

STUDENT bnf PARENTS	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
PLANO	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

STUDENT, (hereinafter referred to as Petitioner or Student) through student's next friends, Parents (hereinafter referred to as Parents) brings this action against Respondent Plano Independent School District (hereinafter referred to as Respondent, PISD, or the District) under the Individuals With Disabilities Education Improvement Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

The sole issue raised in this cause is whether PISD failed to implement Student's IEP during the spring semester of students *** grade year, the academic year 2008-2009. Specifically, Student alleges that PISD failed to implement that portion of students IEP pertaining to the use of Student's ***.

For relief, Student seeks an order requiring PISD to implement student's IEP and provide compensatory tutoring until such time as Student passes the *** grade TAKS test.

PROCEDURAL HISTORY

On or about November 23, 2009, Student filed this request for due process with the Texas Education Agency, which was docketed as Docket No. 067-SE-1109. Throughout the proceedings, Petitioner appeared *pro se* through student's next friends. Throughout the proceedings, Gigi Norman, Attorney at Law, represented Respondent PISD.

A pre-hearing conference was held on December 15, 2009. The due process hearing occurred on January 21, 2010. At the close of the hearing, I granted the parties leave to file post-hearing briefs and, by agreement, ordered the briefs to be submitted on or before February 18, 2010. The parties agreed to extend the due date for the decision of the Hearing Officer commensurate with the time allowed for the filing of the parties' briefs, making the due date for the decision March 4, 2010.

FINDINGS OF FACT

1. Student currently (2009-2010 school year) attends *** grade at *** and lives with student's parents and sibling within the geographical boundaries of PISD. During the 2008-2009 school year, Student was enrolled as a *** grader at *** within PISD.
2. PISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Student is eligible for special education and related services from PISD as a student with a disability under the IDEA. Student is eligible for services under the disability categories of Autism and Speech Impairment. (Respondent's Exhibit 2, p. 2; hereinafter cited as R2:2).
4. During Student's *** grade year, student's IEP provided for small group instruction in a special education setting for ***; with *** instruction in the general education setting. Student received modified instruction on the *** TEKS. In all other areas, Student was instructed on unmodified grade level TEKS. (Transcript, pages 155, 157; hereinafter cited at T. 155, 157; R2:16)
5. Student's IEP during student's *** grade year contained goals and objectives in the areas of ***. (R1, R2).¹
6. Student's IEP throughout student's *** grade year specified that student receive the accommodation of having student's assignment notebook checked by student's special education and general education teachers. (R1:10, R2: 10; T. 151). In addition, Student's IEP provided for other accommodations, such as administration of tests in small groups and reading math questions aloud. (R1:10, R2: 10).
7. Student's special education teacher provided the accommodation of checking student's notebook by ***. The teacher's practice was to prompt Student to write the assignment with a verbal reminder and, if necessary, a tap on student's desk. (T. 93, 154). Student's general education teacher followed the same procedure for prompting Student to write in student's assignment notebook and for checking it. (T. 189-190). On occasion, Student would resist writing down the assignment. (C5:4).
8. In addition to providing the accommodation of checking Student's notebook, Student's teachers often emailed student's parents with additional notes or information. (C:5, 6-8, 11, 14-17, 19-24, 29, 31-32).
9. The accommodation of having Student's assignment notebook checked by student's teachers was especially important to Student's parents because of Student's limited communication abilities. They relied on the assignment notebook and communication about Student's assignments from student's teachers to repeat and review material taught at school, provide extra support to help Student understand difficult concepts, and ensure that Student completed student's homework. (T. 32-35, 73-75).

¹ Petitioner also submitted into evidence copies of Student's ARD documents. The cites to Respondent's exhibits rather than Petitioner's are due to the parties' discussion at the due process hearing that Respondent's copies of the ARD documents are complete, while Petitioner's exhibits may omit a page or two of the complete ARD document.

10. Throughout the fall of Student's *** grade year, student's parents and special education teacher communicated about the problem of Student not writing student's assignments in the assignment notebook. (T. 36, 44-45, 125; Petitioner's Exhibit C5, pages 2-5, 10-12; hereinafter cited as C5:2-5,10-12). Both Student's parents and student's teachers were concerned about Student's success in *** if student did not assume responsibility for tracking student's assignments. (T. 36, 125).
11. As a result of the concerns about Student not writing assignments in student's assignment notebook, the ARD committee adopted a social skills objective at Student's annual ARD on January 9, 2009 to address the issue: "*write homework assignments in agenda independently.*" (R2:9; T. 36, 125, 152). The ARD committee set the level of mastery criteria for the objective at 4 of 5 trials, with evaluation to be determined by observation and a review of the agenda itself. (R2:9). Student had one year to achieve the objective. (T. 153).
12. Student's parents observed that Student wrote student's assignments in student's agenda consistently for approximately three weeks after the ARD meeting adopted this objective. During the period of three weeks following the ARD meeting (approximately January 2009), Student's mother was comfortable and satisfied that Student's IEP was properly implemented. (T. 37, 51; C1:39-45).
13. Between the time frame of February 2009 and April 17, 2009, Student's parents believe that student was not writing student's assignments in student's agenda and that student's teachers were not checking the agenda appropriately to ensure that student wrote assignments down. (T. 37, 53-54). As a result, parents believe they were not able to offer necessary academic support to Student at home, causing him to *** and fail to adequately progress in ***. (T. 53, 56, 64, 66, 76).
14. Student's parents and student's teacher met, along with other PISD staff, on April 17, 2009. Among other subjects, they discussed Student's *** and student's progress on the goal of writing student's assignments in student's agenda. Parents expressed concern over Student *** that they had not even known was going to occur. In addition, the parties discussed the accommodation of Student's teachers checking student's agenda and the issue of independence. (T. 38, 116, 185). Student's teacher suggested to parents that they implement a reward or incentive system at home to encourage and support Student's progress toward the goal of writing student's assignments in student's agenda. (T. 38, 116).
15. Student's parents implemented the suggested incentive system following the April 17, 2009 meeting and Student began to complete student's agenda thoroughly and on a daily basis. As part of the reward system, Student's parents required him to fill in each subject area block and include a notation of "none" if there were no homework; whereas before, a no homework block would be left blank. (T. 38-40).
16. Student's agenda reflects numerous assignments recorded in student's handwriting during the weeks of January 5, 2009 through February 9, 2009. (C1:39-49). During the week of February 16, 2009, only vocabulary/spelling words are recorded in the agenda, with no specific assignments. (C1:50-51). The week of February 23, 2009 reflects a few recorded assignments. (C1:52-53). The weeks of March 2 and March 9, 2009 each reflect a few recorded assignments.

(C1:69-72). The weeks of March 23, March 30, and April 6, 2009 reflect only vocabulary/spelling words and no specific assignments. (C1:73-78). The week of April 13 reflects one noted assignment in, what appears to be, the teacher's handwriting, and one assignment in Student's handwriting. (C1: 79-80). Beginning with the week of April 20, 2009 and continuing until the end of the 2008-2009 school year, Student's agenda contains numerous recorded assignments and the notation of "none" where no homework was assigned. (C1:81-94).

17. The time frame during which Student's agenda reflects fewer to no assignments corresponds with a period of less homework due to diagnostic testing, TAKS preparation, and TAKS testing. (T.116, 125, 175-176).
18. The "none" entries in Student's agenda on the dates between April 20, 2009 and the end of school account for an average of 10-12 blocks per week. (C1:81-94). For those weeks prior to April 20, 2009 when Student started to record "none," it is reasonable to assume that some of the blank blocks reflect a lack of assigned homework, rather than Student failing to write down the assignments.
19. Student's progress toward student's IEP objective of writing assignments in student's agenda independently was measured in March, June, and October 2009. In both March and June, Student showed satisfactory progress toward meeting the objective, with progress at a *** mastery level. As of October 1, 2009, Student had mastered the objective at the level of ***. (R10:30; T. 184).
20. PISD uses the Measure of Academic Progress (MAP) test as one indicia of academic progress for all students. MAP scores are typically charted two to three times during the school year, with the expectation that a typically developing general education student will increase four (4) points over the course of one year. (T. 169). The MAP test also scores students with an RIT score that is compared to an expected range of proficiency for each grade level. (T.144, 166-160-169, 210).
21. On the MAP administrations in *** grades, Student received RIT scores in Reading as follows: *** (spring of *** grade), *** (fall of *** grade), *** (winter of *** grade), *** (spring of *** grade), *** (winter of *** grade). (R6:9; R10:23; T.208-209). Student is currently within the expected level of proficiency for an average general education *** grader in Reading and has demonstrated substantial growth between January 2009 and January 2010. (T. 208-210). During Student's *** grade year only, student also showed improvement, with a gain of *** points in Reading. (R10:16).
22. Prior to *** grade, Student took the TAKS-M in Reading, which tests modified TEKS and is a simpler test. In *** grade, Student took the TAKS-Accommodated (TAKS-A) for the first time because of student's success on the TAKS-M in *** grade (commended score). TAKS-A is a grade level test and differs from the general TAKS test only in eliminating the field questions. (T.160-161). TAKS-A is considerably harder than TAKS-M. (T. 161).
23. Student did not pass the TAKS-A in *** in *** grade. After accelerated instruction following the first administration of the test, student missed passing by one question on the second administration and by two questions on the third. (T. 162-165).

24. Student's *** grade teacher found gaps in Student's reading level when student began *** grade, as measured by the Independent Reading Inventory (IRI), which placed Student at a *** grade level for independent reading. Student's instructional reading level was higher. At the conclusion of the first semester of *** grade, Student had closed the gap in student's reading and was measuring at a *** grade reading level. (T. 216, 233-234, 237-238).
25. Student's MAP scores in Math showed continual improvement, with a gain of 12 points over student's *** grade year. (R10:16). Student's MAP scores in Math show an *** level proficiency. (R6:11; T. 175). Student took and passed the grade level TAKS in Math in *** grade. (R10: 1-2).
26. Student's MAP scores in General Science showed a gain of 7 points over the course of ***grade. In Science Concepts, Student gained 15 points during student's *** grade year. (R10:16; T. 181-182). Student's scores in Science on the MAP test place him within the *** range of general education *** grade students. (T. 211). Student failed to pass the grade level TAKS test in science, missing a passing score by one question. (T. 180).
27. Student's MAP scores in Language Usage show no gain or loss during student's *** grade year; but rather stayed the same with a RIT score of ***. Student scored in the proficiency range for general education *** grade students in the area of Language Usage. (R10:16; T. 182).
28. Student's grades during student's *** grade year and the first semester of student's *** grade year were A's and B's. (R10:21-22).
29. On Student's IEP goals and objectives, student continually made satisfactory progress on all goals and objectives and obtained mastery of many of them. (R10:25-30).
30. Student made meaningful academic progress in *** grade at PISD.

DISCUSSION

The sole issue presented by Student is whether PISD failed to implement those portions of student's IEP pertaining to student's assignment notebook during the spring semester of student's *** grade year.

As the party challenging the implementation of the IEP, Student has the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Van Duyn v. Baker School District 5J*, 481 F.3d 770 (9th Cir. 2007).

I. Legal Standard Governing Claims of Failure to Implement An IEP

The Fifth Circuit has clearly set forth the legal standard governing a claim of failure to implement an IEP under the IDEA: "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead must demonstrate that the ...school...failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *writ*

denied, 531 U.S. 817 (2000). To determine what constitutes a substantial or significant provision of the IEP, the Court explained that one important factor to consider is whether the IEP services provided actually conferred an educational benefit on the student. *Id.* See also, *Van Duyn, supra*.

The legal standard for determining whether a student received educational benefit under an IEP is also clear: did the student obtain more than trivial progress under the IEP? Progress is measured by looking at various indicia of a student's progress with respect to his or her own level of performance, rather than with respect to other peers. *Id.*

Thus, in order to prevail on student's claim that PISD failed to implement student's IEP with regard to student's agenda for homework assignments, Student must show that any failure by PISD amounted to a substantial or significant failure to provide services under student's IEP. Evidence of Student's progress, or lack thereof, during student's *** and *** grade years is probative of whether any shortfall in services by PISD rises to the level of a denial of a free appropriate public education.

II. Application of Legal Standard To The Facts of This Case

Student argues that the PISD failed to implement those portions of student's IEP pertaining to student's homework assignment notebook: an accommodation that student's general and special education teachers check student's agenda for homework assignments and an objective in the area of Social Skills that student write the assignments in student's notebook independently.² Specifically, Student argues that student's teachers failed to implement these portions of student's IEP between approximately February 1, 2009 and April 17, 2009.

As evidence in support of student's claim, Student points to the pages of student's agenda, which reveal few to no entries by Student during the time frame of February 1-April 17, 2009 in contrast to more entries on pages prior to and after that time frame. Petitioner argues that the blank pages in student's notebook prove that student's teachers were not checking student's agenda and/or that Student was not complying with the social skills objective adopted in January 2009. Petitioner argues that, as a result of the District's failure to implement these aspects of student's IEP, student failed to make adequate academic progress as evidenced by student's failure of the *** grade TAKS test in Reading and Science.

Respondent counters that the relatively blank pages in Student's agenda during the February-April time frame are not probative of whether Student's teachers provided the accommodation in student's IEP and checked student's agenda. Respondent points to the fact that the time frame of fewer entries corresponds to a period of less homework due to diagnostic testing and TAKS preparation and testing. Further, Respondent argues that even if there was an intermittent failure to provide the accommodation under student's IEP, it was not a substantial or significant failure, as evidenced by the educational benefit Student received under student's IEP during the relevant time frame.

² Student's claim in student's due process hearing request focuses on PISD's failure to provide the IEP **accommodation** of checking student's assignment notebook. At the hearing, Student also argued that PISD failed to implement student's IEP with regard to the **objective** of Student independently writing student's assignments in student's agenda. Although Respondent makes a distinction between the accommodation and the objective, Petitioner views them as related and argues that neither portion of the IEP was properly implemented. I will address both the accommodation and the objective as they pertain to Petitioner's alleged failure to implement the IEP.

A) Did Respondent Actually Fail to Implement Portions of Student's IEP?

The first issue is whether PISD actually failed to implement the portions of the IEP as Petitioner alleges. Petitioner did not prove that PISD failed to implement these portions of student's IEP. With regard to the accommodation of checking student's assignment notebook, Student's special education teacher testified to a regularly followed procedure for prompting Student to write in student's agenda and for checking to see if student had actually written in the agenda. The record also includes email correspondence between the teacher and Student's parents, during the relevant time frame, which indicates that the teacher checked Student's agenda and followed up by communicating assignments to Parents in case Student failed to write them in student's notebook. (*See for example*, R9: 20, 22). Student presented no evidence to counter student's teacher's testimony other than the blank agenda pages. The blank pages, however, do not necessarily establish that Student's teachers failed to check student's agenda; they could also reflect that Student had no homework or that student failed to record the homework. The evidence supports each of these alternative explanations. The time frame during which the agenda pages are relatively empty corresponds with a period of less homework and the teachers testified that Student refused, on occasion, to write student's assignments in student's agenda. Indeed, if Student wrote student's assignments in student's agenda on a regular basis with no exceptions, the ARD committee would not have needed to adopt a social skills objective designed to support and encourage Student's improvement in this area. Based on the totality of the evidence, I find that Petitioner failed to meet student's burden of showing that Respondent did not provide Student with the accommodation of checking student's assignment notebook during the relevant time frame.

With regard to the objective that Student write student's assignments independently in student's planner, Student's IEP reflects satisfactory progress toward that goal in March and June 2009, with ultimate mastery of the goal at *** in October 2009 during the fall semester of *** grade. Based on this progress data, I conclude that the District was making a good faith and successful effort to assist Student in achieving this important objective.

Thus, the evidence does not support Petitioner's contention that Respondent failed to implement the accommodation and objective in student's IEP pertaining to student's assignment notebook.

B) Was Any Failure To Implement Student's IEP A Substantial or Significant Failure To Provide Services Under the IEP?

Even if I were to find otherwise- that PISD staff failed to regularly provide the accommodation to Student of checking student's agenda or that PISD did not support Student in making progress toward student's goal of writing student's assignments in student's agenda – the conclusive evidence of Student's academic progress during student's *** grade years establishes that an educational benefit was conferred to Student under student's IEP. As such, any failure to implement student's IEP did not constitute a failure to implement a substantial or significant provision that was necessary for the Student's receipt of a free appropriate public education.

As set forth in detail in the Findings of Fact, Student made meaningful documented academic progress in all areas, such that student is currently performing at or above enrolled grade level in all instructional areas. I am mindful of Student's parents concern that student's failure of the *** grade TAKS tests in Reading and Science, coupled with student's *** grade teacher's finding that student had gaps in Reading when student began *** grade, support the conclusion that Student did not receive an

educational benefit under student's IEP. Despite Student's performance on the TAKS test and the IRI given by student's *** grade teacher, I am persuaded that the great weight of the evidence demonstrates meaningful academic advancement. Student's MAP scores in all subjects, including Reading and Science, as well as student's grades, document much more than trivial progress over the course of Student's *** grade years and demonstrate that Student is performing in the range of expected proficiency for student's enrolled grade level in all subjects. With regard to the TAKS test in both Reading and Science, Student missed a passing score by one question. More importantly, *** grade marked the first time that Student took the Reading TAKS on grade level. Even though Student received instruction in modified TEKS in Reading during *** grade, student still was able to come within one question of passing the TAKS in its unmodified form. Though Student's *** grade teacher testified that student started the year with some deficits in certain areas of reading, she also testified that student made substantial progress during the first semester and is currently performing on grade level in Reading. The most recent administration of Student's MAP test in Reading, completed in January 2010, revealed a 15 point increase from student's score in January 2009; an increase almost four times that which is expected of average general education students over the course of one year of instruction.

The evidence taken as a whole conclusively demonstrates that Student obtained a meaningful educational benefit under student's IEP. As such, any failure to implement portions of student's IEP, which might have occurred, cannot be deemed substantial or significant enough to constitute a material failure under *Bobby R.* that deprived Student of a free appropriate public education.

CONCLUSIONS OF LAW

1. Respondent PISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEIA and its implementing federal and state regulations. PISD is Student's resident district under IDEIA. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
2. As the party challenging the District's implementation of Student's IEP, Student bears the burden of proof in this action. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Van Duyn v. Baker School District 5J*, 481 F.3d 770 (9th Cir. 2007).
3. Petitioner failed to show a failure to implement all elements of student's IEP. Further, Petitioner made meaningful educational progress under student's IEP and the services student received in accordance with the provisions of IDEA. *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *writ denied*, 531 U.S. 817 (2000); 34 C.F.R. § 300.323; 19 T.A.C. § 89.1050; § 89.1075.

ORDER

After due consideration of the record, and the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED and **ENTERED** this 4th day of March 2010.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 067-SE-1109

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SYNOPSIS

Issue: Whether PISD failed to implement that portion of Student’s IEP pertaining to checking student’s agenda for homework assignments during the spring semester of student’s *** grade year.

Held: For Respondent. Student failed to show that PISD did not provide the accommodation of checking student’s assignment notebook. Further, Student failed to show that PISD did not make efforts to support Student in making progress on student’s related objective of independently writing student’s assignments in student’s assignment notebook. Even if Respondent did fail to provide the accommodations, Student has failed to show a material failure to implement student’s IEP in light of Student’s meaningful educational progress under the IEP.

Cite: *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *writ denied*, 531 U.S. 817 (2000); 34 C.F.R. § 300.323; 19 T.A.C. § 89.1050; § 89.1075.