

**DOCKET NO. 001-SE-0916**

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

**FINAL DECISION**

Petitioner, \*\*\* (Student) b/n/f \*\*\* (Father) and \*\*\* (Mother) (collectively, Petitioner), filed a request for an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), with notice of the complaint being served by the Texas Education Agency (Agency) on September 1, 2016. The Respondent to the complaint is North East Independent School District (District). Petitioner alleges the District deprived Student of a Free Appropriate Public Education (FAPE) by: (1) failing to draft and implement an appropriate Individualized Educational Program (IEP) for Student that is effective in meeting Student’s behavioral needs; (2) failing to draft IEP goals that appropriately addressed Student’s educational needs; (3) failing to draft a revised Behavioral Intervention Plan (BIP) that appropriately addressed Student’s increased \*\*\* at home; and (4) failing to address Student’s individualized needs and ensure that Student’s learning was not impeded by Student’s referenced behaviors.

After review of the evidence and the closing arguments of the Parties, the Hearing Officer determined that Petitioner did not meet their burden of proof on any of the contested hearing issues and denied the requested relief.

**I. PROCEDURAL HISTORY**

Petitioner filed the complaint with the Agency on September 1, 2016. The case was originally assigned to Hearing Officer Sharon Cloninger on that same day. On January 23, 2017,

the Agency reassigned Hearing Officer Craig Bennett to preside over the case and the undersigned Hearing Officer was assigned the case on April 28, 2017.

The District timely filed its Response to the Complaint on September 7, 2016. The Response contained a Partial Motion to Dismiss all non-IDEA claims.

On September 23, 2016, the parties filed a Joint Motion for Continuance and Extension of the Decision Due Date. The Hearing Officer deferred ruling on the motion until after the prehearing conference.

The prehearing conference was conducted on September 28, 2017, at which time the Parties informed the Hearing Officer on the record they elected to pursue mediation in lieu of conducting a resolution session. 34 C.F.R. § 300.510(a)(3)(ii). The Hearing Officer granted the District's pending Partial Motion to Dismiss all non-IDEA claims during the prehearing conference.<sup>1</sup> Furthermore, after finding good cause during the prehearing conference, the Hearing Officer granted the September 23, 2017, Joint Motion for a First Continuance and Extension of the Decision Due Date and reset the hearing to December 14-15, 2016, and extended the Decision Due Date to January 27, 2017.

During the prehearing conference the Hearing Officer determined, without objection from either Party, the accrual date of the complaint for purposes of the Statute of Limitations was September 1, 2015. 19 Tex. Admin. Code § 89.1151(c).

On October 25, 2016, the District filed a Motion to Compel the Production of Documents. Petitioner missed its motion response deadline and after finding good cause, the motion was granted on October 31, 2017.<sup>2</sup>

---

<sup>1</sup> Order No. 2 at 2.

<sup>2</sup> Order No. 3.

On November 18, 2016, the Parties filed a Joint Motion for a Second Continuance and another Extension of the Decision Due Date. The continuance was needed based on the availability of the mediator and to afford the Parties the opportunity to mediate. 34 C.F.R. § 300.506(a); 19 Tex. Admin. Code § 89.1193(a) (“Mediation is available ... at any time.”). Good cause was apparent and the motion was granted on November 18, 2016, and the hearing was reset to January 23-24, 2017. The Decision Due Date was extended to March 8, 2017.

On January 6, 2017, the Parties filed a Joint Motion for a Third Continuance and Extension of the Decision Due Date. The Parties stated they required additional time to prepare for hearing. Again, after finding good cause the motion was granted on January 10, 2017, and the hearing was reset to February 20-21, 2017, but the Decision Due Date was not extended.<sup>3</sup>

On February 17, 2017, a Fourth Continuance was granted in Order No. 8 extending the hearing dates from February 20-21, 2017 to May 2-4, 2017, and extended the Decision Due Date to June 2, 2017.

The District filed a Motion to Exclude Witnesses and Documents on April 24, 2017. Both parties participated in a telephone conference regarding the matter on April 28, 2017. The District urged that Petitioner failed to timely disclose two expert witnesses and to timely produce several documents before the Disclosure Deadline. After finding the motion had merit and admonishing Petitioner for procedural noncompliance, the Hearing Officer presented the District several options as a remedy: (1) a continuance of the hearing; (2) additional time during the hearing; or (3) calling the particular witnesses on sur rebuttal within two weeks of the hearing.<sup>4</sup> The District ultimately decided to proceed to hearing as scheduled and chose not to elect one of the offered remedies.

The hearing convened on May 2, 2017, at the District’s Administrative Headquarters located at 8961 Tesoro Drive, San Antonio, Texas. Petitioner was represented by Attorneys Karen

---

<sup>3</sup> Order No. 6.

<sup>4</sup> Order No. 9 at 2.

D. Seal and Courtenay Euton. The District was represented by Attorneys Ricardo R. Lopez and Christopher H. Schultz of Shulman, Lopez, Hoffer, and Adelstein, LLP.

At the conclusion of the hearing, the District moved for an extension of the post-hearing briefing deadline and the decision due date to afford the Parties time to write their closing briefs with the benefit of having the completed transcript and to afford the Hearing Officer time to write the final decision while considering the Parties' briefs. Petitioner concurred and did not oppose the motion. After considering the factors set out in 19 Tex. Admin. Code § 89.1186(b)(1)-(4), the Hearing Officer found that the District stated good cause and the motion was granted on the record during the hearing. Specifically, the District requested a 49 day extension of the Decision Due Date from June, 2, 2017 until July 21, 2017. The Hearing Officer found in Order No. 10, issued on May 4, 2017: (1) the extension of time will not adversely affect Student's educational interests because Student will be in summer recess even if the extension of time were denied; (2) the Parties need the additional time due to the time necessary to transcribe the proceeding and make the transcript available to the Parties for briefing; (3) the delay will not cause a financial burden or cause some other detrimental consequence on either Party; and (4) the prior continuances were for good cause and were not excessive.

## **II. ISSUES, PROPOSED RELIEF, AND BURDEN OF PROOF**

### **A. Issues**

In the complaint, Petitioner alleges the District denied Student a FAPE and raised the issues below, which were noted in Order No. 2:

1. Did the District fail to draft and implement an appropriate Individualized Educational Program (IEP) for Student that is effective for Student's behavioral needs?
2. Did the District fail to draft a revised Behavioral Intervention Plan (BIP) that appropriately addressed Student's increased \*\*\* at home?

3. Did the District fail to draft IEP goals that appropriately addressed Student's educational needs?
4. Did the District fail to address Student's individualized needs and ensure that Student's learning was not impeded by Student's behavior?

**B. Proposed Remedies**

Petitioner requested that the Hearing Officer order the following relief:

1. Order the District to place Student in \*\*\* (\*\*\*) for the 2017-2018 school year and reimburse for private tuition and transportation costs accrued during the 2016-2017 school year.
2. Order the District to provide Student with a small student-to-teacher ratio (1:5).
3. Order the District to develop appropriate IEP goals and objectives.
4. Order the District to provide behavioral training to Parents.
5. Order the District to provide Student with social skills.
6. Order the District to provide a structured environment for Student with minimal transitions, noise, and distractions.
7. Order the District to develop an appropriate IEP that addresses all of Student's behavioral and academic needs.
8. Order such other and further relief as the hearing officer may deem just and proper.

**C. Burden of Proof**

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all

times.<sup>5</sup> Petitioner must, therefore, establish that the alleged violations resulted in a denial of FAPE or other substantive violation of the IDEA.

### III. FINDINGS OF FACT

1. North East ISD is the resident school district for Student.
2. Student is \*\*\*-years-old who is currently in the \*\*\* grade and attended the District during the 2015-2016 school year for part of the \*\*\* grade.
3. Student qualified for special education as a student with an Emotional Disturbance (ED) and Other Health Impairment (OHI) due to ADHD.<sup>6</sup>
4. Student attended District schools from \*\*\* through part of the \*\*\* grade. Student attended \*\*\* at \*\*\*, \*\*\* at \*\*\* for \*\*\* through \*\*\* grades, and attended \*\*\* (\*\*\*) for \*\*\* and part of \*\*\* grade.<sup>7</sup> Student began attending \*\*\* on August \*\*\*, 2015, and withdrew from the District on or about \*\*\* \*\*\*, 2016.<sup>8</sup>
5. Parents are both \*\*\*. \*\*\*. \*\*\*. Student experienced significant developmental delays since early childhood: \*\*\*.<sup>9</sup>
6. On May \*\*\*, 2015, Student's ARDC met for the annual review of the IEP.<sup>10</sup>
7. \*\*\*.<sup>11</sup>
8. On August \*\*\*, 2015, the ARDC met to review and discuss transportation needs.<sup>12</sup>

---

<sup>5</sup> *Schaffer ex rel. v. West*, 546 U.S. 49, 126 S. Ct. 528, 537, 163 L.Ed.2d 387 (2005), see also *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. V. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

<sup>6</sup> PE-S4 at 0411.

<sup>7</sup> RE-4 at 000073; Tr. at 43.

<sup>8</sup> RE-7 at 000138.

<sup>9</sup> RE-4 at 000072.

<sup>10</sup> PE-S4 at 0411.

<sup>11</sup> PE-10 at 000001.

<sup>12</sup> RE-1 at 000001.

9. The ARDC met again on September \*\*\*, 2015 to consider a Review of Existing Evaluation Data (REED).<sup>13</sup> At that meeting the ARDC agreed to conduct formal assessments for Speech and Language and a psychological evaluation to assess for an Autism Spectrum Disorder (ASD).
10. \*\*\*.<sup>14</sup>
11. On December \*\*\*, 2015, the ARDC met to review the results of Student's reevaluation.<sup>15</sup>
12. \*\*\*.<sup>16</sup>
13. \*\*\*.
14. Parents withdrew Student from the District on \*\*\* \*\*\*, 2016.<sup>17</sup>
15. Student applied and was accepted to \*\*\* (\*\*\*) on or about June \*\*\*, 2016.
16. Student was unilaterally privately placed by Parents at \*\*\*. Student has attended \*\*\* since on or about September \*\*\*, 2016.<sup>18</sup>
17. Parents did not give 10 day written notice prior to the unilateral private placement. At no time did Parents request the District pay for a private placement because the proposed IEP was not appropriate nor did Parents ever express any disagreement with the results of the ARDC.<sup>19</sup>
18. While attending \*\*\* Student experienced numerous \*\*\* at school resulting in frequent disciplinary referrals and \*\*\* in-school suspensions and \*\*\* out of school suspensions.<sup>20</sup> These episodes often included \*\*\*.
19. While attending \*\*\*, Student's in-school behavior dramatically improved. Student only had \*\*\* disciplinary referrals during the 2015-2016 school year, \*\*\*.<sup>21</sup>

---

<sup>13</sup> RE-2 at 00005.

<sup>14</sup> RE-10 at 000151.

<sup>15</sup> RE-3 at 000036.

<sup>16</sup> RE-12 at 000788.

<sup>17</sup> RE-7 at 000138.

<sup>18</sup> PE-B at 0010.

<sup>19</sup> Tr. at 78.

<sup>20</sup> RE-11 at 713, 716 (“[Student] has struggled with \*\*\*.”).

<sup>21</sup> REs-9; 10.

20. During the 2015-2016 school year Parents became concerned with Student's increased \*\*\* at home. During this school year Student's in-school behavior dramatically improved but Student's \*\*\* at home escalated.<sup>22</sup> During October and November 2015 the \*\*\* of Student's \*\*\* at home escalated even further. Parents reported \*\*\* this time period. The \*\*\* at home typically included \*\*\*. \*\*\*.<sup>23</sup>
21. \*\*\*. \*\*\*.<sup>24</sup>
22. While \*\*\* in November 2015, Student was diagnosed with Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), \*\*\* (\*\*\*), and \*\*\* (\*\*\*).<sup>25</sup>
23. Student's most recent three year reevaluation is dated December \*\*\*, 2015, and a new IEP was devised on the same date.<sup>26</sup>
24. Student's most recent Functional Behavior Assessment (FBA) was completed on November \*\*\*, 2015, and was incorporated into the Behavior Intervention Plan (BIP) contained in the December \*\*\*, 2015, IEP. The BIP targeted one behavior, the incapacity to understand or follow school rules.<sup>27</sup>
25. Student's December \*\*\*, 2015 IEP lists behavior as a "strength:"
- [Student] is able to follow the District code of conduct. [Student] this entire school year of 2015-2016 has had appropriate interactions with [Student's] peers. [Student] respected adult authority when given a directive to remain on task or not to interrupt others with no more than one reminder. [Student] is able to responsibly take care of [Student's] school work and daily responsibility log.<sup>28</sup>
26. Based upon the November 2015 \*\*\* diagnoses of ASD, \*\*\* and Student's \*\*\* at home, Parents requested that Student be assessed for ASD during the December 2015 three year reevaluation.<sup>29</sup>
27. The District's Licensed Specialist in School Psychology (LSSP) conducted the District's autism evaluation. A variety of testing instruments were used to conduct

---

<sup>22</sup> Tr. at 52-53.

<sup>23</sup> RE-11 at 713-14.

<sup>24</sup> RE-11 at 715.

<sup>25</sup> PE-E at 1.

<sup>26</sup> REs-3; 4.

<sup>27</sup> RE-3 at 61.

<sup>28</sup> RE-3 at 38.

<sup>29</sup> PE-R at 319-35.



the evaluation: the Piers-Harris 2 (measuring behavioral adjustment, freedom from anxiety and popularity); the BASC-2 survey completed by Student, teachers, and parents; the Gilliam Autism Rating Scale, Third Edition (GARS-3); the Childhood Autism Rating Scale, 2<sup>nd</sup> Edition (Standard Version) (CARS-2); and the CARS-2 (High Functioning Version), and the Autism Spectrum Disorder Evaluation Scale (ASDES).<sup>30</sup>

28. After completing her evaluation, the LSSP determined Student did not qualify for special education services as a student with ASD as defined by the federal regulation.<sup>31</sup> The LSSP's assessment attributed Student's emotional issues to "an emotional disturbance rather than ASD."<sup>32</sup>
29. Student withdrew from the District (\*\*\*) on \*\*\* \*\*\*, 2016.<sup>33</sup> Student has been privately placed at \*\*\* since August 2016.<sup>34</sup>
30. The December 2015 Reevaluation and IEP/BIP were effective in meeting Student's behavioral needs at school. Student made significant behavioral progress while attending \*\*\*. Despite behavioral progress at school Student continued to be \*\*\* at home.
31. Students teachers found Student was behaviorally compliant and did not present any behavioral concerns at school.<sup>35</sup> Teacher comments include, "\*\*\*\*."<sup>36</sup>
32. Student was well liked, cooperative, compliant, easy to redirect back onto task, and presented no significant behavior problems at school for all school staff.<sup>37</sup>
33. However, at home, Student, \*\*\*."<sup>38</sup>
34. \*\*\*. \*\*\*.

---

<sup>30</sup> RE-4 at 000073-83.

<sup>31</sup> PE-R at 333.

<sup>32</sup> *Id.*

<sup>33</sup> RE-7 at 138.

<sup>34</sup> PE-B.

<sup>35</sup> RE-4 at 95.

<sup>36</sup> RE-4 at 97.

<sup>37</sup> Tr. at 250 ("Like I said, you know, [Student] did not at any point exhibit those behaviors on campus."); 448 ("[Student] was in my \*\*\* grade \*\*\* class and [Student] was absolutely precious."); 449 ("I never really had to even redirect [Student] to get back on task."); 460 ("Great kid. Loved [Student]. Miss [Student]. Tell [Student] I said hi please. [Student]'s a good kid."); and 489 ("[Student] was just like any other kid. [Student] always talked about [Student's] interests like with students when they were working with partners; did [Student's] work; [Student] did everything [Student] was supposed to do.").

<sup>38</sup> RE-4 at 74-75.

35. At school Student reported \*\*\* but maintained grades, and was able to maintain expectations from teachers. Mother reported increased \*\*\*.<sup>39</sup>
36. Student's December 2015 IEP states: "Behavior – Student does display behavior that impedes child's own learning or that of others."<sup>40</sup>
37. The December 2015 IEP contained one annual behavior goal, staying on task with no more than two reminders with success being measured daily \*\*\* with an accuracy rate of 90%.<sup>41</sup> No other behavior concerns were addressed.
38. The Admission, Review, and Dismissal Committee (ARDC) that met and reviewed the December \*\*\*, 2015 IEP discussed and rejected, without explanation, extending ESY services to Student.<sup>42</sup>

**Issue I: Did the District fail to draft and implement an appropriate Individualized Educational Program (IEP) for Student that is effective for Student's behavioral needs?**

39. The LSSP who performed the ASD evaluation has approximately eleven years of clinical psychological experience outside of the school setting and approximately twenty two years' experience as a LSSP.<sup>43</sup>
40. The Diagnostic & Statistical Manual, V (DSM-V) clinical criteria for diagnosing an ASD are different than the criteria set out in the IDEA. Clinically, under the DSM-V diagnostic criteria, social difficulties are the biggest clue and/or insight into whether a child has an ASD. Student's social difficulties included \*\*\* (improving), the \*\*\* (improving), \*\*\*, \*\*\* (\*\*\*), and \*\*\* (\*\*\*)<sup>44</sup>
41. Student's treating child psychiatrist strongly disagreed with the District's finding that Student does not engage in \*\*\* behaviors.<sup>45</sup> Student's \*\*\* and Student's \*\*\* meet the clinical diagnostic criteria for an ASD. The child psychiatrist also disagreed with the District's finding that Student does not experience "\*\*\*."<sup>46</sup> \*\*\* "\*\*\*."

---

<sup>39</sup> RE-10 at 188.

<sup>40</sup> RE-3 at 40.

<sup>41</sup> RE-3 at 42.

<sup>42</sup> RE-3 at 57.

<sup>43</sup> RE-14 (\*\*\*) CV).

<sup>44</sup> Tr. at 131-34.

<sup>45</sup> PE-R at 323.

<sup>46</sup> *Id.*

- 42. On January \*\*\*, 2016, Student underwent a neurophysiological evaluation performed by a board certified adult and child neurologist. The findings of the neurophysiological evaluation validated Student’s existing ADHD diagnosis and led to an additional diagnosis of \*\*\*. \*\*\*. Furthermore, \*\*\*. Student’s “emotional and behavioral difficulties are partially due to [Student’s] neurophysiological problem.”<sup>47</sup>
- 43. The Gilliam Autism Rating Scale – Third Edition (GARS-3) surveys provided to Parents and teachers in preparation for the District’s ASD assessment are noteworthy due to the dramatically different perspectives shared by Parents and teachers concerning Student’s behavior:

Gilliam Autism Rating Scale – Third Edition (GARS-3)		
Subscales	Parent Scale	Teacher Scale
***	***	***
***	***	***
***	***	***
***	***	***
***	***	***
***	***	***
AUTISM INDEX	***	***
PROBAILITY OF ASD	Very Likely	Probable

**Issue II: Did the District fail to draft a revised Behavioral Intervention Plan (BIP) that appropriately addressed Student’s increased \*\*\* at home?**

- 44. Student’s behavior was assessed during the December \*\*\*, 2015, reevaluation and the IEP created that same month contained a BIP identifying one targeted behavior – staying on task, but did not address \*\*\* at home.
- 45. The BIP included a set of replacement behaviors, behavior management techniques, and situations to avoid and the function of the targeted behavior.<sup>48</sup>
- 46. Student’s December 2015 FBA and BIP were developed using a variety of technically sound assessment tools including information provided by Parents.
- 47. Student’s in school behavior was very good. With the exception of a single minor \*\*\*, Student did not display \*\*\* behavior at school during the entire 2015-2016 school year. Student’s \*\*\* teacher described Student as “... a delight. Always had a smile, would talk to friends, and did not need redirection to stay on task.”<sup>49</sup> Student’s \*\*\* Teacher described

<sup>47</sup> PE-H at 99-100; 105-06.

<sup>48</sup> RE-3 at 000061-62.

<sup>49</sup> Tr. at 448.

Student as “Great behavior – typical \*\*\*; very easy to redirect if off task. Had good peer interactions.”<sup>50</sup> The \*\*\* Teacher described Student as “...a great kid. Observed positive peer interactions.”<sup>51</sup> Student’s \*\*\* Teacher described Student as a “Really good student. Compliant. Always had a partner; worked well with others. No negative interactions. Not withdrawn and easy to redirect.”<sup>52</sup>

48. The BIP incorporated the use of positive behavioral interventions and supports that addressed Student’s behaviors that were impeding Student’s learning or that of other students.

**Issue III: Did the District fail to draft IEP goals that appropriately addressed Student’s educational needs:**

49. According to the December 2015 IEP (Schedule of Services), for the 2015-2016 school year, Student took the following subjects plus was graded on behavior: \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\*. The IEP contains annual goals only for \*\*\* and \*\*\*.
50. In Spring 2015 Student scored a “satisfactory” for \*\*\* and an “unsatisfactory” for \*\*\* on the STARR Assessment.<sup>53</sup>
51. Student demonstrated significant academic progress under the December 2016 IEP. During the 2015-2016 school year Student consistently (with only two exceptions) displayed cooperative, respectful, and appropriate behavior in school.
52. Despite struggling with the STARR \*\*\* Assessment, when Student withdrew from the District Student had passing grades in all subjects: \*\*\*.<sup>54</sup>
53. Student missed scoring a satisfactory on the STAAR \*\*\* assessment by one question.<sup>55</sup>
54. The December 2015 IEP did not include a statement of Student’s present levels of academic achievement, measurable annual goals, a description of how progress on annual goals was to be measured, for all subjects other than \*\*\* and \*\*\*.

**Issue IV: Did the District fail to address Student’s individualized needs and ensure that Student’s learning was not impeded by Student’s behavior?**

---

<sup>50</sup> Tr. at 460-61.

<sup>51</sup> Tr. at 482, 484.

<sup>52</sup> Tr. at 489.

<sup>53</sup> RE-3 at 39.

<sup>54</sup> *Id.*

<sup>55</sup> Tr. at 461.

55. Student's December 2015 Reevaluation and IEP/BIP were successful in addressing Student's single school behavior need – staying on task.

#### IV. APPLICABLE LAW AND DISCUSSION

##### A. Statutory Overview and FAPE

The placement recommended by the District is presumed to be appropriate and Petitioner bears the burden of proof at all times.<sup>56</sup>

The primary purpose of the IDEA is to ensure that children with disabilities receive a FAPE.<sup>57</sup> The Fifth Circuit has explained that a FAPE “need not be the best possible one, nor one that will maximize the child’s educational potential.”<sup>58</sup> Instead, the IDEA only guarantees a child with a disability an educational plan reasonably calculated to enable a child to make progress appropriate in light of the child’s unique circumstances.<sup>59</sup> The District is not required to implement the “best” program designed by an expert to remediate or maximize a child’s educational potential.<sup>60</sup>

The IDEA’s FAPE mandate requires schools to provide eligible students with special education and related services that, in part, “include an appropriate preschool, elementary school, or secondary school education.”<sup>61</sup> “Special education” is defined to mean *specially designed instruction*, provided at no cost to the parents, that is intended to meet the unique needs of a child

---

<sup>56</sup> See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); see also *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003).

<sup>57</sup> See *White*, 343 F.3d at 378.

<sup>58</sup> *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998) (hereinafter *Michael F.*); see also *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003).

<sup>59</sup> *Andrew F. v. Douglas County School District*, 136 S. Ct. 2405 (2016).

<sup>60</sup> See *Kings Local Sch. Dist Bd. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003) (stating expert’s program showed district how to maximize student’s potential but IDEA does not require it be implemented).

<sup>61</sup> 34 C.F.R. § 300.17(c).

with a disability.<sup>62</sup> “Specially designed instruction” means adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of the instruction:

- To address the unique needs of the child that result from the child’s disability; and
- To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.<sup>63</sup>

In evaluating the provision of FAPE, the Hearing Officer must determine whether the educational plan developed through the IDEA’s procedures was designed to facilitate Student’s educational progress appropriate in light of the child’s circumstances.<sup>64</sup> In determining whether the District has provided the requisite educational benefit in light of [Student’s] circumstances,” the Fifth Circuit utilizes a four part test: (1) is the program individualized on the basis of the student’s assessment and performance; (2) is the program administered in the least restrictive environment (LRE); (3) are the services provided in a coordinated and collaborative manner by the key “stakeholders;” and (4) are positive academic and non-academic benefits demonstrated.<sup>65</sup>

Applying the Fifth Circuit’s test, the Hearing Officer finds the District designed and implemented an educational program based upon Student’s unique circumstances that resulted in significant behavioral and academic progress for Student:

- (1) Student’s educational program during the relevant time period was individualized on the basis of the December 2015 reevaluation. Student displayed admirable behavior at school. Student’s \*\*\* disciplinary history compared to Student’s disciplinary history at \*\*\* clearly demonstrates Student made progress with Student’s in-school behavior. Student’s grades and the testimony of Student’s assistant principal and teachers strongly support the District’s contention that

---

<sup>62</sup> 34 C.F.R. § 300.39(a)(1).

<sup>63</sup> 34 C.F.R. § 300.39(b)(3).

<sup>64</sup> *Andrew F. v. Douglas County School District, supra.*

<sup>65</sup> *See Michael F.*, 118 F.3d at 247; *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).

Student's educational program facilitated Student's academic and behavioral progress. Student \*\*\* while attending \*\*\*.

- (2) Petitioner did not challenge placement in the LRE; therefore, the Hearing Officer finds that Student's placement at all relevant time periods was in the LRE.
- (3) All key stakeholders, including Parents, were actively engaged and involved in the development of Student's IEP.<sup>66</sup> An autism assessment was conducted at parental request. Furthermore, Father testified that Parents agreed with the December 2015 reevaluation and did not request an IEE, and did not request a private placement.<sup>67</sup> Extensive parental input for the December 2015 reevaluation was documented.<sup>68</sup>
- (4) Student demonstrated positive academic progress as demonstrated by Student's good grades and achieving \*\*\* status. Student made significant non-academic progress with Student's dramatic behavior improvements while in school. The testimony of the assistant principal and teachers showed Student made progress in social skills (*e.g.*, Student got along well with peers and staff, \*\*\*, and had friends that Student appropriately interacted with daily).

## B. Issues

### **Issue I: Did the District fail to draft and implement an appropriate Individualized Educational Program (IEP) for Student that is effective for Student's behavioral needs?**

The federal rule at 34 C.F.R. § 300.8(c)(1) defines autism as:

- (i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects the child's

---

<sup>66</sup> Tr. at 76.

<sup>67</sup> Tr. at 77-78.

<sup>68</sup> RE-4 at 72-75.

educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

- (ii) Autism does not apply if the child's educational performance is adversely affected primarily because the child has an emotional disturbance, ....
- (iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria ... of this section are satisfied.

The clinical criteria for diagnosing an ASD under the Diagnostic Statistical Manual-V (DSM-V) are different than the criteria used to identify a child for special education:

- A. Persistent deficits in \*\*\* and \*\*\* across multiple contexts;
- B. Restricted, repetitive patterns of behavior, interests, or activities;
- C. Symptoms must be present in the early development period;
- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning; and
- E. These disturbances are not better explained by intellectual disability or global development delay.<sup>69</sup>

The LSSP, who has eleven years of clinical experience, credibly testified that if she had been performing a clinical ASD assessment versus an assessment for special education, she would have diagnosed Student with an ASD.<sup>70</sup>

Student's treating child psychiatrist explained an autism clinical diagnosis is made without any assessment.<sup>71</sup> The law, however, requires an assessment before a student can be identified as

---

<sup>69</sup> RE-4 at 86. A mental health provider must find two of the five criteria to make an ASD diagnosis. Tr. at 140.

<sup>70</sup> Tr. at 318-19.

<sup>71</sup> Tr. at 167.



eligible for special education as a student with autism<sup>72</sup> While freely conceding that he never observed Student in the school setting, never reviewed any school work, or spoke to any of the educators involved with Student, and that he has no knowledge of the federal law establishing the criteria for identifying a special education student with ASD, Student's treating psychiatrist questioned the efficacy of Student's reevaluation.<sup>73</sup>

When questioned about Student's ED, Student's treating psychiatrist testified an "Emotional disturbance is not a clinical diagnosis; it is an IDEA label."<sup>74</sup> 34 C.F.R. § 300.8(c)(4).

For a child to meet the IDEA's definition of autism, the eligibility team must determine that the child has: (1) impairments in communication; (2) impairments in social interaction; (3) patterns of behavior, interests, or activities that are restricted, repetitive, or stereotypic; and (4) unusual responses to sensory experiences.<sup>75</sup>

The term "educational performance" is limited to school-based difficulties.<sup>76</sup>

---

<sup>72</sup> 34 C.F.R. § 300.8(a)(1), "Child with a disability means a child *evaluated* in accordance with §§300.304 through 300.311 as having ... a serious emotional disturbance ... autism ... , and who, by reason thereof, needs special education and related services" [emphasis added].

<sup>73</sup> Tr. at 148-49, 157, 163-64, 167,

<sup>74</sup> Tr. at 135.

<sup>75</sup> See *Tigard-Tualatin Sch. Dist.*, 66 IDELR 199 (SEA OR 2015) (where student did not demonstrate all four impairments, district correctly determined that student was not eligible under autism category).

<sup>76</sup> 34 C.F.R. § 300.310(a) (Observation – academic and behavior performance is observed in the child's learning environment); *Q.W. v. Board of Educ. of Fayette County, Ky.*, 630 Fed. Appx. 580, 66 IDELR 212 (6th Cir. 2015, unpublished), cert. denied, 136 S. Ct. 1729 (2016) (holding "This Court notes that, absent a statutory directive to the contrary, the term "educational performance" should be given its ordinary meaning. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). And taken at face value, the term "educational performance" suggests school-based evaluation. This interpretation finds support in the IDEA's emphasis on classroom curricula and observation. See 20 U.S.C. § 1414(c)(1). Thus, as the Hearing Officer [correctly] concluded, "[e]ducational performance does not include the student's performance outside the school setting.")).

Student's IEP contained a statement that Student's behavior impedes Student's learning or the learning of other Students.<sup>77</sup> Student's BIP identified staying on task as the single targeted behavior.<sup>78</sup> Student was easy to redirect to stay on task, lacked disciplinary referrals, and Student's good grades all demonstrate the IEP effectively addressed Student's behavioral needs in the school setting.

The consistent testimony of school personnel concerning Student's positive and appropriate \*\*\* and patterns of behavior buttress the District's conclusion that Student does not qualify for special education as a student with ASD under federal law.<sup>79</sup>

Student's academic and non-academic progress, especially the notable progress in behavior and social interaction, persuades the Hearing Officer that the District did not violate the IDEA by declining to identify Student as a student with an ASD.<sup>80</sup> It is the IEP team, not Student's physician, who makes the eligibility determination whether Student qualifies as a student with autism for special education and related services under the IDEA.<sup>81</sup> Applying the IDEA's ASD identification criteria, the District did not err by failing to identify Student as a student with an ASD. The preponderance of the evidence supports the District's negative ASD finding supported further by the neurophysiological evaluation diagnosing Student with a \*\*\* and ADHD.

**Issue II: Did the District fail to draft a revised Behavioral Intervention Plan (BIP) that appropriately addressed Student's increased \*\*\* at home?**

---

<sup>77</sup> RE-3 at 40.

<sup>78</sup> RE-3 at 61.

<sup>79</sup> Tr. at 17.

<sup>80</sup> See *D.A. and J.A. v. Meridian Joint Sch. Dist. No. 2*, 65 IDELR 286 (9th Cir. 2015, unpublished); See *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (finding when a student with a disability is participating in the general curriculum, good report card grades suggest that the student has made progress and such progress, in turn, strongly suggests that the student has received FAPE).

<sup>81</sup> *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010).

The December 2015 BIP appropriately addressed Student's one identified in-school behavior problem of staying on task. Student's \*\*\* outside of the school setting was known and documented by the ARDC but was not a targeted behavior in devising Student's IEP/BIP.

Student's December 2015 BIP was developed using a variety of technically sound assessment tools, and information provided by Parents.<sup>82</sup> The BIP adequately incorporated the use of positive behavioral interventions and supports that addressed Student's behaviors that were impeding Student's learning or that of other students.

Observation of Student during the December 2015 reevaluation was appropriately limited to observations in the school setting. The District was not required to devise behavioral interventions for Student at home when Student had not manifested any behavioral problems of consequence in the school setting.<sup>83</sup> The absence of in home behavioral interventions in the December 2015 IEP/BIP was not a violation of the IDEA and did not deny Student a FAPE.

**Issue III: Did the District fail to draft IEP goals that appropriately addressed Student's educational needs:**

The IDEA defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. § 300.320 through 34 C.F.R. § 300.324." 34 C.F.R. § 300.22. Among other requirements, an IEP must include a statement of the child's current educational performance, articulate measurable educational goals, and specify the nature of the special services that the district will provide. 34 C.F.R. § 300.22; and 34 C.F.R. § 300.320(a).

The IEP is a comprehensive statement of the educational needs of a child with a disability and the specially designed instruction and related services a district will employ to meet those

---

<sup>82</sup> 34 C.F.R. § 300.304(b).

<sup>83</sup> *Q.W. v. Board of Educ. of Fayette County, Ky.*, 66 IDELR 212 (6th Cir. 2015, unpublished), cert. denied, 136 S. Ct. 1729 (2016)

needs. *Burlington Sch. Comm. V. Massachusetts Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996 (1985).

The IEP must also describe the special education and related services that will be provided so that the child may advance appropriately toward attaining annual goals and, when possible, be involved in and make progress in the general education curriculum. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). See *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

An IEP must offer instruction “specially designed” to meet a child’s “unique needs” and be constructed after careful consideration of the child’s present levels of achievement, disability, and potential for growth. *Andrew F. v. Douglas County Sch. Dist. RE-1, supra*.

The failure of an IEP to address a child’s educational needs will likely result in a denial of FAPE. See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484 (2009); *Jefferson County Bd. of Educ. V. Lolita S.*, 581 Fed. Appx. 760 (11<sup>th</sup> Cir. 2014, *unpublished*) (a boilerplate IEP for a student with SLD and held him to the same academic standards as children without disabilities); *S.B. v. New York City Dep't of Educ.*, 65 IDELR 264 (S.D.N.Y. 2015) (Measurement methods for IEP goals were “more of an ‘anything goes’ laundry list” that lacked necessary specifics and individualization).

The IDEA recognizes that coming up with an IEP will be a “fact-intensive” exercise that will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP “must appreciate” that the question is whether the IEP is reasonable, not whether it is ideal. The IEP must be appropriately ambitious in light of the student’s circumstances. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F. v. Douglas County Sch. Dist. RE-1, supra*.

For the 2015-2016 school year Student took the following subjects, plus was graded on behavior: \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\*. The IEP contains annual goals only for \*\*\*

and \*\*\*.<sup>84</sup> Despite struggling with the STAAR \*\*\* Assessment, Student scored “satisfactory” for \*\*\* on the STAAR and at the time Student withdrew from the District Student was making good grades in all subjects (including \*\*\*); Student achieved \*\*\* status.<sup>85</sup>

In Spring 2015 Student scored a “satisfactory” for \*\*\* and an “unsatisfactory” for \*\*\* on the STARR Assessment.<sup>86</sup>

Student demonstrated significant academic progress that successfully addressed Student’s unique circumstances under the December 2015 IEP. During the 2015-2016 school year Student consistently (\*\*\*) displayed cooperative, respectful, and appropriate behavior in school.

The December 2015 IEP did appropriately address Student’s educational needs and permitted Student to make significant educational progress as demonstrated by Student’s actual academic and behavioral progress. Student did not demonstrate a need for an IEP in every core academic subject.

**Issue IV: Did the District fail to address Student’s individualized needs and ensure that Student’s learning was not impeded by Student’s behavior?**

Student’s severe behavior problems at home were undisputed. The issue was, however, whether the District adequately addressed Student’s behavior to ensure Student’s behavior was not impeding Student’s education. The Hearing Officer concludes the preponderance of the evidence shows the District addressed Student’s individualized behavioral needs. Student was reevaluated on schedule; Student had an IEP, FBA, and a BIP and Student consistently exhibited good behavior in school during the relevant time period.

---

<sup>84</sup> RE-3 at 52-53.

<sup>85</sup> RE-3 at 39.

<sup>86</sup> *Id.*

Student's BIP appropriately addressed the single behavioral need that impeded Student's learning at school: staying on task. There was little evidence to suggest Student exhibited other behaviors at school and instead the evidence showed otherwise; Student was well behaved at school and had very few disciplinary referrals.<sup>87</sup>

As stated, Student's BIP addressed the single targeted behavior of staying on task. Teacher testimony that Student was easily redirected back on task supports the conclusions that Student's behavior out of the school setting did not impede Student's learning and the BIP was effective as drafted and implemented. Those conclusions were further supported by the testimony of the vice principal who testified, "Student did not make behavior progress; Student was always a well behaved kid," the testimony of Student's teachers, and good grade reports, coupled with the almost complete lack of disciplinary referrals during the 2015-2016 school year (only \*\*\* disciplinary referrals), all indicate that Student's individualized needs to ensure behavior were adequately addressed.

In addition to the demonstrable academic benefits provided by the District (*e.g.*, achieving \*\*\* status), the IEP and behavior plan also provided social and non-academic benefit to Student. The evidence showed that Student had friends and that Student socialized with daily with peers. Administrators and teachers had affection for Student.<sup>88</sup> After comparing Student's disciplinary history while attending \*\*\* with Student's \*\*\* disciplinary history, there is no question that Student made behavioral progress while in \*\*\* under the IEP and BIP implemented during the 2015-2016 school year. Student's grades and academic performance show real educational progress and benefit.<sup>89</sup>

Student's individualized needs were adequately addressed to ensure that Student's learning was not impeded by Student's behavior.

---

<sup>87</sup> See *Cypress-Fairbanks Independent School Dist. v. Michael F. by Barry F.*, 118 F.3d 245, 254-55 (5th Cir. 1997) (describing the testimony of the assistant principal and his observations of behavioral progress).

<sup>88</sup> Tr. at 448, 460-61, 489.

<sup>89</sup> Compare RE-11 at 713 with RE-9, Notes 41-44, *supra*.

## V. CONCLUSIONS OF LAW

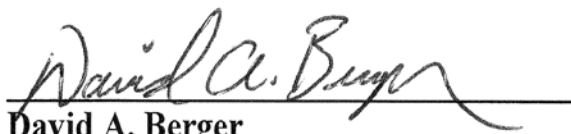
1. The District is a local education agency (LEA) responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Student, by next friends, Parents, (collectively, Petitioner) bears the burden of proof on all issues raised in Petitioner's complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The Texas one-year statute of limitation (SOL) began running one year before the date the Complaint was originally filed September 1, 2016. The accrual date for the complaint was September 1, 2015. 19 Texas Administrative Code § 89.1151(c).
4. Student did not meet the eligibility criteria for special education services as a student with autism under the IDEA. 34 C.F.R. § 300.8(c)(1).
5. The District devised and implemented an IEP reasonably calculated to enable Student to make progress and was appropriately ambitious in light of Student's circumstances. Student's IEP provided Student with the requisite educational benefit.. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988 (2017); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).
6. The District correctly identified Student as a student with an emotional disturbance (ED). 34 C.F.R. § 300.8(c)(4).
7. Petitioner did not meet their burden of proving there was an educational need for the BIP to address Student's behavior at home. *B.G v. School Bd. of Palm Beach County*, 255 Fed. Appx. 360 (11th Cir. 2007) (ruling on a summary judgement motion, "Because all of the plaintiffs' evidence relates to B.G.'s behavior at home, and none of it shows that Student was not making progress inside the classroom, the plaintiffs failed to raise a genuine issue of material fact.").
8. The District is only required to include annual goals for areas of the general curriculum for which Student requires special education programming or services. Student's unique circumstances require special education programming for \*\*\* and \*\*\* (as demonstrated by Student's performance on the STAAR Assessment and Student's reevaluation) and those needs were adequately addressed by the District. The lack of IEPs for Student's other subjects did not result in a denial of a FAPE. 34 C.F.R. § 320(a)(2)(i).

**VI. ORDER**

After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders as follows:

The Hearing Officer **DENIES** Petitioner's requested relief.

**SIGNED July 13, 2017.**

  
\_\_\_\_\_  
**David A. Berger**  
**Special Education Hearing Officer**  
**For the State of Texas**

**NOTICE TO THE PARTIES**

This Decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision 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.<sup>90</sup>

---

<sup>90</sup> 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).