

DOCKET NO. 192-SE0220

STUDENT, B/N/F PARENT,
Petitioner

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§

BEFORE A SPECIAL EDUCATION

The due process hearing was held remotely via Zoom June 8-9, 2020, and recorded and transcribed by a certified court reporter.

Petitioner was represented by petitioner's legal counsel, Jordan McKnight Debra Liva, parent advocate, assisted as part of the legal team. Student's parents attended the hearing.

Respondent was represented by Rebecca Brantley, assisted by counsel, Sadia Ahmed. In addition, ***, the District's Director of Special Education, attended as the party representative. The parties filed timely written closing briefs. The Hearing Officer's Decision is due on July 24, 2020.

III. ISSUES

A.

- x Whether the District failed to provide Student sufficient social skills training and/or sufficient therapy/support to allow Student to achieve independence and develop positive behavioral intervention strategies.
- x Whether the District failed to provide Student counseling.

B. Petitioner's Requested Relief

1. An order finding the District denied Student FAPE;
2. An order directing the District to provide an Independent Educational Evaluation (IEE) at District expense in all areas of actual or suspected need, including but not limited to: cognitive and achievement testing a complete psychological evaluation for all suspected or known disabilities to include Autism, an FBA, speech, OT, and counseling;
3. A one-time medical evaluation for Other Health Impairment (OHI) eligibility, including but not limited to, evaluations for Attention Deficit Hyperactivity Disorder (ADHD) and Autism;
4. An order directing the District to establish an interim BIP pending any evaluations, to include the IEE, that addresses Student's unique needs;
5. An order directing the District to convene an Admission, Review, and Dismissal (ARD) Committee meeting after the IEE is complete to establish supports, accommodations, and specific and measurable goals to address Student's unique needs;
6. An order directing the District to facilitate and fund participation of each evaluator at an ARD Committee meeting where the testing is reviewed;
7. An order directing the District to provide compensatory education and related services to address Student's area of disabilities and/or needs including, but not limited to OT, speech therapy, tutoring, social skills training, counseling, and Applied Behavioral Analysis therapy;
8. An order directing the District to provide training by a certified behavior specialist to all staff working with Student on Student's specific areas of need and disabilities;
9. Reimbursement of parental expenses for educational or diagnostic services;
10. Attorney's fees (dismissed under 19 Tex. Admin. Code § 89.1192); and
11. Any and all other remedies Petitioner may be entitled to under the law.

area of pragmatic language¹¹.

11. The FIE recommended strategies to help Student achieve and maintain satisfactory progress in the area of language/communication, including one-on-one or small group pre teaching of vocabulary and concepts before introduction in a large group setting, checking often for understanding and attention. Student continued to be eligible as a student with a Speech Impairment¹².
12. The FIE also assessed Student's adaptive behavior functioning through observations, parent and teacher reports, and student interview communication, self-care, home living, social/interpersonal skills, use of community resources, recreation, functional academic skills, work, leisure, health, and safety. Student's overall adaptive behavior was considered within normal limits¹³.
13. The FIE documented one behavioral incident¹⁴, 2018. However, during the 2017-18 school year, Student had *** days with reported behavior, and *** behavior incidents a total of ***.¹⁵ The LSSP who prepared the FIE did not utilize all available resources to review Student's behavior data, specifically the Antecedent Behavior Consequence (ABC) data collection.¹⁶
14. Student's academic performance was evaluated through informal and/or formal testing. These measures included parent and teacher summary reports/report cards, District assessments such as the Measure of Academic Progress (MAP), and iStation Reading Program results. On MAP testing in spring 2018, Student received a score, placing Student in the *** percentile. iStation results from January 2018 ranked Student in the ***.¹⁷
15. The evaluator administered the Woodcock-Johnson IV Achievement Test (WJ), which measures academic achievement. Student performed below grade level expectations in ***. These results indicate Student would likely experience difficulties with large tasks in these areas. Student was on grade level in ***, in the average range. Student could express Student's ideas in ***.¹⁸
16. The May 2018 FIE confirmed Student's continuing eligibility as a student with an ED.

¹¹ Id., p. 45, 61; Transcript (Tr.) Vol. II, p. 210.

¹² JE 3, p.46.

¹³ JE 3, p. 50.

¹⁴ JE 3, p. 47.

¹⁵ JE 15, p.355; PE 7.

¹⁶ Tr. Vol. II, p. 150153.

¹⁷ JE 3, p. 523.

¹⁸ Id., p. 5055.

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22. Student's schedule of services called for ELAR *** minutes per week and *** classroom for *** minutes per week. Student also received *** weekly of social skills group services in the resource classroom. Student's placement was the general education classroom with supports for *** weekly. The IEP also called for speech therapy for a minimum of *** minutes per week per *** grading period in the ***.²⁸
23. The ARD Committee updated Student's BIP to target ***. The BIP listed behavior management techniques to avoid ***,²⁹ The BIP listed a number of prosocial strategies to implement, such as ***. The BIP included suggestions for adapting the classroom environment, including ***.³⁰

The 2018-19 School Year

24. During the 2018-19 school year, Student's *** grade year Student's general education classroom was a "*** classroom," which means the classroom had few ***.³¹ Student's parents noted an escalation of behaviors, and grew concerned the classroom was not structured enough. The parents also contacted the District on December **, 2018 about failing to provide *** in the classroom, as required by Student's IEP. Student's teacher provided *** ***, ***.³² Student responded well to *** when Student became frustrated.³³
25. On ***, 2018, Student allegedly ***.³⁴ Student's IEP was amended on December ***, 2018 to add another behavioral goal to address ***.³⁵
26. Student's IEP was amended again on December ***, 2018 to add new goals for Speech Therapy because Student mastered all goals.³⁶ A Speech and Language Pathologist (SLP) who has worked with student since *** identified some issues with pragmatic speech and the District modified Student's IEP to include ***.³⁷
27. On March ***, 2019, the District responded to a report from Student's parents about ***. The District did not address the complaint as a disciplinary matter or investigate because the allegation occurred off school property, but offered to ***³⁸, which was acceptable to

²⁸ Id., p. 150.

²⁹ Id., p. 158-159.

³⁰ Id., p. 160.

³¹ PE 13; Tr. Vol. II, p. 172-173.

³² PE 10; JE 8, p. 160; Tr. Vol. II, p. 181-82, 311; Vol. V, p. 442-44.

³³ JE 12, p. 262.

³⁴ PE 6, p. 103.

³⁵ JE 9, p. 173; PE 11, p. 312-313.

³⁶ JE 10, p. 176-178; JE 25, p. 428-29.

³⁷ PE 5, p. 61; Tr. Vol. II, p. 224.

42. The ARD Committee also conducted a Review of Existing Evaluation Data (REED) to determine an appropriate evaluation plan following incident. Information was obtained from Student's parent, teachers, related service providers, current evaluations, and classroom observations. The ARD Committee recommended a FBA and Psychological Services Evaluation (PSE).⁵⁷
43. Student's parent reported to the ARD Committee Student was ***. The District began an investigation the same day by interviewing Student. The investigation was completed on October ***, 2019, and the District found no evidence Student was ***. The District took measures to ***.⁵⁸
44. Student attended school at the DAEP from September ***, 2019 to November ***, 2019, and continued receiving resource supports and speech services. Student had one behavioral referral while in the DAEP on ***, 2019 for ***.⁵⁹
45. The District contacted Student's parent October ***, 2019 to offer a tour of the ***, self-contained behavioral placement Student could attend if the ARD Committee recommended change to Student's placement after completion of the FBA and PSE.⁶⁰
46. Student's parent's response to the District's offer to tour the *** was to inquire about ***.⁶¹
47. On November ***, 2019, with parental consent, the District completed the PSE recommended after *** incident and concerns about Student's lack of behavioral progress since Student's annual ARD Committee meeting in March 2019.⁶² The PSE included parent and teacher information, and information from an interview with Student. The evaluation concluded Student would benefit from direct psychological services support progress on Student's IEP goals. The ARD Committee also proposed placement in the *** program, with *** minute sessions of psychological services with the possibility of additional time if significant concerns were still present after the *** direct sessions.⁶³
48. Student's *** as observed during the PSE attributable to Student's primary disability of ED. The LSSP who did the PSE observed ***, and patterns of behaviors in a student with an ED and Autism have significant overlap. However, the LSSP did not suspect Autism because Student was already identified as a student with ED.⁶⁴

⁵⁷ Id., p. 325-326.

⁵⁸ RE 15; Tr. Vol. IV, p. 499500.

⁵⁹ JE 14, p.319; JE 70, p. 1089.

⁶⁰ JE 79, p.1184.

⁶¹ Id., p. 1189.

⁶² JE 43, p. 582; JE 5, p. 80.

⁶³ JE 6, p. 82; JE 12, p. 220.

⁶⁴ Tr. Vol. II, p. 27677.

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 the parent 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).

The one year statute of limitations rule will not apply in Texas if the parent was prevented from requesting a due process hearing due to either

1. Specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or
 2. The school district withheld information from the parent that it was required to provide
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C. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael*, 570 F. 3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the IEP and placement. *Schaffe v. Weast*, 546 U.S. 49, 62 (2005); *League Ind. Sch. Dist. v. Todd*, 999 F.2d 127, 131 (5th 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. Free, Appropriate Public Education

The Four Factors Test

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets the IDEA requirements, to include whether:

- x The program is individualized on the basis of assessment and performance;
- 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, 118 F. 3d 245, 253 (5th Cir. 1997).

These factors are indicators of an appropriate program, guiding the 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*, 780 F. 3d 286, 294 (5th Cir. 2009). See also *Klein Indep. Sch. Dist. v. Per Hove*, 690 F. 3d 390, 397 (5th Cir. 2012).

1. Individualized on the Basis of Assessment and Performance

calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 at 999 (2017).

Student's BIP was modified multiple times to address Student's needs in response to increasing behaviors. While some of the targeted behaviors in the BIP remained the same, others changed, such as ***, and Student mastered this goal during the 2017-18 school year, and it was not included going forward.

The ARD Committee also considered Student's behavior at school, and did not impede Student's learning or that of others, and otherwise addressed Student's behavioral needs. The evidence supports the conclusion Student exhibited no need for a BIP or other behavioral supports. 34 C.F.R. § 300.324(b)(5), P., 582 F.3d at 583.

Petitioner argues that the School District failed to timely update Student's BIP despite ongoing and increasing behaviors. The evidence shows that on September ***, 2019, Student The *** recommended holding an ARD Committee meeting to consider revising Student's services and support ***. The ARD Committee conducted a REED on September ***, 2019 during the MDR. The sources of information consisted of parental input in March 2019

year. Student's goals were later modified to reflect progress in OT. The School District appropriately considered the outside OT evaluation data and created measurable goals designed for Student to make progress. 34 C.F.R. § 300.502(c).

ESY services must be provided only if a student's IEP team determines, on an individual basis, that the services are necessary. 34 C.F.R. §300.103; 19 Tex. Admin. Code §89.1065. The need for ESY services must be documented and determine that a student has exhibited a severe or substantial regression that cannot be recouped in a reasonable period of time. 19 Tex. Admin. Code §89.1065(2). Petitioner complains Student was denied ESY services. Student made academic progress during the 2019-20 school year, ESY was not necessary for Student to access Student's educational program or achieve academically. 34 C.F.R. §300.103; 19 Tex. Admin. Code §89.1065

2. Least Restrictive Environment

The evidence showed Student was educated in the least restrictive environment. 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. 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 290, (5th Cir. 2009).

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 bears the burden of showing why the educational setting is not appropriate. Christopher M., 933 F.2d at 1291.

1049; 34 C.F.R. § 300.114.

3. Services Provided in a Coordinated and Collaborative Manner by Key Stakeholders

Third, the evidence showed Student's services were provided in a coordinated and collaborative manner by key stakeholders.

The District met its obligation to convene an annual ARD Committee meeting from August 2015 to September 2019. These meetings were attended by the requisite members including Student's Special Education teacher, a General Education teacher, a behavior coach, a speech therapist, an occupational therapist, and at least one of Student's parent. 34 C.F.R. § 300.321(a)(1)-(7).

Student's parent or parents attended all ARD Committee meetings in person, save for the November^{***}, 2019 ARD Committee meeting when they cancelled the meeting. They were routinely invited to share parental concerns, participated in the discussions, and asked questions of District personnel.

In December 2018, Student's parent first raised concerns regarding Student's classroom as written in Student's IEP. Staff explained Student was allowed^{**}. Student's parent requested the^{**}, and this was provided.

Petitioner argues the District predetermined a placement change before new evaluations were completed. However, the District began to consider a more restrictive placement only following ^{***} incident. This significant behavioral event spurred appropriate discussion about whether Student's placement met Student's needs, and the parents were invited to tour^{**}. Student's parent responded via email to inquire about^{**} and did not specifically object to the potential placement. The weight of the credible evidence supports the conclusion that Student's parents were able to access and participate in the IEP development process. 34 C.F.R. § 300.324(a)(1)(i-iv)

4. Academic and Non-Academic Benefits

Fourth, the evidence supports the conclusion Student's program was reasonably calculated to provide meaningful educational benefits. *Rowley*, 458 U.S. at 206-207. The evidence also showed Student's program was appropriately ambitious in light of Student's unique circumstances. *Endrew F.*, 137 S. Ct. at 992.

The IDEA does not require an IEP to guarantee a certain level of accomplishment, instead be reasonably calculated to meet the student's educational needs in light of his or her unique circumstances. A school district is not required to provide a student the best possible education, and improvement in every academic and non-academic area is not required to show benefit. The issue is thus not whether a school district could have done more, but whether the student received an educational benefit. *P.*, 582 F. 2d at 590. Importantly, whether a student demonstrates positive academic and non-academic benefits is 'one of the most critical factors in this analysis.' *See J. v. Houston Indep. Sch. Dist.*, 913 F.3d 523, 529 (5th Cir. 2019).

Academic benefit is not always the proper measure of progress, particularly for a student, like Student, with a cognitive impairment and other complex needs. Academic benefit, however, can be shown by progress on IEP goals and objectives. Student's goals and objectives reflect that Student's IEP was reasonably calculated to meet Student's needs in light of Student's unique circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. at 992. Student received academic benefits from Student's educational program. *See, Houston Indep. Sch. Dist. v. Bobby R.*, 328 F.3d 804 (5th Cir. 2003).

The evidence showed the IEP implemented during the 2019-2020 school year until the beginning of March 2020 provided meaningful academic benefits. Although Student exhibited increased behaviors during this period, specifically during the fall of 2019, Student responded fairly well to the IEP implemented when Student becomes frustrated. While at the DAEP, Student had one behavioral incident where Student was frustrated, but no further incidents of frustration occurred. Progress reports reflect Student had mastered all of Student's speech therapy goals, all of Student's reading goals, and most of Student's math goals while making progress on the remaining goals in March

of 2020. Student did not master Student's behavioral goals, but made meaningful progress, even without a more restrictive placement, new BIP, and psychological services that the School District sought to propose at the ARD meeting in November 2019.

Student received non-academic benefits as well. Student mastered Student's speech therapy and OT goals. Student made so much progress in speech therapy, the frequency in service was reduced during the 2019-20 school year. While at the DAEP Student had one behavioral referral, Student did not have any more significant behavior incidents during the 2019-20 school year.

Student was first evaluated and identified with a primary disability of ED in June 2015, and continued to meet ED eligibility criteria following the May 2018 FIE. The District attributed the Student's weaknesses in the area of receptive language, eye gaze, and social interactions to ED, and Petitioner failed to present sufficient evidence Student has Autism, and the District's programs accounted for these identified needs. Petitioner thus did not meet Petitioner's burden of proving the District should have suspected it, or needed to evaluate in this area.

Because the District did not fail to identify Student as a student with Autism, the hearing officer will not address whether the District denied Student a FAPE by failing to consider and implement the strategies required in Tex. Admin. Code § 89.1055(e).

Petitioner next alleges the District failed to identify Student as a student with an SLD in reading and math. 34 C.F.R. § 300.8(c)(10)(i). The IDEA regulations define "SLD" as a disorder

needs of their child, providing information about child development, and help parents acquire social skills to support implementation of the student's IEP); psychological services, therapeutic recreation services, school health services, social work services, and transportation. 34 C.F.R. § 300.34.

The District has provided speech therapy as a related service to Student at every annual ARD Committee meeting since 2015. Additionally, the ARD Committee considered Student's outside OT evaluation and recommended OT as a related service to support Student's Language Arts and Behavior. The record also reflects that direct psychological services were proposed by the District to assist Student in progressing on Student's IEP goals. Petitioner therefore did not meet Petitioner's burden on this claim.

G. Bullying as a Denial of FAPE

Bullying is the unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior must be repeated, or have the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking tGivev

SIGNED July 24, 2020.

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VIII. NOTICE TO 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 state court of competent jurisdiction or in a district court of the United States~~20~~. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code Sec. 89.1185(n).