

DOCKET NO. 217-SE-0320

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

v.

**ALIEF 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 friend Parent (collectively, Petitioner), brings this action against the Alief Independent School District (Respondent or School District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482 and its implementing state and federal regulations. The main issues in this case are whether the School District denied Student a Free, Appropriate Public Education (FAPE), and whether the School District failed to conduct a necessary behavior assessment of Student.

The Hearing Officer concludes the School District provided Student a FAPE, individualized a program reasonably calculated to meet Student's unique needs in light of Student's circumstances that provided educational benefit. The School District also ensured Student was educated in a safe and non-hostile educational environment, and conducted all necessary behavior assessments.

Petitioner's requested relief is therefore denied.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout the litigation by Student's parent, ***. The School District was represented throughout the litigation by its legal counsel, Erik Nichols with KBS Attorneys.

III. DUE PROCESS HEARING

The due process hearing was held on April 30, 2020. The hearing was conducted using the Zoom videoconferencing application, and recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's parent, ***.

Respondent continued to be represented by Erik Nichols, who was assisted by co-counsel, Arlisa Certain. ***, the Director of Special Education for the School District, also attended the hearing as the party representative. The parties filed timely written closing briefs. The Hearing Officer's Decision is due on June 15, 2020.

IV. ISSUES

A. Petitioner's Issues

Petitioner raised the following IDEA issues for decision:

FREE, APPROPRIATE PUBLIC EDUCATION

- Whether Respondent denied Student a FAPE by failing to ensure a safe and non-hostile educational environment.
- Whether Respondent denied Student a FAPE by failing to develop an appropriate Individual Education Program (IEP) and Behavior Intervention Plan (BIP).

EVALUATION

- Whether Respondent failed to conduct a necessary behavior assessment for Student.

B. Respondent's Legal Position and Additional Issues

1. Respondent entered a general denial to all claims raised by Petitioner.
2. Respondent specifically disputed the factual allegations made by Petitioner, as well as Petitioner's legal claims.
3. Respondent asserted the Hearing Officer lacks jurisdiction to hear Petitioner's sexual harassment, discrimination, and Title IX claims.

V. REQUESTED RELIEF**A. Petitioner's Requested Relief**

Petitioner seeks the following relief:

An order directing the School District to conduct a behavior assessment of Student.

B. Respondent's Requested Relief

Dismissal of all of Petitioner's claims arising under laws other than the IDEA. The hearing officer granted Respondent's request and dismissed all of Petitioner's non-IDEA claims in Order No. 2.

VI. FINDINGS OF FACT

1. Student is *** year-old *** grade student in the School District. Student is eligible for special education under the categories of *** and other health impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD).¹
2. Student has a short attention span, is impulsive, lacks self-control, becomes over-stimulated in play, and overreacts when faced with a problem. Student struggles to maintain attention to tasks requiring sustained mental effort, and experiences significant internal distress characterized by behavioral and mood symptoms. Student tends to evade others to

¹ Joint Exhibit (JE) 1, page (p.) 1; Petitioner's Exhibit (PE) 4, p. 1.

- avoid social contact. Student does not recover from setbacks as easily as Student's same-age peers, and lacks the social skills to work well with others in groups. Student is easily upset when encountering environmental changes, and reacts negatively to changes in everyday activities or routines. Student is argumentative, defies requests from adults, and has poor anger control. Student worries about what other people think of Student and fears others mocking Student. Student generally feels sad or misunderstood and experiences an excessive amount of worry and nervousness.²
3. Student exhibits verbal and physical aggression at school, and leaves Student's assigned area without permission. Student performs best with high levels of positive reinforcement and limited verbalization when correction is needed. Student benefits from structure, routine, and organization in an educational setting.³
 4. Student attends *** campus in the School District and receives services through the *** program. The *** program is designed for students with ***, and provides a small student/teacher ratio, increased time to master IEP goals and other tasks, and close supervision. In this program, Student is expected to have improved behavior because Student will experience greater academic success and less frustration. Student attends a general education *** class, as well as general education ***, including ***, ***, ***, and ***.⁴
 5. The School District completed a Functional Behavior Assessment (FBA) of Student on September ***, 2019. The evaluator identified Student's inappropriate behavior as noncompliance more than five times per week, six to ten incidents of physical aggression toward adults per week, and leaving an assigned area six to eight times per week. Student engaged in the identified behaviors to gain control or power, and to acquire desired tangible items.⁵
 6. The School District developed and implemented a BIP for Student, which was most recently updated on January ***, 2020. The BIP targets physical aggression, work refusal, and leaving the classroom without permission, and includes the following strategies for staff to utilize when responding to Student's target behaviors: scheduled breaks; positive feedback for meeting expectations; opportunities to earn preferred activities or items; private discussion; and reminders about consequences. During the 2019-20 school year, Student consistently met the goals related to Student's BIP, and significantly reduced physical aggression and the number of times Student leaves the classroom without permission.⁶

² JE 17, p. 3, 5-7, and 14.

³ JE 2, p. 2; JE 7; PE 4, p. 2.

⁴ PE 4, p. 6; JE 9, p. 6-7.

⁵ JE 10.

⁶ JE 16; JE 12, p. 10.

7. The School District provides a combination of individual, group, and collaborative classroom-based counseling services for Student to help improve interpersonal relationships with peers, help manage negative emotions, and teach coping and problem solving strategies for managing frustrating and stressful situations. Student receives *** counseling sessions each *** week grading period.⁷
8. Student formed friendships with other students, assisting peers with their school work, and playing with them ***. Prior to January ***, 2020, Student's behavior improved, and Student received very few disciplinary referrals during the 2019-20 school year.⁸
9. Student's Admission, Review, and Dismissal (ARD) Committee met on September ***, 2019. The Committee recommended the *** Program on a general education *** campus in the School District. The Committee recommended special education bus transportation to this program, which is located on a campus other than Student's home campus. Student's Mother agreed with the ARD Committee's recommendations, including the proposed placement.⁹
10. On October ***, 2019, Student's ARD Committee met and added *** minute per week sessions of accelerated instruction in the areas of reading and math to address Student's below standard State of Texas Academic Achievement and Readiness (STAAR) test results.¹⁰
11. The ARD Committee met on January ***, 2020. At this meeting, Student's Mother requested an updated BIP to reflect Student's improved behavior. The School District agreed to conduct an FBA in order to update Student's BIP. At this meeting, the ARD committee also agreed Student would attend general education ***.¹¹
12. On January *** and ***, 2020, Student ***, violating the School District's Student Code of Conduct. These incidents involved Student ***. ***. ***. On January ***, 2020, the *** did not notice Student's inappropriate conduct, but it was later identified by review of *** video. On January ***, 2020, a *** noticed and reported Student's inappropriate behavior, which was later confirmed by review of the video. The School District suspended Student for *** days for these violations of the Student Code of Conduct.¹²

⁷ JE 9, p. 4-6.

⁸ Transcript (TR) at 56-57 and 109-110.

⁹ JE 9, p. 14.

¹⁰ JE 11.

¹¹ PE 4, p. 10; JE 12, p. 10.

¹² TR at 44-45, 146 and 178-180; PE 6; PE 8.

13. Following the incidents ***, Student resisted attending school, and expressed anxiety about doing so. Student's Mother kept Student home from school *** after learning of the incidents.¹³
14. When Student returned to school, the School District moved Student to a different *** classroom on the same campus, ***. Student remained in the alternate *** classroom for *** weeks, and then returned to the original *** classroom. The School District investigated a claim *** was bullying Student, but found no evidence of bullying.¹⁴
15. The School District terminated *** who failed to properly supervise Student *** on January ***, 2020.¹⁵
16. Student's ARD Committee met on January ***, 2020. At this meeting, Student's Mother requested an independent FBA, withdrawing her request for an FBA conducted by the School District. She also requested the School District provide homebound services.¹⁶
17. Student's physician refused to certify that Student required homebound education services. Student's Mother then returned Student to school. When the coronavirus caused closure of all schools in Texas in April 2020, Student received home-based educational services from the School District.¹⁷
18. As of the date of the due process hearing, Student was receiving passing grades in all of Student's classes for the 2019-20 school year.¹⁸

VII. DISCUSSION

A. Duty to Provide a Free, Appropriate Public Education

The School District has a duty to provide a FAPE to all resident children with disabilities ages 3-21. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). Petitioner alleges the School District failed to provide a FAPE to Student, and specifically alleges the School District failed to develop an appropriate IEP and BIP for Student, and failed to ensure a safe and non-hostile

¹³ TR at 69, 107, and 112.

¹⁴ TR at 46, 149-150, and 156.

¹⁵ JE 19, p. 1; TR at 185.

¹⁶ PE 2, p. 1; JE 15; TR at 103.

¹⁷ TR at 111.

¹⁸ PE 5.

educational environment. Petitioner contends these failings led to a denial of Student's right to a FAPE.

The IDEA's purpose is to ensure 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). The School District must provide 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). Petitioner alleges the School District failed to provide Student with specialized instruction to meet Student's unique needs, and, as a result, Student did not receive educational benefit.

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.¹⁹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The School District was obligated to provide Student with a FAPE during the 2019-20 school year, *and* to offer a program reasonably calculated to provide the requisite educational benefit. However, Petitioner has the burden of proof to show the School District failed in its obligations to Student. *Id.*

C. FAPE Analysis

1. The Four Factors Test

¹⁹ 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).

The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program provides a FAPE to a student. To determine whether the School District met its obligation to provide Student a FAPE, the following factors must be analyzed:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Whether the student demonstrates positive academic and non-academic benefits. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997); *E.R. by E.R. v. Spring Branch Independent School District*, 909 F.3d 754, 765 (5th Cir. 2018).

These four factors need not be accorded any particular weight, nor applied in a particular way. Instead, they are merely indicators of an appropriate program, and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

2. Individualized on the Basis of Assessment and Performance

Petitioner contends the School District failed to develop an appropriate IEP and BIP for Student. The School District's obligation when developing Student's IEP and BIP is to consider Student's strengths, Student's Mother's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. 300.320(a)(1)(i). For Student, whose behavior impedes Student's learning and that of others, the School District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i).

The School District was also obligated to have an IEP in effect for Student at the beginning of the school year. An IEP is more than simply a written statement of annual goals and objectives

and how they will be measured. Rather, Student's IEP must include a description of the related services, supplementary supports and services, instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the School District must nevertheless provide Student with a meaningful educational benefit, and one likely to produce progress, not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP and BIP implemented by the School District were individualized based upon Student's assessment and performance and "reasonably calculated to enable [Student] to make progress appropriate in light of Student's unique circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017).

The School District based Student's program on the 2018 FIE and input from Student's Mother. To address Student's behavior, the School District conducted a FBA to determine the nature, frequency, and impact of the behaviors. The School District utilized the FBA to develop a BIP targeting Student's noncompliance, physical aggression, and leaving class without permission. The BIP contained goals for improving the targeted behaviors and positive strategies for staff to employ.

The School District convened Student's ARD Committee at the beginning of the 2019-20 school year to develop and IEP, program, and placement for Student. The ARD Committee placed Student in the *** program, providing Student with a small student/teacher ratio, increased time to master IEP goals, increased time to master tasks, and close supervision. The *** program is designed to improve the behavior of children with ***, like Student, by allowing students to experience greater academic success and less frustration. Student's program also provided counseling to help improve Student's interpersonal relationships with peers, to help manage Student's negative emotions, and teach Student coping and problem solving strategies for managing frustrating and stressful situations. The School District's program addressed Student's identified need for high levels of positive reinforcement and limited verbalization when correction is needed, as well as structure, routine, and organization in an educational setting. In sum, the

School District developed an IEP, BIP, and placement to address Student's needs and provided a program reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Andrew F.*, 137 S. Ct. at 999.

3. Least Restrictive Environment

The IDEA requires that a student with a disability be educated with non-disabled peers to the maximum extent appropriate. Special classes, separate schooling, and other removal from the regular education environment may occur only if the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment (LRE) requirement." 34 C.F.R. § 300.114(a)(2)(i)(ii). A determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, needs and abilities, and the school district's response to those needs. *Id.*

At school, Student is frequently noncompliant, physically aggressive, and prone to leave Student's assigned area without permission. Student requires a setting with high levels of positive reinforcement, and limited feedback when correction is needed. Student also needs structure, routine, and organization. Student is unable to be educated solely in general education classes, because of Student's behavioral challenges and need for a smaller student to teacher ratio where more frequent reinforcement can take place.

Student attends general education classes for *** and *** and the ARD Committee recently added the additional general education class of ***. With Student's Mother's consent, Student is placed a majority of the school day in the self-contained *** program where Student receives the structure, routine, and frequent reinforcement Student requires. The School District's program and placement for Student represent Student's LRE.

4. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

The evidence showed the School District convened multiple ARD Committee meetings to develop and modify Student's IEP and program during the 2019-20 school year. Student's Mother was an active participant in the meetings, with her input reflected in Student's program. The School District utilized a behavior specialist to conduct an FBA, leading to a BIP designed to address Student's behavioral challenges. The ARD Committee, including Student's Mother, agreed the *** program was the most appropriate setting. When Student's behavior showed significant improvement, the School District reconvened Student's ARD committee at Student's Mother's request, to change the BIP and add *** as a general education class. The evidence clearly shows Student's program was developed in a coordinated and collaborative manner with the key stakeholders.

5. Academic and Non-Academic Benefits

The IDEA does not require a student's IEP guarantee a certain level of accomplishment. An IEP must instead be reasonably calculated to meet a student's educational needs given Student's unique circumstances. *Andrew F.*, 137 S. Ct. at 999. A school district is not required to provide a student the best possible education, and improvement in every academic and non-academic area is not required to receive an educational benefit. The issue is not whether the school district could have done more, but whether the student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.* 582 F. 3d 576, 590 (5th Cir. 2009). Whether a student demonstrates positive academic and non-academic benefits is one of the most critical factors in the FAPE analysis. *Renee J. v. Houston Indep. Sch. Dist.*, 913 F.3d 523, 529 (5th Cir. 2019).

In this case, Student made both academic and non-academic progress during the 2019-20 school year. Student received passing grades ***, and could focus without distractions on academics while in the *** program. In addition, Student significantly reduced the behaviors of physical aggression and leaving the classroom without permission, and had positive social interactions with peers. The weight of the credible evidence showed Student made academic and non-academic progress during the 2019-20 school year.

D. Bullying as a Denial of FAPE

Petitioner alleges Student was a victim of bullying at school. Specifically, Petitioner contends Student was bullied ***. 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>).

Petitioner failed to establish Student was a victim of bullying. The evidence supports the conclusion Student's *** was not the result of bullying. In addition, there was no evidence presented to indicate *** bullied Student at other times at school. In fact, the evidence demonstrated Student had positive relationships with peers at school, and was not subject to unwanted, aggressive behavior from other students.

Even if Petitioner had shown bullying took place, there also needs to be evidence the School District failed to stop the bullying leading to a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013). Petitioner would need to show the bullying resulted in the Student failing to receive meaningful educational benefit. 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).

In this case, the School District, immediately upon receiving the bullying complaint from Student's Mother, took reasonable steps to address the allegation. The School District conducted a bullying investigation, concluding Student was not a victim of bullying. Furthermore, the School District took the precautionary step of temporarily moving Student out of the classroom with the alleged bully. The School District also terminated *** who failed to properly supervise Student

*** on January ***, 2020. Moreover, Student made academic and non-academic progress during the 2019-20 school year, and was provided a FAPE.

Petitioner failed to meet Petitioner's burden to prove the School District denied Student a FAPE by either failing to develop an appropriate IEP and BIP, or failing to ensure a safe and non-hostile education environment during the 2019-20 school year. *Schaffer*, 546 U.S. at 62.

E. Behavior Evaluation of Student

Student's Mother alleges the School District failed to conduct a necessary behavior evaluation of Student. The allegation arises from her January ***, 2020 request for an updated BIP. The School District must ensure Student is assessed in all areas related to Student's suspected disability including, and if appropriate, Student's social and emotional status. 34 C.F.R. § 300.304(c)(4). Before a school district can conduct an evaluation, a parent must provide consent for the evaluation. 34 C.F.R. § 300.300.

The School District agreed to update Student's FBA in response to Student's Mother's request to update the BIP to reflect Student's improved behavior. However, Student's Mother later withdrew her request for an FBA, and her written consent was never provided for the evaluation. 34 C.F.R. § 300.300. In addition, Student's academic and non-academic success under Student's 2019-20 IEP and program reflected no need for further evaluations. Therefore, because Student's Mother did not consent, and Student's needs did not dictate, the School District did not fail to conduct a necessary behavior evaluation. 34 C.F.R. § 300.304(c)(4).

VIII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proof as the party challenging a student's IEP and educational placement. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. Student was provided a FAPE during the relevant time period. Student's IEPs for the 2019-2020 school year were appropriately ambitious and reasonably calculated to meet Student's needs in light of Student's unique circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.

Ct. 988 (2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

3. The School District conducted necessary evaluations of Student as required under the IDEA. 34 C.F.R. § 300.304.
4. All of Petitioner's claims arising under any laws other than IDEA are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503(a); 300.507, 19 Tex. Admin. Code § 89.1151(a).

IX. ORDERS

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

SIGNED June 15, 2020.



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).