

**DOCKET NO. 237-SE-0320**

**STUDENT, B/N/F PARENT,  
Petitioner**

v.

**KATY INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

Petitioner, Student, by next friend Parent (“Student” or, collectively, “Petitioner”) brings this action against Katy Independent School District (“Respondent” or “School District”) under the Individuals with Disabilities Act, 20 U.S.C. §§1400-1482 (IDEA) and its implementing state and federal laws and regulations.

The main issue in this case is whether the School District violated parent’s procedural rights and whether that constituted a denial of a Free Appropriate Public Education (FAPE). The Hearing Officer concludes Petitioner did not meet Petitioner’s burden of proof and is not entitled to any of the requested relief.

**II. PROCEDURAL HISTORY**

**A. Legal Representation**

Student was represented throughout this litigation by Student’s legal counsel, Martin Cirkiel with Cirkiel & Associates. The School District was represented throughout this litigation by its general counsel, Alaina Smith and Kevin Christiansen,

**B. Prior Legal proceedings**

This case was previously filed and dismissed without prejudice under TEA Docket Number 078-SE-1217. The dismissal was based upon a finding that the previous complaint was time barred by the statute of limitations. Petitioner subsequently sought judicial review of the Hearing Officer's decision dismissing the previous complaint. On March 20, 2020, this case was remanded to the Hearing Officer. *Washington ex rel. \*\*\* v. Katy Indep. Sch. Dist.*, Civil Action No. H-18-2752 (S.D. Tex. 2019). The Court ordered the Hearing Officer to make findings as to which of Petitioner's IDEA claims may proceed under the Texas statute of limitations.

**III. DUE PROCESS HEARING**

The due process hearing was conducted on August 24-25, 2020, via the Zoom video conference platform. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Martin Cirkiel. Holly Terrell and Dominique Augustus served as co-counsel. In addition, Student's parent (Parent) attended the due process hearing.

Respondent continued to be represented by its general counsel, Alaina Smith and Kevin Christiansen. In addition, \*\*\*, the Executive Director of Special Education for the School District, attended the hearing as the party representative. Both parties timely filed written closing briefs. The Decision in this case is due on October 23, 2020.

**IV. ISSUES****A. Petitioner's Issues**

Petitioner confirmed the following IDEA issues for decision in this case:

1. Whether the School District failed to provide Student a safe, non-hostile educational environment thus denying Student educational opportunities as evidenced by persistent bullying.

2. Whether the School District failed to implement Student's Individualized Education Program (IEP) and Behavior Intervention Plan (BIP) by failing to use the positive behavioral interventions and supports, and other identified strategies to address Student's behaviors that were established in Student's IEP/BIP.
3. PROCEDURAL: Whether the School District failed to convene an Admission, Review, and Dismissal (ARD) Committee meeting and significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE.
4. PROCEDURAL: Whether the School District failed to appropriately respond to and remedy the effects of the incident on Student, including:
  - a) Petitioner was forced to \*\*\*;
  - b) Petitioner repeatedly requested an IEP committee meeting, but the School District did not schedule one until April \*\*\*, 2017, which the School District then cancelled;
  - c) at the rescheduled meeting on May \*\*\*, 2017, the School District refused to discuss \*\*\*;
  - d) the School District never scheduled a meeting to discuss \*\*\*; and
  - e) the School District never responded to Petitioner's requests to speak to a counselor about how Student's plan would address the anxiety Student suffered at school from \*\*\*.

#### **B. Respondent's Legal Position and Additional Issues**

Respondent generally denies the factual allegations stated in Student's Complaint. The School District contends it provided Student with FAPE during the relevant time period and Petitioner is not entitled to any of the requested relief. The School District reasserted its Statute of Limitations affirmative defense claiming all of Petitioner's claims are barred by the one-year Statute of Limitations as applied in Texas.

### **V. REQUESTED RELIEF**

#### **A. Petitioner's Requested Relief**

Petitioner confirmed the following items of requested relief:

1. An order directing the School District to provide (unspecified) IEE's in all areas of disability and need.

2. An order requiring the School District to fund at public expense an assessment performed by a "Life Care Planner" for long term damages caused by the alleged \*\*\*.
3. An order requiring the School District to fund at public expense a psychiatric evaluation for long term damages caused by the alleged \*\*\*.
4. That Student be assessed for leisure activities and be given the opportunity to participate in both academic and non-academic programs.
5. An order requiring the School District to devise a transition plan.
6. An order requiring the ARDC convene to consider and address the findings of the IEEs.
7. An expert consultant retained at public expense to address Student's educational and non-educational needs:
  - a. And the expert be invited to attend Student's ARDC meeting for the next two consecutive school years.
  - b. An expert consultant retained at public expense to train all staff who might interact with Student during the next two school years.
  - c. To train staff in harassment and bullying of students with disabilities by other students and staff.
8. An order directing the School District provide social skills training to Student.
9. That Student be provided counseling or therapy services outside of the school environment.
10. That Student be provided Social Work services.
11. That Student be provided with Home and Family Support Services.
12. That Parents receive a stipend of up to \$1,000.00 for parental training.
13. The District \*\*\* to ensure.

**B. Respondent's Requested Relief**

1. Dismissal of Petitioner's claims.

**VI. FINDINGS OF FACT**

1. Student transferred into the School District on August \*\*\*, 2016, as \*\*\* grader. Student qualified for special education and related services as a student with an Intellectual Disability (ID) and an Emotional Disability (ED).<sup>1</sup> The School District agreed to implement Student's IEP from Student's previous school district and hold a permanent ARD Committee meeting by October \*\*\*, 2016.<sup>2</sup> Student is \*\*\*.<sup>3</sup>
2. The School District held an ARD Committee meeting on September \*\*\*, 2016.<sup>4</sup> Student received instruction in a LIFE Skills class and utilized the \*\*\* program for support.<sup>5</sup> The \*\*\* program is the \*\*\*, which is a behavioral support.<sup>6</sup> The program includes social skills and strategies, behavioral supports, and other various intentional applications to support students who may struggle emotionally or behaviorally or with interactions with others.<sup>7</sup> Student received psychological services for \*\*\* minutes each six weeks in a special education group setting.<sup>8</sup> The School District's LSSP provided one-on-one services on an as needed basis for Student during the Spring 2017 semester.<sup>9</sup>
3. Student had \*\*\* based on bullying prior to attending the School District. Student attended counseling prior to entering the School District.<sup>10</sup>
4. Student's IEP from September \*\*\*, 2016, listed Student's weaknesses as \*\*\* if Student \*\*\*. Student \*\*\*.<sup>11</sup> Student's IEP included goals in academics, health, and behavior.<sup>12</sup> Student's BIP listed \*\*\* as Student's inappropriate behavior.<sup>13</sup>
5. On November \*\*\*, 2016, \*\*\*.<sup>14</sup> The \*\*\* incident was ruled outside the Statute of Limitations period by Judge Rosenthal of the United States District Court for the Southern

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<sup>1</sup> Joint Exhibit 28 p. 000554-000555 (referred to hereafter as JE \_\_\_ or JE \_\_ at \_\_\_).

<sup>2</sup> JE 28 at 000554.

<sup>3</sup> Transcript Volume II p. 475; 362 (referred to hereafter as TR II at \_\_\_).

<sup>4</sup> JE 31 at 000113.

<sup>5</sup> JE 31 at 000116.

<sup>6</sup> TR Vol I at 42.

<sup>7</sup> TR Vol I at 43.

<sup>8</sup> JE 31 at 000135.

<sup>9</sup> TR II at 498-99.

<sup>10</sup> TR II at 375-76.

<sup>11</sup> JE 31 at 000115.

<sup>12</sup> JE 31.

<sup>13</sup> JE 31 at 000143.

<sup>14</sup> TR II at 382.

District of Texas after appeal of the prior hearing officer's dismissal of Petitioner's case filed on December 5, 2017.<sup>15</sup>

6. On December \*\*\*, 2016, Student's outside physician sent a note to the School District stating Student was to\*\*\*.<sup>16</sup>
7. The day after the \*\*\* incident, Student's School District counselor called Parent to discuss how Student was doing. Parent reported Student was not doing well, \*\*\*. The counselor notified Parent of resources in the community she could access to help Student. The counselor stated people at the School District care about Student and they want to help provide services so Student can learn skills to\*\*\*.<sup>17</sup>
8. Two teachers from the School District called the day after the \*\*\* incident to check on Student's well-being. Parent indicated Student was not doing well and \*\*\*. The teachers asked to speak to Student and told Student they care about Student, Student can talk to them anytime, and they are ready for Student to\*\*\*. Parent stated she did not know what happened and the teachers suggested she talk to the principal. The teachers said they were ready to continue to help Student work.<sup>18</sup>
9. A School District nurse called Parent two days after the \*\*\* incident. Parent notified her Student was not doing well. The nurse asked Parent if she talked to the student support assistant principal (AP) and offered to place Parent on hold while she located the AP so they could speak. Parent ended the phone call saying she does not have time to talk to the AP. The nurse told Parent to let Student know Student can always talk to her or a teacher and will leave a message for the AP to call Parent.<sup>19</sup>
10. Parent called the school to obtain the special education paperwork for Student's psychiatrist so she could help Student\*\*\*. Parent instructed the school personnel to send the paperwork home with Student. The school personnel gave Parent her direct number in case Parent needed any additional information.<sup>20</sup>
11. In January 2017, the AP called Parent to follow up on the request for paperwork. Parent wanted special education paperwork to give to Student's psychiatrist. The AP asked if Parent wanted to sign consent forms for the psychiatrist to speak to School District personnel. Parent declined. The AP stated the paperwork would be ready that day and parent requested it be sent home \*\*\*. The AP asked how Student was doing and wanted to discuss a plan for\*\*\*. Parent stated she did not know what happened prior to the \*\*\*

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<sup>15</sup> \*\*\*

<sup>16</sup> Petitioner's Exhibit 28 (referred to hereafter as PE \_\_\_ or PE \_\_\_ at \_\_\_).

<sup>17</sup> PE 36.

<sup>18</sup> PE 38.

<sup>19</sup> PE 37.

<sup>20</sup> PE 40.

- incident and the AP began to explain. Parent says the information she received from the school is different than what the AP was explaining. Parent did not ask any additional questions about what happened prior to the incident. She indicated she spoke with the \*\*\* when she was at the school after the \*\*\* incident.<sup>21</sup> Parent ended the phone call without listening to the principal explain what happened prior to the \*\*\* incident.<sup>22</sup>
12. Parent met with the \*\*\* principal in person. Her main concern in the meeting was Student's safety and \*\*\*. The principal informed Parent the \*\*\*, not the School District. The Principal asked Parent if she was interested in Student attending a different school in the School District. Parent and principal had a conversation about whether or not \*\*\* actions were justified. Parent did not ask the principal about what happened prior to the \*\*\* incident, nor did she ask any follow up questions about Student transferring to another campus.<sup>23</sup>
  13. Multiple School District personnel attempted to contact Parent and had difficulty contacting her. The AP, the diagnostician, and the LSSP all made attempts to contact Parent to discuss Student's well-being and Student's\*\*\*.<sup>24</sup>
  14. Parent spoke to several school personnel the week following the \*\*\* incident. She spoke to the School District diagnostician "billions" of times and one of Student's teachers "frequent" times per her testimony during her deposition.<sup>25</sup> Parent spoke with one of Student's teachers every other day. The School District would send messages to parent \*\*\*, asking how Student was doing,\*\*\*.<sup>26</sup>
  15. After the \*\*\* incident, Student attended \*\*\* of school prior to the winter break.<sup>27</sup> Student attended school in the beginning of the Spring 2017 semester. Student attended \*\*\* in \*\*2017, \*\*\* in\*\*\*, \*\*\* in\*\*\*, and \*\*\* in\*\*\*. Student missed \*\*\* full days of school.<sup>28</sup> Parent kept Student home from school if Student did not want to attend.<sup>29</sup> Parent told the LSSP she did not want Student to attend school because of \*\*\* .<sup>30</sup> The LSSP encouraged

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<sup>21</sup> TR II at 326.

<sup>22</sup> PE 39.

<sup>23</sup> PE 41.

<sup>24</sup> Respondent's Exhibit 1; TR II at 510-12.

<sup>25</sup> JE 57 at 26.

<sup>26</sup> JE 57 at 26-27.

<sup>27</sup> TR I at 223.

<sup>28</sup> JE 20; Hearing Officer took judicial notice of the 2016-2017 Katy ISD Instructional Calendar.

<sup>29</sup> TR II at 395-96, 549.

<sup>30</sup> TR II at 549.

- Student to attend school even if it was for a partial day.<sup>31</sup> She tried to incentivize Student to attend school by offering Student \*\*\* for coming to school.<sup>32</sup>
16. Per Student's BIP, Student could leave class to go to the \*\*\* as a designated "cool-off" point.<sup>33</sup> During the Fall 2016 semester, Student utilized the \*\*\* incident, then fewer than \*\*\* times during Student's time at the School District.<sup>34</sup>
  17. Student was in the Life Skills class for \*\*\* subjects each day.<sup>35</sup> Student and Student's Life Skills teacher had a good relationship and Student \*\*\* sometimes.<sup>36</sup> After the \*\*\* incident, Student's Life Skills teacher did not see any noticeable difference in Student's ability to access instructional information or engage in instruction.<sup>37</sup>
  18. After the \*\*\* incident, Student's Life Skills teacher stated Student \*\*\*.<sup>38</sup> The Life Skills teacher did not notice Student being afraid or bullied, nor did Student report being fearful or bullied.<sup>39</sup>
  19. Student had a history of \*\*\* getting upset.<sup>40</sup> For example, in the classroom prior to the \*\*\* incident someone said, "\*\*\*\*." Student\*\*\*\*. Student became upset. "\*\*\*\* is one of Student's triggers that causes Student to become upset."<sup>41</sup> Student did not have any "concerning" disciplinary incidents during the 2016-2017 school year.<sup>42</sup>
  20. The School District mailed two consents for disclosure to Parent on March \*\*\*, 2017. The forms were for Student's family doctor and Student's counselor to complete so the School District could use their information in an ARD Committee meeting to discuss\*\*\*\*.<sup>43</sup> Parent did not provide the number for Student's outside providers because she did not trust the AP.<sup>44</sup>

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<sup>31</sup> TR II at 552.

<sup>32</sup> TR II at 503.

<sup>33</sup> TR II at 438.

<sup>34</sup> TR II at 483, 440.

<sup>35</sup> TR II at 484.

<sup>36</sup> TR II at 475.

<sup>37</sup> TR II at 476.

<sup>38</sup> TR II at 478-79.

<sup>39</sup> TR II at 479.

<sup>40</sup> TR II at 480.

<sup>41</sup> TR II at 438, 480.

<sup>42</sup> TR II at 481.

<sup>43</sup> JE 32 and 33. TR I at 233.

<sup>44</sup> TR II at 388.



21. In February or March 2017, the School District wanted to schedule an ARD Committee meeting because Student was missing school and they did not want Student to fall behind academically.<sup>45</sup> The School District's diagnostician called mom and offered three dates for an ARD Committee meeting. Parent chose April \*\*\*, 2017.<sup>46</sup> Parent arrived with an attorney at the ARD Committee meeting and the meeting was rescheduled so the School District's attorney could attend as well.<sup>47</sup>
22. Parent came to Student's school in March 2017 and a meeting took place between Parent, the counselor, the AP, and the diagnostician. The diagnostician gave parent \*\*\* paperwork for her to complete.<sup>48</sup> Parent declined \*\*\* services and did not provide consent for the School District to speak with Student's outside providers.<sup>49</sup>
23. As of April \*\*\*, 2017, Parent reported Student\*\*\*. Student was seeing a private counselor and psychiatrist.<sup>50</sup>
24. The School District completed a Reevaluation of Existing Data (REED) prior to the May \*\*\*, 2017 ARD Committee meeting. The REED addressed emotional and behavioral issues. The REED reviewed Student's 2015 REED from Student's previous school district. Teachers in that school district reported Student is a good student who is\*\*\*.<sup>51</sup> The School District LSSP conducting the 2017 REED recommended further evaluation in the form of a Functional Behavior Assessment (FBA) and/or counseling evaluation to determine further supports.<sup>52</sup> The REED reviewed Student's psychological evaluation from 2007, Student at that time had feelings of depression, feelings of inadequacy, and low self-esteem. Student at times\*\*\*, which lead to Student\*\*\*.<sup>53</sup>
25. During the May \*\*\*, 2017 ARD meeting, Parent was in agreement with the special education services scheduled for Student; however, she was upset no one discussed what happened during Student's class prior to the \*\*\* incident.<sup>54</sup> The School District did not discuss the \*\*\* incident during the ARD because it is not part of education programming

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<sup>45</sup> TR I at 230-31.

<sup>46</sup> TR II at 408.

<sup>47</sup> TR I at 235.

<sup>48</sup> TR I at 232.

<sup>49</sup> TR II at 512-13.

<sup>50</sup> JE 36 at 000250.

<sup>51</sup> JE 36 at 000250.

<sup>52</sup> JE 36 at 000251.

<sup>53</sup> JE 36 at 000250.

<sup>54</sup> JE 57 at 9.

- for Student.<sup>55</sup> Parent recommended a meeting with herself and the School District to discuss the \*\*\* incident.<sup>56</sup>
26. At the May \*\*\*, 2017 ARD meeting, the School District LSSP recommended an occupational therapy consult for Student and \*\*\* to assist Student when Student is upset. The School District diagnostician suggested a conversation between Student's psychiatrist and the LSSP. The LSSP proposed a FBA and a counseling assessment for Student to create an appropriate behavior plan for Student. Parent agreed with these assessments. Parent suggested adding a "code" for Student to communicate when Student is angry. Parent wants Student in school. Parent suggested Student and the LSSP come together to get Student to attend school. Extended School Year (ESY) services were recommended and parent declined transportation.<sup>57</sup>
27. Student's BIP was changed to add LSSP and \*\*\* consulting, inform teachers and staff of "trigger" words or signs of anger to ensure awareness, \*\*\*, use a\*\*\*, use a \*\*\* or recognize when Student needs to refocus, and home-school communication.<sup>58</sup>
28. The LSSP completed a Counseling Evaluation on October \*\*\*, 2017. The LSSP did not recommend counseling as a related service because Student did not demonstrate frequent emotional/behavioral concerns in the school setting. In the evaluation, the LSSP again recommended parent provide consent for School District staff to speak with Student's outside mental health providers to facilitate better coordination of care.<sup>59</sup> Parent declined the School District's request to talk to Student's psychiatrist.<sup>60</sup>
29. In the Fall of 2017, the School District LSSP worked with Student on Student's\*\*\*. The reason Student did not want to \*\*\* was because Student \*\*\*. The LSSP worked with Student on \*\*\*. She worked through scenarios with Student, like \*\*\*, to make it a positive experience so then it's easier to\*\*\*, instead of continued \*\*\* which makes this situation harder.<sup>61</sup>
30. Parent claimed Student was diagnosed with \*\*\*; however, she cannot recall when and never told anyone from the School District.<sup>62</sup> In January 2017, \*\*\*. Parent claimed Student

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<sup>55</sup> TR I at 224-25.

<sup>56</sup> JE 40 at 000213.

<sup>57</sup> JE 40 at 000213-214.

<sup>58</sup> JE 39.

<sup>59</sup> JE 44.

<sup>60</sup> TR II at 503.

<sup>61</sup> TR II at 435-38.

<sup>62</sup> JE 57 at 5.

was bullied when Parent was attempting to \*\*\*. Parent said \*\*\* from the \*\*\* incident \*\*\*.<sup>63</sup>

31. Student attended the \*\*\* summer session in \*\*\* 2017 to make up \*\*\* from missing school during the spring semester. Student did not\*\*\*.<sup>64</sup>
32. When Student attended school Student passed Student's classes. Student failed most of Student's classes the \*\*\* six weeks of the 2016-2017 school year. During the 2017-2018 school year, Student passed all Student's classes with mostly As and Bs.<sup>65</sup> Student demonstrated ability to follow directions and learn, Student participated in the \*\*\* program where Student learned \*\*\*.<sup>66</sup> Student attended the \*\*\* in May 2018.<sup>67</sup>
33. An ARD meeting was held on May \*\*\*, 2018. The plan for the 2018-2019 school year was for Student to participate in \*\*\* class for \*\*\* and the \*\*\* program for \*\*\*. Student would continue to receive behavioral help via the \*\*\* program.<sup>68</sup> Student transferred to a different school district at some point in the Fall of 2018.<sup>69</sup>

## VII. DISCUSSION

### A. Statute of Limitations

A parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2).

The two-year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. 20 U.S.C. §1415 (f)(3)(C); 34 C.F.R. § 300.507

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<sup>63</sup> JE 57 at 12.

<sup>64</sup> TII 417, 423.

<sup>65</sup> JE 16, 17.

<sup>66</sup> TR II at 488.

<sup>67</sup> TR II at 517-18; JE 53 at 000465.

<sup>68</sup> JE 53 at 000466.

<sup>69</sup> TR II at 396.

(a)(2). Texas has an explicit statute of limitations rule. In Texas, a parent must file a request for a due process hearing within one year of the date he or she knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code § 89.1151 (c).

The November \*\*\*, 2016 \*\*\* incident was ruled outside the statute of limitations period by the prior Hearing Officer and the original complaint filed on December 4, 2017 was dismissed without prejudice. The Southern District of Texas upheld the Hearing Officer's decision as it related to the \*\*\* incident. The case was remanded for the Hearing Officer to make a fact-specific determination as to which claims accrued within the one-year statute of limitations.<sup>70</sup> The Parent has not plead any exceptions to the statute of limitations.

This Hearing Officer is tasked with determining the accrual date of Petitioner's claims. Parent made several procedural claims which included \*\*\* and repeatedly requesting an ARD meeting. She also made denial of FAPE claims based on bullying and failure to implement Student's IEP. After the \*\*\* incident in Fall 2016, Student only attended \*\*\* of school prior to the winter break. It is not unheard of for a Student to miss school after a major incident.

In Spring 2017, Student began attending classes in January, but attended sporadically. By the end of\*\*\*, Student was missing school on a consistent basis. The School District offered an ARD Committee meeting on April \*\*\*, 2017, but it could not be held until May \*\*\*, 2017. The date by which Parent knew or should have known date of the claim she was forced to keep Student home from school would have accrued on or after \*\*\* 2017 because that is when Student began missing school consistently. Additionally, the bullying and failure to implement claim could only accrue after Student was attending school again after the \*\*\* incident. The date by which Parent knew or should have known of those FAPE claims would be in January 2017. Petitioner filed the original case in December 2017; therefore, all of Petitioner's procedural claims are not time-barred by the one-year statute of limitations.

## **B. Duty to Provide FAPE**

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<sup>70</sup> \*\*\*.

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). A school district has a duty to provide a FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3).

A school district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

### **C. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>71</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). In this case the School District was obligated to provide Student with a FAPE. The burden of proof in this case is on Petitioner to show the School District did not do so. *Id.*

### **D. Implementation of the IEP**

The four factor FAPE analysis is not appropriate for this case because Petitioner did not plead a general denial of FAPE. Petitioner's Complaint included a claim of denial of FAPE due to failure to implement Student's IEP and persistent bullying.

The appropriateness of an IEP is typically determined by consideration of the four "indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit

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<sup>71</sup> 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).

under the IDEA,” which were set forth in *Cypress-Fairbanks Independent School District v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 253 (5th Cir. 1997). In *O.W.*, the Court determined when a plaintiff brings a claim based on a failure to *implement* an IEP, the first factor (whether the program is individualized) and second factor (whether the program is administered in the least restrictive environment) are generally “not at issue.” *Spring Branch Independent School District v. O.W. by next friend Hanna W.* 961 F. 3d 781, 795-96, *citing Bobby R.*, 200 F.3d at 348. Rather, a court must decide whether a FAPE was denied by considering, under the third factor, whether there was a “substantial or significant” failure to implement an IEP; and under the fourth factor, whether “there have been demonstrable academic and non-academic benefits from the IEP.” *Id.* at 796, *citing Bobby R.* at 349.

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student’s parents, to accede to a parent’s demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student’s parents have the right to dictate an outcome, because parents do not possess “veto power” over a school district’s decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student’s parents or refusal to listen to them, a school district must be deemed to have met the IDEA’s requirements regarding collaborating with a student’s parents. *Id.*

The analysis of implementation of the IEP begins with the third *Michael F.* factor of whether the educational program was provided in a collaborative manner pursuant to the holding in *O.W.* *O.W.* 961 F. 3d 781, 795-96. Under the third factor, the evidence showed Student’s educational program was provided in a collaborative manner with key stakeholders. School District staff were involved in trying to have meetings with Parent after Fall 2016 to get Student engaged in school. Parent was a member of the May \*\*\*, 2017 ARD Committee meeting and some of her suggestions were added to Student’s BIP. The evidence shows the School District reached out multiple times to check on Student’s well-being after the \*\*\* incident, let Parent know the

School District was still willing and able to help Student with skills to \*\*\*, and determine how to get Student back in school on a regular basis.

As required under the BIP, Student's teachers and the LSSP used positive behavioral interventions to address Student's behavioral needs. Student was allowed to go to the \*\*\* to cool down when Student was upset. Student was allowed to \*\*\* room or the \*\*\* room so Student could avoid \*\*\*, which was a source of Student's\*\*\*. Student was praised with tangible things \*\*\* for attending school. Student's BIP was followed by the School District. No evidence of substantial or significant failure to implement Student's IEP was presented by Petitioner.

Under the fourth factor, the evidence showed Student did receive academic and non-academic benefit. When Student attended school, Student was successful academically. Student had mostly As and Bs in 2017-2018 and \*\*\*. Student received \*\*\* skills and was learning how to deal with Student's \*\*\* from the LSSP. Had Student attended school more regularly, Student may have benefited even more.

Petitioner alleged in Petitioner's closing brief Student was not educated in Student's Least Restrictive Environment (LRE). At no time prior to the closing brief did Petitioner indicate an issue regarding LRE; therefore, this Hearing Officer did not analyze LRE. Petitioner did not meet Petitioner's burden on the issue of failure to implement Student's IEP.

#### **E. 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 someone physically or verbally and excluding someone from a group on purpose. *Government Accountability Office, Report on Bullying (June 2012)* (<http://www.gao.gov/assets/600/591202.pdf>).

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004) (unabated harassment and bullying of

high school student made it impossible for student to receive FAPE where student became depressed, harassment continued, and student attempted suicide); *Letter to Dear Colleague, 113 LRP 33753* (OSERS Aug. 20, 2013) (bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied).

Bullying may constitute a denial of a FAPE if school personnel were deliberately indifferent to, or failed to take reasonable steps, to prevent bullying that adversely affects or results in the regression of educational benefit or substantially restricts the student with a disability from accessing educational opportunities. *T.K. and S.K. ex rel K.K. v. New York City Dept. of Educ.*, 779 F. Supp. 2d 289, 316 (S.D. N.Y. 2011) (school district's motion to dismiss denied where allegations that 12-year-old with learning disabilities was denied a FAPE due to persistent bullying by peers – student was ostracized, pushed, peers refused to touch items student touched, and student was ridiculed daily).

The bullying need not be outrageous but it must be sufficiently severe, persistent, or pervasive that it creates a hostile environment for the student with a disability. It is not necessary that Petitioner show the bullying prevented all opportunity for an appropriate education but only that it is likely to affect the opportunity of the student for an appropriate education. *T.K.*, 779 F. Supp. 2d at 317.

Petitioner did not meet Petitioner's burden on this claim. The \*\*\* incident may have risen to the level of denial of a FAPE due to bullying; however, as previously stated, that incident was deemed outside the scope of this Hearing Officer's decision because it is outside the statute of limitations period as applied in Texas.

Parent notified the School District at the transfer ARD Committee meeting in August 2016 Student was bullied at other schools. School District staff and teachers did not see any bullying of Student and Student did not report any bullying. The only alleged bullying incident discussed took place at the School District when Student's \*\*\*. A \*\*\*, not involved in the \*\*\* incident, \*\*\*. Parent claims when she went to get Student's \*\*\*, the \*\*\* involved in the \*\*\* incident \*\*\*. The incident \*\*\* was something that occurred off-campus and was investigated by a non-School District entity. Student continued to attend school after the \*\*\* incident and even \*\*\*. Petitioner did not show the School District was even made aware of the \*\*\* incident. While Student may have been



uncomfortable in the presence of \*\*\* involved in the \*\*\* incident; the conduct does not rise to the level of bullying.

#### **F. Procedural Issues**

Petitioner did not meet Petitioner's burden on proving the School District violated Student's or Student's parent's procedural rights under the IDEA. Under the IDEA, a denial of FAPE can only be found if the procedural violations: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i-iii).

Parent complains of several procedural issues. First, whether the School District failed to convene an ARD committee meeting which significantly impeded Parent's opportunity to participate in the decision making process. The evidence showed the School District did not fail to convene an ARD Committee meeting. Parent was offered three dates for an ARD Committee meeting and she chose April \*\*\*, 2017. Parent arrived at the meeting with an attorney and had not shared this information with any School District personnel prior to the meeting. The School District rescheduled the ARD Committee meeting for May \*\*\*, 2017, with Parent's consent. The ARD Committee meeting was held on May \*\*\*, 2017. In March 2017, the School District tried to obtain consent forms so School District personnel could speak with Student's outside providers and Parent declined to sign. Parent took herself out of some decision making when she was difficult to get in touch with, refused to allow the School District and Student's outside providers to speak to each other, and did not ask anyone what happened in the classroom prior to the \*\*\* incident. The School District did not impede Parent's participation in the decision making process.

Second, Parent claims the following procedural issues:

##### **a. Parent was forced to \*\*\***

Parent allowed Student to \*\*\*. Parent was offered the opportunity to have Student transfer schools and did not follow up with gathering more information about that option. Parent was not

forced to \*\*\* she chose to do so. Multiple School District personnel reached out multiple times to offer help in \*\*. The School District also offered Student opportunities to learn how to \*\*. Student attended school a few times during the Spring 2017 semester and \*\* in May 2018.

**b. Petitioner repeatedly requested an ARD Committee meeting, but the School District did not schedule one until April \*\*, 2017.**

No evidence was presented that Parent requested an ARD Committee meeting. The evidence showed the School District requested an ARD Committee meeting due to Student's poor attendance. In the six recordings of conversations between Parent and School District personnel, Parent never requested an ARD meeting.

**c. At the rescheduled meeting on May \*\*, 2017, the School District refused to discuss the \*\***

The School District did not discuss the \*\* incident at the May \*\*, 2017 ARD meeting because they deemed it a \*\* issue that should not be discussed during a special education meeting. The School District did discuss Student's feelings \*\*, Parent's concern Student is\*\*, and Student's \*\* \*\*self. Student's BIP was changed based on the conversations had in the ARD Committee meeting and the LSSP derived an incentive program to get Student to attend school. While the School District did not directly discuss the \*\* incident, the conversation had at the ARD Committee meeting was centered around the effects the \*\* incident had on Student and how to change Student's educational program to assist Student.

**d. The School District never scheduled a meeting to discuss the \*\***

A formal meeting to discuss the \*\* incident never occurred between Parent and the School District. However, Parent spoke to \*\* involved in the incident the day it occurred. She had some information from some source about the \*\* incident because during the recorded conversation with the AP she said the information she had did not match what the AP was telling her. Additionally, the AP was trying to relay what occurred prior to the \*\* incident and Parent ended the phone call without hearing the AP's explanation of what occurred in the classroom prior to the

\*\*\*. Parent could have learned what happened prior to the \*\*\* incident if she would have continued the conversation with the AP. In the six recordings of conversations between Parent and School District personnel, Parent never asked what occurred in the classroom before the \*\*\* incident or to be put in touch with someone who could give her the information. During the phone calls, Parent indicated she did not know what happened and several School District staff encouraged Parent to speak with the AP. A School District nurse offered to place Parent on hold while she found the AP and parent declined. When Parent had the opportunity to speak with the AP, she ended the call without finding out what happened in the classroom.

- e. **The School District never responded to Petitioner's requests to speak to a counselor about how Student's plan would address the anxiety Student suffered at school from the \*\*\*.**

No evidence was presented that Parent requested a meeting with a counselor to discuss a plan for Student. Parent refused to let the School District speak with Student's outside providers. Despite not being allowed to speak to the outside providers, the School District developed a plan at the May \*\*\*, 2017 ARD meeting to address Student's fears and returning to school. Student received psychological services prior to the incident and after. Teachers and staff did not witness any anxiety from Student related to the \*\*\*. The anxiety Student exhibited was in regards to \*\*\*. Student had a history of \*\*\*. Student was receiving one-on-one help from the LSSP to learn techniques to deal with Student's\*\*\*. Parent never provided any expert testimony or documents connecting Student's anxiety and the \*\*\* incident.

The procedural allegations raised by Parent do not rise to the level of a denial of FAPE. Student's right to a FAPE was not impeded, Parent's opportunity to participate in the decision-making process was not impeded, and Student was not deprived an educational benefit. 34 C.F.R. §300.513.

## VIII. CONCLUSIONS OF LAW

1. The School District did not fail to provide Student a safe, non-hostile educational environment and thus did not deny Student educational opportunities. *Shore Regional High*

*Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194.

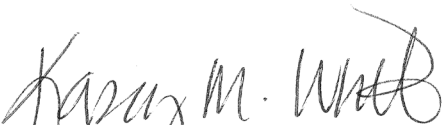
2. The School District did implement Student's IEP and BIP. *Spring Branch Independent School District v. O.W. by next friend Hanna W.* 961 F. 3d 781, 797.
3. The School District did not violate Student and Parent's procedural rights. 34 C.F.R. §300.513.

### IX. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**.

All other relief not specifically stated herein is **DENIED**.

**SIGNED October 23, 2020.**

  
\_\_\_\_\_  
**Kasey M. White**  
**Special Education Hearing Officer**  
**For the State of Texas**

### X. 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 state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a) (b).