

DOCKET NO. 001-SE-0916

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

FINAL DECISION

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

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

I. PROCEDURAL HISTORY

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

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

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

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

On February 17, 2017, a Fourth Continuance was granted in Order No. 8 extending the hearing dates from February-20, 2017 to May 24, 2017, and extended the Decision Due Date to June 2, 2017.

The District filed a Motion to Exclude Witnesses and Documents on April 24, 2017. Both parties participated in a telephone conference regarding the matter on April 28, 2017. The District urged that Petitioner failed to timely disclose two expert witnesses and to timely produce several documents before the Disclosure Deadline. After finding the motion had merit and admonishing Petitioner for procedural noncompliance, the Hearing Officer presented the District several options

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

At the conclusion of the hearing, the District moved for an extension of the closing briefing deadline and the decision due date to afford the Parties time to write their closing briefs

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

B. Proposed Remedies

Petitioner requested that the Hearing Officer order the following relief:

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

C. Burden of Proof

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

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

### III. FINDINGS OF FACT

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

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20. During the 2015~~2016~~ school year Parents became concerned with Student's increased \*\*\* at home. During this school year Student's in-school behavior dramatically improved but Student's \*\*\* at home escalated.<sup>21</sup> During October and November 2015 the \*\*\* of Student's \*\*\* at home escalated even further Parents reported \*\*\* this time period. The \*\*\* at home typically included \*\*\*. \*\*\*.<sup>23</sup>
21. \*\*\*. \*\*\*. <sup>24</sup>
22. While \*\*\* in November 2015, Student was diagnosed with Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), \*\*\*\*(\*\*), and \*\*\* (\*\*\*) .<sup>25</sup>
23. Student's most recent three year reevaluation is dated December 2013, and a new IEP was devised on the same date.<sup>26</sup>
24. Student's most recent Functional Behavior Assessment (FBA) was completed on November \*\*, 2015, and was incorporated into the Behavior Intervention Plan (BIP) contained in the December \*\*, 2015, IEP. The BIP targeted one behavior the incapacity to understand or follow school rules.<sup>27</sup>
25. Student's December \*\*, 2015 IEP lists behavior as a "strength:"

[Student] is able to follow the District code of conduct. [Student] this entire school year of 2015-2016 has had appropriate interactions with [Student's] 1t-2(')m [d.m



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

28.

After completing her evaluation, the LSE  
 PA



42. On January \*\*\*, 2016, Student underwent a neuropsychological evaluation performed by a board certified adult and child neurologist. The findings of the

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

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

Issue III:

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

#### IV. APPLICABLE LAW AND DISCUSSION

##### A. Statutory Overview and FAPE

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

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

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





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

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

The clinical criteria for diagnosing an a



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

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

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

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

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

<sup>73</sup> Tr. at 148, 157, 163, 164, 167,

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

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

<sup>76</sup> 34 C.F.R. § 300.310(a) (Observation of academic and behavior performance is observed in the child's learning environment); Q.W. v. Board of Educ. of Fayette County, 630 Fed.Appx. 580, 66 IDELR 212 (6th Cir. 2015, unpublished), cert. denied, 136 S. Ct. 1729 (2016) (holding This Court notes that, absent a statutory directive to the contrary, the term "educational performance" should be given its ordinary meaning. See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 54 U.S. 246, 252 (2004). Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.). And taken at face value, the term "educational performance" suggests school-based evaluation. This interpretation finds support in the IDEA's emphasis on classroom curricula and observation. See 34 C.F.R. § 300.1414(c)(1). Thus, as the Hearing Officer found, 34 C.F.R. § 300.78(a)-7.8(r)ug O 47.8(a7.8(m)20.9( )-7.8(r)ug O).021 [(v).8(j) 0.00.3(.

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

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

Observation of Student during the December 2015 reevaluation was appropriately limited to observations in the school setting. The District was not required to devise behavioral interventions for Student at home when Student (r)3(ve)4(nt)2(s)-1(odi)-2(de)(i)-2((e)e)(i)-2((e)ed(qui

needs Burlington Sch. Comm. V. Massachusetts Dep Educ., 471 U.S. 359, 105 S.Ct. 1996 (1985).

The IEP must also describe the special education and related services tghe105 Sddj 0.0006 Tc



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

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

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

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

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

<sup>88</sup> Tr. at 448, 461, 489.

<sup>89</sup> Compare RE-11 at 713 with RE-9, Notes 414, supra.

## V. CONCLUSIONS OF LAW

1. The District is a local education agency (LEA) responsible for complying with the IDEA

## VI. ORDER

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

The Hearing Officer DENIES~~S~~Petitioner's requested relief.

SIGNED July 13, 2017.

## NOTICE TO THE PARTIES

This Decision of the hearing officer is a final and appealable ~~order~~ <sup>by</sup> party aggrieved by the findings and decision made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.<sup>90</sup>

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