**DOCKET NO. 121-SE-0118**

**(Consolidated with No. 214-SE-0418)**

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| **STUDENT, b/n/f PARENT and PARENT** | § | **BEFORE A SPECIAL EDUCATION** |
| | § | |
| | § | **HEARING OFFICER** |
| | § | |
| **V.** | § | |
| | § | **FOR** |
| **AUSTIN INDEPENDENT** | § | |
| **SCHOOL DISTRICT** | § | **THE STATE OF TEXAS** |

## DECISION OF HEARING OFFICER

Petitioner Student, b/n/f Parents (Student) filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA") 20 U.S.C. §§ 1401-1482 (IDEA) and its implementing state and federal regulations. The complaint was received by the Texas Education Agency on January 30, 2018. The Respondent in the complaint is Austin Independent School District, (School District), and it has made a general appearance.

LEGAL REPRESENTATIVES

Student was represented by Elizabeth Angelone and Meera Krishnan of the Cuddy Law Firm. The School District was represented by Amy Tucker and Pam Kaminsky of the law firm Rogers Morris & Grover L.L.P.

CASE SUMMARY

The main issue in this case is whether the school district fails to provide Student with a Free Appropriate Public Education (FAPE). Specifically, whether the school district fails to provide and implement an appropriate Individual Education Plan (IEP) and an appropriate Behavior Intervention Plan (BIP) in the least restrictive environment (LRE).

The hearing officer finds that the school district's Full Individual Evaluation (FIE) and FBA are appropriate, and therefore, Petitioner is not entitled to the cost of an Individual Educational Evaluation (IEE) at school district expense.

## PRELIMINARY MOTIONS

### SUFFICIENCY OF COMPLAINT

The School District challenged the sufficiency of Student's initial complaint and an Amended Complaint was filed. There being no objection, the amended complaint was found to be sufficient to meet the requirements of the IDEA.

### CONSOLIDATION OF CASES

The School District filed a separate request for a due process hearing 214-SE-0418 which was assigned to this hearing officer on April 17, 2018. These cases share both law and facts. The School District requested the unopposed consolidation of the two matters plus one day be added to the hearing schedule for the School District's additional issues.

A special education hearing officer in Texas has the authority to manage the hearing process and exercise discretion in issuing any orders that justice may require. 19 Tex. Admin. Code § 89.l 170(e). Consolidation is governed by Texas Rule of Civil Procedure 174 and is appropriate when the evidence presented "will be material, relevant, and admissible in each case." In re Gulf Coast Bus. Dev. Corp., 247 S.W.3d 787, 794-95 (Tex. App. Dallas 2008, orig. proceeding).

Finding it will preserve judicial resources and avoid the unnecessary costs of two hearings and two decisions, the two requests for due process hearing were consolidated. The School

3. The Student's IEP Alternate Schedule Denies FAPE.
    a. Procedural Violations Deny a FAPE.
    b. Substantive Violations Deny a FAPE.
4. Compensatory and Equitable Relief Should be Awarded.

The School District alleges it has provided FAPE to the Student, has initiated and implemented an appropriate IEP, developed an appropriate BIP, and has reviewed the outside provider information provided by Parent, obtained parental input in the Admission Review and Dismissal (ARD) process, and continues to serve the Student in the least restrictive environment. The School District seeks an order pursuant to 34 CFR 300.532(b)(2)(ii), affirming the ARD committee's proposed placement.

The School District also seeks to establish the appropriateness of its Full Individual Evaluation (FIE) and Functional Behavioral Assessment (FBA). If the school district's Full Individual Evaluation (FIE) was appropriate, then Petitioner is not entitled to the cost of an Individual Educational Evaluation (IEE) at school district expense.

BURDEN OF PROOF

There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. Schaffer v. Weast, 546 U.S. 49, 62 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993).

STUDENT'S REQUESTED RELIEF

1. A finding that School District procedurally and substantively denied Student a free appropriate public education during the relevant time periods.

2. Order the School District to reimburse parents for the privately funded evaluation conducted by Petitioner's expert within 10 days of decision.

3. Order the School District to reimburse parents for the weekend and summer social skills classes that Student's parents have enrolled Student in and have paid for.

4. Order the School District to fund an independent Functional Behavioral Assessment of Student by a master's level board-certified behavior analyst (BCBA) or equivalent of the Parent's choosing so as to obtain recommendations related to the programming and services; alternatively, Order the School District to reimburse Parents for Dr. ***'s evaluation.

5. Order the School District to fund an independent Occupational Therapy Evaluation and Assistive Technology Evaluation of Student by an evaluator of the Parent's choosing so as to obtain recommendations related to the programming and services.

6. Order the School District to convene an ARD Committee and develop appropriate frequency, duration and methodologies necessary to address the Student's academic and behavioral needs. In the alternative, order the District to reimburse the Parents for privately funded evaluations.

7. Order the School District to implement appropriate supplemental aids and services with fidelity, before requesting a more restrictive environment.

8. Order the School District to provide Student with a one-on-one dedicated aide who is a master's level BCBA who can appropriately and consistently implement a BIP for Student.

9. Order that upon receipt of the above evaluations, the ARD Committee convene and develop a new IEP that accurately reflects Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) statements and includes: appropriate goals and short-term objectives that address Student's myriad of academic, social, communication, and behavioral needs; appropriate supports and services; identifies appropriate teaching methodologies that will be employed to address Student's

p. 633 (lines 17-20), p. 650 (lines 14-25), p. 651 (lines 1-22). However, the assessment confirmed previous determinations of Student's intellectual disability. Tr. at p. 651 (lines 21-22).

4. Student has received special education services from the School District since the 2014-15 school year (*** Grade). Student's IEP addressed Student's academic deficits, detailed the modifications Student requires, and included needed supplemental services, such as a special education inclusion teacher to support Student. In addition to the opportunity to type written responses, the ARD Committee documented extensive classroom accommodations to ensure Student could successfully access the general education curriculum. P's Ex. 12-26 –12-27. Student needed *** during all academic and leisure activities for safety, academic support, behavioral support and social success. P's Ex. 12-24.

9. When the new FBA was completed, another ARD meeting was convened on February ***, 2015, to review the FBA and update the Behavioral Intervention Plan (BIP). P's Ex. 13-15; P's Ex. 13-20 – 13-22. The ARD Committee reviewed data indicating the use of the Alternate Schedule was effective and the data supported its continued use. P's Ex. 13-15; P's Ex. 13-11.

10. The ARD Committee also discussed Student's inability to focus and attend to social skills instruction provided in the general education classroom. P's Ex. 13-9. Staff were redirecting Student an average of 5 times/minute during direct instruction. P's Ex. 13-9. To address some of the concerns, the School District staff recommended a schedule be implemented in a special education setting for 20 minutes/day of services indicating "social/behavioral skills." Student's mother indicated her willingness to agree only if it was implemented on a trial basis and data was collected to determine its effectiveness. P's Ex. 13-15. The ARD meeting ended in agreement. P's Ex. 13-15; P's Ex. 13-30 .

11. The next ARD committee meeting convened on November ***, 2015. (*** Grade – 2015-2016 school year) . P's Ex. 14. The ARD began by planning for the three-year re-evaluation that was due before the end of the school year. P's Ex. 14-14. When asked about their concerns, the family noted that "this is the best school year Student has had." P's Ex. 14-14.

12. The ARD Committee discussed Student's progress in behavior noting there had only

13. Student's PLAAFPs, IEP goals and objectives, assistive technology, schedule of services, BIP, accommodations, the Autism Supplement, and ESY were reviewed and revised. P's Ex. 14-3 – 14-9 (PLAAFPs); P's Ex. 14-9 (ESY and AT); P's Ex. 14-10 – 14-11 (LRE discussion); P's Ex. 14-11 – 14-13 (schedule of services); P's Ex. 14-16 – 14-21 (new IEP goals/objectives); P's Ex. 14-21 – 14-22 (BIP); P's Ex. 14-23 – 14-25 (Autism Supplement); P's Ex. 14-26 – 14-27 (accommodations summary).

14. School District stat19pC /LBody <</MCID P g. stat19p-Tw 1.4 [illegible]

25. The ARD Committee next convened for the annual ARD Committee meeting on October ***, 2017. (*** Grade – 2017-2018 school year) Jt. Ex. 2-18. Student's progress in speech therapy and OT was reviewed. Jt. Ex. 2-18 – 2-19. The OT reported Student was very enthusiastic about ***. Jt. Ex. 2-19. Student's special education case manager and resource teacher reviewed the PLAAFPs. Jt. Ex. 2-19; see also Jt. Ex. 2-3 – 2-10.

26. The AT evaluation noted that Student continues to use the iPad throughout the day. Jt. Ex. 2-19. The Parents agreed and did not raise questions or concerns. See Jt. Ex. 2-19. Jt. Ex. 3-16.

27. During review of the Autism Supplement, it was agreed that in-home training, ESY, and parent training were not needed. The Parents did not raise questions or concerns. Jt. Ex. 2-19. The ARD Committee confirmed that Student requires very close, vigilant *** support, every moment of every day including classroom time, lunch, ***, restroom, and in the hallways during transitions. Jt. Ex. 2-31; see also Tr. at p. 393 (lines 7-18).

28. It was reported that Student engages in physical and verbal aggression. *** were discussed. Attempts to re-direct verbal aggression risked physical aggression. Jt. Ex. 2-3. In addition, Student had started to ***. Jt. Ex. 2-4.

29. A snapshot of the work avoidance data collected the week before the ARD meeting indicated significant levels of work avoidance in the general education classroom. To the contrary, instances of work avoidance were minimal during resource instruction. Jt. Ex. 2-19.

30. During the first nine weeks of school, the recorded data showed *** of physical aggression towards others (***). Student's behaviors caused ***. Jt. Ex. 2-12.

36. Student's mother discussed her concerns with the new FBA, expressing that it was misleading and purposefully negative, and therefore she was not in agreement. Id. The family was provided information on how to request an IEE. Jt. Ex. 1-20. The Parents requested an IEE at the expense of the school district.

37. The School District proposed adding the support of another behavior specialist to provide additional behavior support, assistance with data collection, and help monitoring progress. Jt. Ex. 1-20.

38. The School District staff again proposed increasing Student's resource time. Jt. Ex. 1-20. After much discussion of the appropriate schedule of services, the School District continued to recommend increased resource time and the family continued to disagree. The ARD ended in disagreement. Id.

39. Student struggle to make academic, behavioral and social progress while being served in the general education environment. The Student is educated through the delivery of a modified education program delivered as a "class within a class." Student's need for *** on modified curriculum has created a class-within-a-class, where Student receives a *** in the same space of non-disabled peers. Tr. at p. 1040 (lines 9-15). It distracts the teacher and students who are engaged in a different activity at a much higher level. Tr. at p. 249 (lines 10-15).

40. Although Petitioner's expert testified that a "class within a class" is not a bad thing; Petitioner's inclusion specialist testified to the contrary, that "it is not what we want." Tr. at p. 665 (lines 15- 22); p. 924 (lines 7-9).

41. The School District has provided Student the opportunity to work with some excellent teachers including *** Tr. At 1061 (lines 1-3). Student's case manager is a certified special education teacher and BCBA. See Tr. at p. 419 (lines 11-25).

42. A Board Certified Behavior Analyst (BCBA) must successfully complete a board approved graduate level program. Tr. at p. 518 (lines 8-25). In addition, a BCBA

completes 1500 supervision hours under a currently certified BCBA before sitting for the BCBA exam. Tr. at p. 519 (lines 6-17) (detailing the selectiveness of the program, which admits only 15 out of roughly 1000 students, and the difficulty with the BCBA exam where 60% of students passed the first administration).

43. All staff involved directly with Student, including the paraprofessionals, are at a minimum, certified regular education teachers or certified special education teachers. Tr. at p. 1061 (lines 3-5); Tr. at p. 1056 (lines 18-25), p. 1057 (lines 1-20); Tr. at p. 480 (lines 1-3); Tr. at p. 1130 (lines 8- 25), p. 1131 (lines 1-10); Tr. at p. 1132 (lines 8-10); Tr. at p. 336 (lines 1-14); p. 380 (lines 8-16), Tr. at p. 302 (lines 9-23); Tr. at p. 1005; Tr. at p. 136 (lines 2-21); Tr. at p. 190 (lines 20-25), p. 191 (lines 1-4); Tr. at p. 1111 (lines 16-25), p. 1112 (lines 1-4).

44. The campus rearranges substitutes to ensure Student only interacts with trained teachers at all time. Tr. at p. 441 (lines 16-21) (***). And, of course, Student has several accommodations such as preferential seating, extra time, supplemental aids, individual reminder, ***, etc. See Jt. Ex. 2-34 (ARD accommodation summary).

45. The education professionals who have worked en3(of)-10(f)3( c)4.p(----

1-13) (***); p. 546 (lines 1-16) (***). because of Student's cognitive limitations, Student is unable to grasp any of the actual grade level curriculum, but instead requires 100% of it to be significantly; p. 1038 (lines 2-7) (*** explaining that Student's classwork resembles a *** academic level).

47. The School District staff recommended that the LRE appropriate for Student was a combination of general education instruction and increased resource time. Jt. Ex. 2-19. The School District explained that the progress Student was exhibiting was occurring in the resource setting. Jt. Ex. 2-19. The family objected to the proposed schedule and suggested that their inclusion advocate come to observe again. Jt. Ex. 2-19.

48. A 44-page IEP with numerous goals and objectives, modifications, accommodations, behavior intervention plans, ***, speech therapy, occupational therapy, and *** programming is highly individualized to meet Student's unique needs. Jt. Ex. 1. Each line on each page (with the exception of recently, the schedule of services), has been approved by Student's parents. *See, e.g.*, Jt. Ex. 5-16 (documenting line-by-line review of ARD document).

49. The School District has clearly made more than mere token gestures to accommodate Student in regular education. Student has *** support from certified teachers, and this year they were trained and supervised by a BCBA. *See, e.g.,* Tr. at p. 214 (lines 14-17), p. 481 (lines 1-14) ( "***" strategy used by staff when student becomes violent *i.e.* ***). The BCBA has been collaborating with a second BCBA for the entire school year. R's Ex. 3; R's Ex. 5; Tr. at p. 537 (lines 1-6), p. 1140 (lines 11-14).

50. The ARD Committee reviewed the various areas of the Autism Supplement every year, and the deliberations note the parents did not need in-home training. P's Ex. 12-15; P's Ex. 12-12 – 12-25.

51. The School District has demonstrated a willingness to listen to parental concerns by making programming changes, conducting additional evaluations, adding and/or changing IEP goals, and adding supports and services. The ARD Committee meetings have lasted 2.5 to 3.5 hours each, where as 90 percent of the other ARDs conclude

within an hour. Jt. Ex. 5-16 – 5-17.

52. Despite Student's intensive needs in the regular education environment, the School District has provided extensive research-based supplementary aids and services in an effort to meet Student's needs in that environment for a significant portion of the school day. See Jt. Ex. 1-36, 1-37 (Accommodation Summary).

53. Student's behavioral issues significantly inhibit Student's ability to receive academic benefits from instruction in the general education environment despite more than reasonable efforts by the School District. Petitioner's expert reported that during their *** lesson while she was instructing, Student *** interrupted the lesson by . P's Ex.

Tr. at p. 483 (lines 19-21); p. 558 (lines 9-11) (data that student is making progress in or small group instruction); p. 851 (lines 5-10); Tr. at p. 622 (lines 7-16).

68. The School District's proposed placement is reasonably calculated to allow Student to make academic progress, to receive behavior intervention, and to develop social skills. This proposed program will likely lead to academic and nonacademic benefit for Student. I

must be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. The inquiry is whether Student received an educational benefit. Rowley, 458 U.S. at 188-189.

THE FOUR FACTOR TEST

The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program meets IDEA requirements to provide a FAPE. Those factors are:

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, collaborative manner by the "key" stakeholders; and,
4. 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 four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. Richardson Ind. ndind. nditheetr (-81Lv5)-2(c)1j 0.243f(n I)23(n ( (-81L.72 Tdl23(nuc)4(a)144(a)114(n)16T0

LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires that students with disabilities must

the experience would violate the Act's mandate for a FAPE. Daniel R.R., 874 F.2d at 1049.

When a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place them in special education classes. 20 U.S.C.§ 1412 (a)(5); 34 C.F.R. § 300.114(a) (1) (2) (i) (ii). Id.

Mainstreaming is pointless if instructors are forced to modify the regular education curriculum to the extent the handicapped child is not required to learn any of the skills. Educators are not required to change the curriculum beyond recognition or operate a "classroom within a class."

When the curriculum must be altered such that it no longer resembles the curriculum in the classroom, the presumption in favor of mainstreaming is overcome and such efforts are not required under the IDEA. Daniel R.R., 874 F.2d at 1050. A class-within-a-class is an instructional arrangement the Fifth Circuit does not require in the name of inclusive education. Brillon v. Klein Indep. Sch. Dist., 100 F. App'x 309, 313 (5th Cir. 2004); Daniel R.R., 874 F.2d at 1049.

Here, the behavior significantly interferes with Student's learning and the learning of other classroom peers. The effect the disabled child's presence has on the regular classroom environment, and thus, on the education the other students are receiving, is relevant. In this regard, , the child may engage in disruptive behavior. And, if the disabled child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of special education. Daniel R.R., 874 F.2d at 1049-1050.

The Fifth Circuit has specifically approved of a mixture of special and regular education classes for children whose cognitive limitations and behaviors t

services with a mixture of special education and regular education is the LRE.

Here, Student's parents, teachers, and service providers have engaged in a

Although the additional supports recommended by Student's experts might "enhance" and "improve" the "gains" and "success" Student is already experiencing, the IDEA does not require the School District to implement them. See Zelazny, *supra*, 325 F.3d at 731 (expert's program showed district how to maximize student's potential, but IDEA does not require it be implemented).

DISCUSSION

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reasonably calculated to meet Student's unique needs.

While it is clear that Student continues to have behavior challenges and ongoing struggles, the educational programming was individualized on the basis of the Student's assessments and performance, and it was reasonably calculated to enable Student to make appropriate progress in light of Student's individual circumstances. Endrew F., *supra*, 137 S.Ct. 988 at 1000.

Petitioner provided evidence to the contrary, including expert testimony showing that reasonable minds can disagree on pragmatic details of the delivery of the educational program. The school district is under a duty to consider the results and recommendations of that evaluation at an ARD committee meeting. The evidence showed the school district did that.

While "more," "different," or "better" services/goals/accommodations might be possible, the relevant question is whether the IEP as written is appropriate. Adam J. v. Keller Indep. Sch. Dist., Civ. No. 4:01-CV- 0797-A, 2002 WL 1906001 at *2 (N.D. Tex. Aug. 15, 2002) (finding fact that another plan "might work as well or even better does not mean that defendant has failed to provide plaintiff a FAPE"), *aff'd*, 328 F.3d 804 (5th Cir. 2003).

The role of the court is not to "second guess" school officials or substitute their own idea of an appropriate IEP for the opinion of the educational professionals. C.G. by & through

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needs are considered. The evidence showed the school district did so – by administering the student and parent surveys and getting feedback from Student's teachers as to how Student was doing in Student's classes.

Petitioner complains the approach lacked objective and measurable goals. The evidence shows the goals were relatively clear. Even if the goals lacked more detail in describing behavior strategies, the IEP

If the school district provides evidence that its evaluation is appropriate then the parent may still obtain an independent evaluation, but it will not be provided at the school district's expense. 34 C.F.R. § 300.502(b)(3).

On April , 2018, Petitioner requested an IEE for a Functional Behavioral Assessment (FBA) conducted by the School District dated January , 2018. P's Ex. 42-6. The School District pursued its statutory right to

14. The Student's placement and schedule of services for the 2017-2018 school year, and the District's proposed placement and schedule of services for the 2018-2019 school year, place the Student in the LRE. 20 U.S.C. § 1412(a)(5)(A), 34 CFR §300.300, and 19 T.A.C. §89.1055. See Daniel R.R., *supra*, and Michael F., *supra.*

15. The combination of regular education and special education instruction complies with the IDEA's mandate that Student be included with Student's non-disabled peers to the maximum extent appropriate. See Daniel R.R., 874 F.2d 1036 at 1050 (5th Cir. 1989) (explaining IDEA's mandate for a continuum of placementpr R t82004 Tc -0.056 Tw ..K-6(en)6(t)-004

20. The School District's failure to provide all required components of prior written notice explaining its proposed actions or refusals did not result in a loss of educational opportunity or infringe upon Parents' opportunity to participate in the IEP process. The errors were educationally harmless. Adam J. ex rel. Robert J. v. Keller Independent School Dist., 328 F.3d 804, 812 (5th Cir. 2003).

27. Respondent's June 2016 FIE was appropriate under the IDEA and, therefore, Petitioner is not entitled to reimbursement for the cost of the independent educational evaluation secured at parental expense. 34 C.F.R. § 300.502(b) (3).

28. Petitioner's request for an award of attorneys' fees and litigation costs, including expert witness costs, are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.516, 300.517; 19 Tex. Admin. Code § 89.1185 (n).

## ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. The FBA/BIP developed by the School District is sufficiently appropriate such that

6. All other relief requested by either party not specifically granted in these Orders is hereby DENIED.

SIGNED on August 10, 2018.

RAY E. GREEN

Special Education Hearing Officer
For the State of Texas

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NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any sth102a inca1(e)]TJtthf