinforcement of student efforts
2. Preferential seating

Required Equipment/Assistive Technology

1. Calculator

Parents filed a formal complaint with the Texas Education Agency claiming that these accommodations and modifications were not being consistently implemented. The Texas Education Agency investigated and determined that Lago Vista ISD failed to ensure that these accommodations and modifications were implemented during the 2004-2005 and 2005-2006 school year. The Agency found that Lago Vista did not provide documentation of consistent implementation of some of the student's accommodations and modifications in

some of the student's classes, and that in the student's math class, that the accommodations of an assignment notebook and providing copies of class notes were not being provided to the student. Although such findings by the Texas Education Agency are not binding in this proceeding, they were confirmed by the evidence presented in this matter.

In the case *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the United States Fifth Circuit Court of Appeals took the approach of the Sixth Circuit in *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F.2d 551 (6th Cir. 1991) in determining that a local education agency's failure to provide all the services and modifications outlined in an IEP does not constitute a per se violation of the IDEA. The Fifth Circuit concluded that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. The Court found this approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. The Court then applied the Cypress Fairbanks four prong analysis to the facts of the case, which included the failure of the school district to provide speech therapy services for a substantial period of time, failure to provide AP services for two months, and the general failure to provide instructional accommodations and modifications of highlighted and taped texts. The Court determined, upon reviewing the student's progress as shown from standardized intelligence and achievement tests, that he had made academic progress under his IEP. The Court also determined that significant provisions of the student's IEP had been followed and therefore concluded that, as a result, he received an educational benefit.

Accordingly, a similar analysis is required in this case. I find that in applying the Cypress Fairbanks four-prong analysis to this case, that significant provisions of

the student's IEP had been followed by Lago Vista ISD and that the student did receive an educational benefit from his instruction. On the state mandated alternative test assessing the student's knowledge and skills (SDAA II), he achieved a level ** in math, indicating he was proficient in and met the *th grade Texas Essential Knowledge and Skills in that curriculum. In reading, the student also received a level **, indicating he was proficient in and met the *th grade Texas Essential Knowledge and Skills in that curriculum. In writing, the student received a level **, indicating that he had moderately achieved the skills in that curriculum. It also indicated that this was the level of his expected achievement, due to his disability. Additionally, his reading teacher administered the Qualitative Reading Inventory (QRI) to the student. It indicated that he was reading on grade level at the end of his *th grade year. Also, the student achieved passing grades in all of his academic subjects and was promoted to the ** grade. Although the parents dispute whether the student truly earned passing grades and point to numerous failing test scores, it is clear that the student made academic progress under his 2005-2006 IEP, and mastered the *th grade curriculum. Accordingly, I find that the student, despite the failure of Lago Vista ISD to fully implement instructional modifications, received a meaningful educational benefit during the 2005-2006 school year and was provided with a free appropriate public education.

I find no merit to the parents claims that Lago Vista ISD failed to properly monitor, supervise or train the teachers and staff who worked with the student in implementing his IEP's.

Hostile Educational Environment

Parents allege that the student was subjected to a hostile educational environment as evidenced by alleged continuing animosity displayed by staff toward the student by treating the student as a discipline problem instead of a special education student and through other actions taken against him from November 2005 through May, 2006. Parents do not cite any statutory authority or case law recognizing a cause of action against a school district for allowing a

“hostile educational environment” under the IDEA, but it is presumed that such a claim could be cognizable if a student was subjected to an oppressive educational environment that hindered the student’s access to an appropriate instruction to such a degree that it denied him a free appropriate public education².

²A hostile educational environment claim has been recognized in situations involving peer-to-peer sexual harassment in violation of Title IX. *Davis v. Monroe*, 526 U.S. 629, 650 (1999). The Davis Court held that a school district can be held liable if it is "deliberately indifferent" to peer sexual harassment and its response is "clearly unreasonable in light of the known circumstances." 526 U.S. at 648-49; see also *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998) (finding school district could be liable in damages under Title IX when it is deliberately indifferent to the known acts of sexual harassment by a teacher). However, school district liability for a general claim of hostile educational environment under the IDEA has not been recognized or addressed by the U.S. Supreme Court or the Fifth Circuit.

Parents complain that a hostile educational environment existed in the student’s homeroom and one classroom on the basis that his teacher dressed in a manner they deemed sexually provocative and inappropriate; because on one occasion, as a means to dissuade students from sitting on the back two legs of a chair, the teacher inappropriately moved a chair out from under the student causing him to fall; and because she used comments such as “suck” and “crap” in class and called students “idiots,” “morons,” and “retards.” Parents claim that despite numerous complaints by parents, no disciplinary action was taken against the teacher. Parents also complain that a hostile educational environment existed outside this classroom as evidenced by the student being “uninvited” by a football coach to participate in football which devastated the student causing him to withdraw from friends, family and school. Additionally, parents complain that the student was subjected to disciplinary actions for behavior related to his disability. Parents argue that these acts establish a hostile educational environment³. I find this argument to be unpersuasive. Even assuming that a “hostile educational environment” cause of action exists under the IDEA, none of the incidents

described, nor the totality of their effect, reasonably rose to a level that caused a denial of a free appropriate public education to the student. Even if the student was traumatized by each incident, it did not result in the student missing school or a significant amount of academic instruction. Consequently, these incidents did not cause a deprivation of educational services to the student or deny the student a free appropriate public education.

³Parents point to the implementation of lunch detentions whenever the student did not complete his assignment notebook as a punitive action based on the student's disability. However, this action was recommended by his parent and for purposes of trying to get the student to properly maintain and complete the assignment notebook. I find this action to be a proper response to the student's failure to comply. Providing negative consequences for behavior is not prohibited by the IDEA, nor The fact that it was not successful, diminished the student's self-esteem, and was not what parents considered "positive reinforcement" is immaterial. To allow the parents to fault the school district for this action would be inequitable.

Assessment

Parents complain that the student's dyslexia was under-diagnosed as mild to moderate when, in fact, their dyslexia expert determined that the student was severely dyslexic. Parents complain that this under-diagnosis, coupled with a reduction in school staff, inappropriately resulted in a reduction in the dyslexia services provided to the student during the 2005-2006 school year.

Dyslexia is a disorder of constitutional origin manifested by a difficulty in learning to read, write, or spell, despite conventional instruction, adequate intelligence, and sociocultural opportunity. TEX. EDUC. CODE §38.003 (d)(1). Each student in the State of Texas is tested for dyslexia and related disorders. Dyslexia, in and of itself, is not a recognized disability under the IDEA and dyslexia services are not provided pursuant to an IEP developed by an ARD Committee.

Consequently, any complaint regarding the amount of dyslexia services provided to the student are outside the purview of the IDEA. However, the student in this case also qualified for special education services as a student with specific learning disabilities in the areas of reading and written expression. His IEP for the 2005-2006 school year included goals and objectives related to reading and

writing skills that were to be implemented by his general and special education teachers and his dyslexia teacher. Accordingly, a review of these services is indicated.

The student's most recent full individual evaluation was completed by the school district on ***, 2004. It showed that the student had average intelligence and when applying a discrepancy model, the student was determined to have learning disabilities in basic reading and written expression. In reading, he was described as having been very slow to acquire basic word decoding skills, of being weak in sight recognition and as laboring in sounding out words. Although no category of mild, moderate or severe was used to describe his learning disability in reading, the fact that he qualified for special education services on the basis of this disability indicated that he had significant deficits in this area. The evidence confirmed that the student was provided with an IEP in reading and received reading instruction in general and special education, which were supplemented with dyslexic services by a dyslexia teacher. I find that the services provided pursuant to his IEP were appropriate and resulted in the student improving his reading skills to the extent that by the end of the *th grade, he was reading on grade level. Although parents assert that much of the student's success in reading was due to private services they obtained for the student and through their attempts to assist the student at home, there is no rational means to determine which service or individual caused the student's improvement in reading. Accordingly, I find that the student was adequately and appropriately evaluated pursuant to the IDEA and that his learning disabilities in reading and written expression were identified and properly addressed in his IEP.

TEA Investigative Findings of Fact / October 24, 2006 ARD Committee Meeting

Parents further complain that Lago Vista ISD did not adequately address the TEA Investigative Findings of Fact and that the ARD Committee held in response thereto failed to properly address parental concerns and TEA's Findings of Fact. It is clear that Lago Vista ISD disagreed with the TEA Investigative Findings of Fact regarding its failure to fully implement the instructional accommodations and

modifications of the student's IEP. Lago Vista ISD claimed full implementation and that it was not required by the IDEA to keep written documentation of each time it implemented one of the instructional modifications. However, as indicated herein, the evidence confirmed that not all of the instructional modifications were implemented and that TEA upheld the parents' complaint and ordered the parties to convene an ARD Committee meeting to determine if compensatory educational services should be provided to the student. The ARD Committee meeting was held on October 24, 2006, and the ARD Committee determined that compensatory educational services were not warranted.

Compensatory educational services would have been warranted if the failure to fully implement the student's instructional accommodations and modifications had deprived the student of a free appropriate public education. Since these violations of the IEP were not found to be a significant deprivation of educational services, as determined herein, an award of compensatory educational services would not be appropriate.

Conclusions of Law

1. Texas applies a one year statute of limitations to claims brought pursuant to the IDEA. 19 TEX. ADMIN. CODE §89.1151.
2. The first step in analyzing whether parents' claims are time-barred is to determine when they knew or should have known about the alleged IDEA violation. The earliest the parents knew or should have known of the alleged IDEA violation regarding lack of IEP implementation was during the 2004-2005 school year.
3. The IDEA contains two exceptions to the statute of limitations. One exception occurs when a parent is prevented from requesting the hearing due to "specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint." 20 U.S.C. §1415(f)(3)(D).
4. The IDEA's exception to application of the statute of limitations regarding "specific misrepresentations" is not invoked by general statements made by school staff during ARD Committee meetings that the student's IEP is being implemented since such statements are not specific, and do not purport to "resolve the problem forming the basis of the complaint." Instead, the comments denied the existence of the problem and thus put the parent on notice that their complaints were without merit and would not be resolved. Under such circumstances, parents should have timely invoked their due process hearing rights. 20 U.S.C. §1415(f)(3)(D).

5. The one year statute of limitations is applicable to the issue of whether Lago Vista ISD failed to implement the student's IEP and bars those alleged failures which occurred before December 6, 2005 and bars all other issues with claims accruing prior to December 6, 2005.
6. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." See 20 U.S.C. §1412(a)(10)(C)(ii).
7. The parents, being the party attacking the appropriateness of an IEP established by Lago Vista ISD, bear the burden of showing why the IEP and resulting placements were inappropriate under the IDEA. *Cypress-Fairbanks Indep, Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997).
8. When the parents unilaterally placed the student privately in August 2006, there was no appropriate IEP proposed or in effect for the student for the 2006-2007 school year. Consequently, the IEP in effect at the time of the student's private school placement was not reasonably calculated to provide the student with a meaningful educational benefit. *Cypress-Fairbanks Indep, Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997). Lago Vista ISD failed to offer the student an IEP reasonably calculated to provide the student with a free appropriate public education during the fall of 2006.
9. The cost of reimbursement may be reduced or denied if: (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa). 20 U.S.C. §1412(a)(10)(C)(iii).
10. The parents failed to establish that they provided Lago Vista ISD with proper and timely notice of their intent to privately place the student as required by the IDEA. However, the IDEA leaves it to the discretion of the hearing officer to determine whether the cost of reimbursement should be reduced or denied. Under the facts of this case, and in applying equitable principles, the costs of reimbursement should be reduced and limited to the duration of the IEP in effect at the time of the student's private school placement. The underlying justification for limiting this award to the duration of the IEP is that the IEP provided to the student during the 2005-2006 school year was appropriate and provided the student with a free appropriate public education and accordingly, an updated IEP of a similar nature would also have offered the student a free appropriate public education during the 2006-2007 school year. 20 U.S.C. §1412(a)(10)(C)(iii).

11. School district liability for a general claim of “hostile educational environment” under the IDEA has not been recognized or addressed by the U.S. Supreme Court or the Fifth Circuit. Presumably, such a claim could be cognizable if a student was subjected to an oppressive educational environment that hindered the student’s access to an appropriate instruction to such a degree that it denied him a free appropriate public education. See, e.g. *Davis v. Monroe*, 526 U.S. 629, 650 (1999).
12. The facts of this case do not indicated that the students was subjected to such an oppressive and hostile educational environment that it denied him a free appropriate public education. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982).
13. Dyslexia is a disorder of constitutional origin manifested by a difficulty in learning to read, write, or spell, despite conventional instruction, adequate intelligence, and sociocultural opportunity. TEX. EDUC. CODE §38.003 (d)(1). Each student in the State of Texas is tested for dyslexia and related disorders. Dyslexia, in and of itself, is not a recognized disability under the IDEA and dyslexia services are not provided pursuant to an IEP developed by an ARD Committee but are provided as part of general education. Complaints regarding the failure to provide dyslexia services are not cognizable under the IDEA.
14. To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Significant provisions of the student’s 2005-2006 IEP had been followed by Lago Vista ISD and the student did receive an educational benefit from his instruction. Lago Vista ISD provided the student with a free appropriate public education during the 2005-2006 school year.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby ORDER that the following relief is GRANTED:

1. Lago Vista ISD shall reimburse the parents for the private school tuition they incurred on behalf of the student during the time period from the student’s enrollment at the private school in August 2006, through November 2, 2006. If the parties are unable to agree on the amount of reimbursement due parents for this time period, then such reimbursement shall be on a pro rata basis, the percentage being the number of calendar days in the 2006-2007 school year of the private school as the denominator and the number of calendar days from the date of the first day of school to and including November 2, 2006, as the numerator, multiplied by the private school tuition for the 2006-2007 school year.
2. Lago Vista ISD shall reimburse the parents for the transportation costs they incurred on behalf of the student in transporting the student to and from the

- private school during the time period from the student's first day of school at the private school in August 2006, through November 2, 2006. Transportation costs related to mileage shall be computed using the current State of Texas mileage reimbursement rate and shall be based on the actual highway mileage between the student's residence and the private school.
3. The parents shall provide to Lago Vista ISD all necessary information, receipts, mileage calculations, etc. for accurately determining the reimbursement amount for the tuition and transportation costs.
 4. Lago Vista shall pay the parents the costs of tuition and transportation costs within 30 calendar days of obtaining the necessary information for calculating the amounts owed.
 5. All other relief not specifically granted herein is DENIED.

NOTICE TO PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 Texas Administrative Code §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency, and copied to the parent within 15 school days from the date of this Decision: 1) Documentation demonstrating that the Decision has been implemented; or 2) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 27th day of April 2007.

James W. Holtz

Special Education Hearing Officer

DOCKET NO. 097-SE-1206

STUDENT BNF PARENT
PETITIONER

vs.
LAGO VISTA INDEPENDENT
SCHOOL DISTRICT
RESPONDENT

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

- ISSUE:** Whether one year statute of limitations was applicable to parents' complaints?
- HELD:** For School District. The Texas one year statute of limitations was applicable to this proceeding and time-barred any claims of parents which accrued prior to December 6, 2005.
- ISSUE:** Whether Parents are entitled to tuition reimbursement from school district for a unilateral private school placement?
- HELD:** For Parent, in part. School District failed to have in place an appropriate IEP at the time the parents unilaterally placed the student in a private school. However, parents failed to provide timely notice to the School District of their intent to privately place the student at public expense, resulting in a reduction in the amount of tuition awarded. Instead of awarding one school year of tuition reimbursement, the award was limited to the duration of the inappropriate IEP, being from the beginning of the 2006-2007 school year through November 2, 2006.
- CITATION:** 20 U.S.C. §1412(a)(10)(C)(ii) and (iii).
- ISSUE:** Whether School District denied student a free appropriate public education during the 2005-2006 school year?
- CITATION:** *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).
- HELD:** For School District: To prevail on a claim under the IDEA, a party

challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Significant provisions of the student's 2005-2006 IEP had been followed by Lago Vista ISD and the student did receive an educational benefit from his instruction. Lago Vista ISD provided the student with a free appropriate public education during the 2005-2006 school year.

ISSUE: Whether student was subjected to a "hostile educational environment?"

See, e.g. *Davis v. Monroe*, 526 U.S. 629, 650 (1999); *Board of Education of*

CITATION: *Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982).

For the School District. School district liability for a general claim of "hostile educational environment" under the IDEA has not been recognized or addressed by the U.S. Supreme Court or the Fifth Circuit. Presumably, such a claim could be cognizable if a student was subjected to an

HELD: oppressive educational environment that hindered the student's access to an appropriate instruction to such a degree that it denied him a free appropriate public education. The facts of this case do not indicated that the students was subjected to such an oppressive and hostile educational environment that it denied him a free appropriate public education.