

DOCKET NO. 173-SE-0220

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

v.

**NORTH EAST 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

Student, ***, by next friends Parent and Parent (collectively, Petitioner), brings this action against the North East Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations. The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) by failing to implement Student's Individualized Education Program (IEP) and Behavior Intervention Plan (BIP).

The Hearing Officer concludes the District provided Student a FAPE during the relevant time period, and implemented Student's IEP and BIP with fidelity.

II. PROCEDURAL HISTORY

A. Legal Representation

Petitioner was represented throughout this litigation by Petitioner's legal counsel, Jeremy Gilbreath with the Gilbreath Law Offices. Respondent was represented at the prehearing conferences by its legal counsel, Ricardo Lopez of Schulman, Lopez, Hoffer, and Adelstein, LLP.

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconference platform on November 4 and 5, 2020. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel, Jeremy Gilbreath. In addition, *** and ***, Student's parents, attended the hearing.

Respondent was represented by its legal counsel, Christopher Schulz, who was assisted by his co-counsel, Maia Levenson, both of Schulman, Lopez, Hoffer, and Adelstein, LLP. In addition, ***, the Executive Director of Special Education for the District, and ***, Critical Care Coordinator for Special Education Programs, attended the hearing as the party representatives. Both parties filed timely written closing briefs. The Decision in this case is due on January 8, 2021.

IV. ISSUES

A. Petitioner's Issues

Petitioner raises the following issues under the IDEA for decision:

FAPE

- Whether Respondent denied Student a FAPE during the relevant time period.
- Whether Respondent denied Student a FAPE by failing to implement and follow Student's IEP and BIP.

B. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations stated in Student's Complaint. Respondent also contends it provided Student a FAPE during the relevant time period, and Petitioner is not entitled to any of the relief requested.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. Compensatory education services;
2. Reimbursement for private education services provided by Student's parents;
3. Prospective private placement for Student; and
4. Training for District staff who work with Student.

VI. FINDINGS OF FACT

1. Student is a *** year-old child who attended *** in the District during the 2017-18 and 2018-19 school years. Student is eligible for special education services under the categories of Emotional Disturbance (ED), Other Health Impairment (OHI) due to Attention Deficit Hyperactivity Disorder, and Autism.¹
2. Student withdrew from the District on or about February ***, 2019, and has been homeschooled since that time.²
3. Student is able to stay on task and complete Student's work during structured time at school. Student is, however, often inattentive and disruptive during unstructured time. Student has difficulty with social interactions with peers, at times resulting in ***. Student struggles with emotional regulation, ***, resulting in ***, ***.³
4. Student has deficits in articulation and pragmatic language which have an adverse impact on Student's ability to effectively communicate. The District provided Student with ***-minute speech therapy sessions each *** week grading period through December 2018.⁴
5. Student's IEP included a goal to address *** and a goal to address situations that cause Student to become frustrated. Student received *** minutes per day in the *** classroom,

¹ Joint Stipulations of Fact (JSF); Joint Exhibit (JE) 3.

² Petitioner's Exhibit (PE) 3; PE 8; Transcript (TR) at 124 and 127.

³ JE 3 at 3 and 5; JE 7 at 3.

⁴ JE 3 at 2 and 12; JE 5 at 2.

*** minutes per day of social skills instruction, and spent the remainder of Student's school day in general education classes. Student received *** minutes per week of inclusion support in ***.⁵

6. Student had a BIP in place, which was last updated by Student's Admission, Review, and Dismissal (ARD) Committee on December ***, 2018. The BIP targeted ***, and called for intervention strategies of ***. The BIP advised District staff to *** to Student when Student is agitated. The BIP further indicated *** would be utilized when Student appeared ***. Student's IEP also called for the positive behavior intervention strategies of ***.⁶
7. As of October ***, 2018, Student made appropriate progress on Student's IEP goal related to *** and behaving more appropriately in the classroom. Student made limited progress on Student's IEP goal related to handling frustrating situations, and struggled with using problem-solving strategies when encountering a frustrating situation.⁷
8. On November ***, 2018, Student's ARD Committee met to discuss an incident ***. The ARD Committee added a *** class to Student's services, which is designed to assist students with individual behavioral challenges, and updated Student's IEP and BIP to address ***. Student's Mother informed the ARD Committee Student would need to be ***. The ARD Committee also discussed the District's ***.⁸
9. On December ***, 2018, Student's ARD Committee met for Student's annual meeting and to conduct a Review of Existing Evaluation Data. The Committee decided to remove Student's Speech Impairment eligibility and dismiss Student from direct speech therapy services due to progress on Student's speech goals. At Student's Mother's request, the Committee also decided to conduct additional evaluations in the areas of Autism and pragmatic language.⁹
10. Between the beginning of the 2018-19 school year and December ***, 2018, Student engaged in ***. Student ***. Student was ***.¹⁰
11. Student's Mother requested she be allowed to come to school to support Student in class when Student ***. She also requested Student not be sent home for ***, because she believed *** were a school avoidance strategy. The District discussed this request at an ARD Committee meeting on November ***, 2018, but declined the request, indicating it

⁵ JE 5 at 8 and 14; JE 3 at 6-8 and 12; JE 2 at 12.

⁶ JE 5 at 6 and 22-24.

⁷ JE 12.

⁸ JE 3 at 15-16; TR at 54 and 349-351.

⁹ JE 5 at 2, 17, 20; JE 7.

¹⁰ JE 5 at 3.

- was contrary to District policy related to ***. This policy requires the District to determine the credibility of ***.¹¹
12. For the fall semester of the 2018-19 school year, Student passed all of Student's classes, receiving ***.¹²
 13. During the 2018-19 school year, staff consistently implemented Student's IEP and BIP, regularly ***. Staff avoided *** to Student. District staff also ***.¹³
 14. On February ***, 2019, Student ***. While upset, Student ***. ***. Student then ***. Student's teachers called to request assistance from the *** teacher.¹⁴
 15. Before the *** teacher arrived, a school counselor arrived to take Student to her office. The counselor had received a report indicating that prior to ***. The counselor was attempting to implement the District's ***. ***. ***. ***. ***. ***.¹⁵
 16. ***.¹⁶
 17. ***. ***.¹⁷
 18. On February ***, 2019, District staff implemented Student's BIP and IEP. Attempted interventions included ***. District staff *** to Student, and instead ***.¹⁸
 19. On February ***, 2019, Student's ARD Committee determined Student met eligibility criteria as a student with Autism due to significant deficits in social interactions, social communication, and perspective taking. Student also exhibits ***. The District offered to continue providing services to Student as set forth in Student's IEP and BIP, but Student's Parents declined this offer, choosing to continue to home school Student.¹⁹

¹¹ JE 4 at 16; TR at 57-58.

¹² JE 15.

¹³ TR at 71-73 and 184-187.

¹⁴ PE 3; PE 4.

¹⁵ PE 3; PE 4.

¹⁶ PE 3; PE 4.

¹⁷ PE 2.

¹⁸ TR at 201-204 and 416-419.

¹⁹ JE 6 at 8 and 18; JE 8 at 22.

VII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education 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)(1)(A). The District has a duty to provide FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001. Here, Petitioner alleges the District violated its duty to provide Student a FAPE by failing to implement Student's IEP and BIP.

The 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).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.²⁰ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District failed to provide Student a FAPE *and* offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

²⁰ 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).

C. FAPE

The basic inquiry in this case is whether the IEP implemented by the District “was reasonably calculated to enable [Student] to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017). A school district must both adequately design a student’s IEP and adequately implement the IEP. *Rene J., as next friend of C.J. v. Houston Indep. Sch. Dist.*, 913 F.3d 523, 528 (5th Cir. 2019). In this case, Petitioner does not challenge the design of Student’s IEP. Instead, Petitioner challenges the District’s implementation of the IEP. In particular, Petitioner raised concerns about the implementation of Student’s IEP and BIP on February ***, 2019.

When determining whether a school district failed to adequately implement a student’s IEP, a Hearing Officer must determine whether a FAPE was denied by considering whether there was a significant or substantial failure to implement the IEP and whether there have been demonstrable academic and nonacademic benefits from the IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020).

1. Significant or Substantial Failure to Implement

Petitioner takes issue with the District’s implementation of Student’s IEP and BIP. To prevail on Petitioner’s claim, Petitioner must show more than a de minimis failure to implement all elements of Student’s IEP, and instead must demonstrate the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Student’s IEP contained a goal to address Student’s *** and a goal to address situations that caused Student frustration. To help Student achieve these goals, the IEP included *** minutes per day of instruction in the *** program, *** minutes per day of social skills instruction, and inclusion support in ***. The evidence showed the District consistently provided Student with the services outlined in Student’s IEP during the 2018-19 school year. Student received Student’s daily *** class and social skills instruction and was provided inclusion support in Student’s *** classes.

Student's BIP targeted ***, and called for intervention strategies of ***. Behavior intervention strategies for Student also included ***. The evidence showed that during the 2018-19 school year, District staff consistently implemented Student's BIP, regularly ***. District staff also ***.

Petitioner contends Student *** on February ***, 2019 as a result of the District's failure to implement Student's BIP. The evidence does not support this contention. Student struggled with emotional regulation and had a history of ***. Only three months prior to the February ***, 2019 incident, Student ***. The District thus quite appropriately took Student's *** seriously. When District staff received the report, they directly sought out Student to verify ***. District staff calmly requested that Student *** to have a private discussion with them, but Student refused all of these requests. The *** only intervened after multiple intervention efforts by staff were unsuccessful. A school district does not violate a student's BIP by merely requesting the assistance of *** when a student's behavior poses a substantial risk of serious injury to the student or others. *O.W. by Hannah W.*, 961 F.3d at 799. Here, Student's *** certainly posed a substantial risk of harm to Student in light of Student's emotional struggles and recent history ***. Moreover, when he intervened, *** acted in a manner consistent with Student's BIP by ***. During this conversation, Student clearly and directly communicated ***. Student then ***. The ***, having received a ***, took steps to have Student ***.

In this case, the District utilized positive behavioral interventions and supports when developing and implementing Student's IEP and BIP, as required under the IDEA. 34 C.F.R. § 300.324(a)(2)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012). Moreover, the District substantially implemented Student's IEP and BIP during the 2018-19 school year and, in particular, on February ***, 2019. *Bobby R.*, 200 F.3d at 349.

In addition, the District developed Student's IEP and BIP with input from Student's parents. 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 District held three ARD Committee meetings during the fall of the 2018-19 school year. During these meetings, Student's parents actively participated and

provided input into Student's program. The District adjusted Student's program to add *** to address behavioral concerns raised by both Student's parents and teachers. The District also agreed to conduct an Autism evaluation to address issues raised by Student's parents.

Student's Mother requested ***, and the District declined this request. The IDEA, however, 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). Here, the District appropriately rejected Student's Mother's request because it was inconsistent with District policy and an inappropriate response to Student's significant ***. 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.*

2. Demonstrable Academic Benefit

The evidence showed Student made demonstrable academic benefit during the 2018-19 school year. Student passed all of Student's classes, receiving ***. Student also made appropriate progress on Student's IEP goal related to ***. To address Student's lack of progress on Student's IEP goal related to dealing with frustrating situations, Student's ARD Committee added the *** class. Here, Petitioner presented no evidence to show Student failed to make demonstrable benefit.

3. Material Implementation Failure

A school district's failure to implement a material portion of an IEP violates the IDEA, but failure to perfectly execute an IEP does not amount to denial of FAPE. *M.N. v. Sch. Bd. of City of Virginia Beach*, 2018 WL 717005 (E.D. Va. 2018); *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011). At all times during the 2018-19 school year, including on February ***, 2019, the District implemented material portions of Student's IEP and BIP. *Id.*

Petitioner did not show the District denied Student a FAPE by failing to adequately implement Student's IEP and BIP. *O.W. by Hannah W.*, 961 F.3d at 796.

VIII. CONCLUSIONS OF LAW

1. Student was provided FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988.
2. Petitioner failed to meet Petitioner's burden of proof to show the District failed to provide Student with a FAPE *and* offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).
3. The District adequately implemented Student's IEP and BIP during the relevant time period. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

IX. ORDERS

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

SIGNED January 8, 2021.



Steve Elliot
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, § 2001.144(a)-(b).