DOCKET NO. 180-SE-0219

STUDENT, B/N/F PARENT and PARENT, Petitioner	§	BEFORE A SPECIAL EDUCATION
v.	§	HEARING OFFICER FOR
FRISCO INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner,

The hearing officer concludes Student received FAPE from the School District during the relevant time period and is therefore not entitled to a reimbursement for private school expenses at school district expense.

II. PROCEDURAL HISTORY

A. Legal Representatives

Student was represented throughout this litigation by Student's legal counsel Roy Atwood with Atwood Gameros. The School District was represented throughout this litigation by its legal

V. REQUESTED RELIEF

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lasted a few seconds.[30]

14. At the end of ***, Student received all As in Student's classes.[31] Student's reading, writing, and math skills were on or above grade level and continue to be so.[32]

15. On March ***, 2018, Student was upset in *** classroom. Student *** . *** . Student was asked if Student needed a break and Student refused. The school counselor and the principal were called to the room. ***. ***. ***. ***.[33]

16. On March ***, 2018, Student had an incident in ***. Student was upset ***. ***. ***. ***. After Student calmed down Student understood Student's behavior was wrong, ***, and then went back to class.[34]

17. The School District held Student's initial Admission, Review, and Dismissal (ARD) Committee meeting on March ***, 2018.[35] Student qualified for special education services due to Autism.[36] The Individual Education Plan (IEP) included present levels of academic achievement and functional performance (PLAAFPs). It also included social skills goal of o when experiencing heightened emotions Student will utilize an appropriate coping skill to de-escalate, in 7 out of 10 observations over a grading period. The special education teacher and general education teacher were to implement this goal. Student's progress on this goal was to be reported concurrent with report cards. Student's progress was to be measured using data and anecdotal notes, discipline records, and teacher observation.[37] The ARD committee was to make a determination on developing a Functional Behavior Assessment (FBA) after data was collected.[38]

18. Teachers were going to collect ABC (Antecedent, Behavior, Consequence) data with the goal of decreasing physical behaviors and eventually other behaviors.[39] The special education teacher for Spring 2018 was trained on how to collect the data by the School District's Licensed Specialist in School Psychology (LSSP) and then the special education teacher trained the other teachers on data collection.[40] *** were put in Student's IEP to

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[30] Transcript Volume II at 456-62. (referred to hereafter as T ___ at ___).

[31] JE 23 at 10.

[32] JE 9 at 8.

[33] RE 8 at 12, 13.

[34] RE 8 at 18.

[35] JE 8 at 1.

[36] JE 8 at 3.

[37] JE 8 at 7.

[38] JE 8 at 9.

[39] RE 8 at 16.

[40] T II at 613.

provide behavior supports to Student and address the behaviors Student was exhibiting.[41] Student's teachers recorded Student's behaviors on a daily point sheet.[42] Student carried a notebook to each class or activity with Student's point sheet on it for teachers to record Student's compliance or behaviors.[43]

19. Student's initial IEP had the following curriculum accommodations: frequent breaks; opportunity to respond orally; ***; allow access to sensory items; behavior feedback discussed privately; allow for enrichment opportunities when grade-level work is completed; allow access to computer to produce written assignments; allow alternative seating in the classroom; preferential seating during assemblies; ***; provide additional support ;D 45 ;D 45 ; [(-12(y)20l)-11.9( )(p -0.004 Tc()-15(t)-6(04 Tc 0.174 TwO6(n-8(r)5e4

and refused.[99] ***. ***. ***. [100]

41. Student's *** in late October 2018.[101] On November ***, 2018, Parent emailed teacher and notified her parents were in the process of *** they had *** and found it was causing more agitation and irritability. The Parents wanted to wait until all of Student's *** was completed to finalize the ***.[102]

42. The teacher noticed in November 2018 Student was frustrated more easily and she was not able to get Student to calm down as easily with the cooldown procedures as she was previously.[103]

43. On November ***, 2018, Student was restrained ***, ***.[104] Student was frustrated *** ***. During Student's escalation, Student's *** teacher attempted to use cooldown techniques, offered Student a break, and called the *** teacher to the room as part of the IEP accommodations. ***. [105]

44. Student continued to escalate ***. During the entire incident, teachers and staff followed Student's IEP by offering breaks, meetings with preferred teachers, offering sensory items and each time Student refused to utilize the technique.[106] ***.

45. Once Student was with the counselor, Student worked through why the incident occurred to process Student's emotions. Student was allowed ***, which is one of Student's coping strategies. Student was offered the opportunity to ***, Student refused multiple times. Student did eventually ***.[107]

46. Student's *** teacher requested a removal of Student from her class in accordance with Texas Education Code 37.002(b) in December ***, 2018.[108] An agreement was made at the December ***, 2018 ARD meeting to allow Student to stay in the classroom until the end of the semester so Student could adjust to the new plan over winter break.[109] On December ***, 2018, the *** teacher asked again for Student's immediate removal from

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[99] *** 62.

[100] T I at 302-03.

[101] RE 17 at 10.

[102] RE 5 at 33.

[103] T I at 304.

[104] *** 53, 54, 55.

[105] T I at 305, 306.

[106] *** 58.

[107] *** 63.

[108] RE 8 at 84; T I at 133.

[109] T I 26-27.

her classroom.[110]

47. On December ***, 2018, the School District's Speech Language Pathologist (SLP), LSSP, and *** teacher provided training to teachers and staff on how to meet Student's unique needs. The plan was after the initial training the team would meet again during winter break of 2018 and then weekly.[111]

48. In December 2018, Student began having a hard time completing Student's work. Student would say things like "***" or " ***".[112]

49. On December ***, 2018, ***. ***. The teacher gave Student space and Student seemed to calm down. ***. ***. ***. ***. Once Student calmed down, ***.[113]

50. On December ***, 2018, ***. The *** teacher offered a coping strategy, Student refused and continued to escalate. The *** teacher was called because Student was continuing to bother the other student. Student agreed to take a break with the counselor. Once Student returned to class Student ***. Student was offered a coping strategy, refused, *** Student was offered another coping strategy and refused. The *** teacher was called. Student escalated and ***. ***. ***. ***.[114]

51. Student was offered a break with the counselor or time with the principal and Student refused. ***. ***. ***. ***. ***. ***. ***. ***. ***. The teacher offered coping strategies and Student refused. The *** teacher was called. Student was offered a break with the counselor and Student took it.[115]

52. ***. During the winter break, parents asked the *** to see if it was necessary.[116]

53. On December ***, 2018, Student had difficulties in various classes. In ***, Student wanted to ***. In reading, Student did not want to do the class activity. In ***. During English, Student ***. In music, Student ***.[117]

54. On December ***, 2018, Student's parents notified the School District of their inte [(In)-3( )]TJ 0 Tc

failing.[130]

59. During the fall semester of the 2018-19 school year, Student's *** teacher, *** teacher, and staff implemented Student's IEP. During sensory breaks Student was allowed to access many different choices such as ***. Student often would do one sensory break for a short time and then decline any more. Student chose to use Student's ***.[131]

60. Parent complimented Student's *** teacher on how well she navigated Student's needs.[132]

61. Student's *** teacher was in frequent email contact with the parents.[133] She would inform the parents of Student's behaviors and frustrations when Student had them and how she handled these behaviors. She would also inform parents of the joy she had educating Student, how "extremely intellectual" and "sweet" Student was. The *** teacher regularly allowed Student to go to the *** teacher's classroom, the *** teacher's would be called to the teacher's classroom.[134] If Student had a bad day, the teacher would call or email parents to inform them of it.[135]

time teachers and assistant.[151] Every Student at *** has some type of learning disability.[152] The school uses the Texas TEKS.[153] The school has reduced Student's academic rigor until Student expresses through Student's behavior Student is ready to move on.[154]

71. At the beginning of Student's time at ***, Student did not attend full days. Student had a one-on-one aide as needed, which was provided by the parents.[155] Student does not attend ***.[156] Student observes *** and discusses a plan with the teacher for how Student may handle *** in the future.[157] During Student's time at ***, Student has ***.[158] Student was ***. Student has been restrained a couple of times to move Student to another room.[159] When Student has behavior issues lasting longer than 30 minutes, parents are called to pick Student up and take Student home.[160]

72. Student ***.[161] The *** is a registered behavioral therapist (RBT), which was an additional support for Student and an interventionist.[162]

73. Since being at *** Student's self-esteem and attitude has improved.[163] Student is relearning ***. Student is relearning how to focus on instruction and sustain Student's attention without becoming frustrated or ***.[164]

VII. DISCUSSION

A. Statute of Limitations

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[151] T II at 523.

[152] T II at 501-02.

[153] T II at 537.

[154] T II at 541-42.

[155] T I at 158.

[156] T II at 527-528.

[157] T II at 528-29.

[158] T II at 532.

[159] T II at 534.

[160] T II at 691.

[161] RE 18 at 22, T II at 374, 375.

[162] T II at 374-75.

[163] T II at 375.

[164] T II at 376.

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 (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 Student or she knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex.o y0.006 Tc -0.l8duci;IoS.Rex.0(y)3

Therefore, to the extent Petitioner raises claims under laws other than the IDEA, those claims shall be dismissed as outside the jurisdiction of the hearing officer, including specifically claims under Section 504 of the Rehabilitation Act of 1974.

C. 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 (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 has a duty to provide 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).

The 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).

D. Burden of Proof

In addition, Petitioner seeks continued placement at ***'s School District expense. The burden of proof is on Petitioner to show the proposed placement of the School District is not appropriate and that continued placement at *** is appropriate. Burlington Sch. Committee v. Dept. of Educ., 471 U.S. 359, 370 (1985)

E. FAPE

The Four Factors Test

The Fifth Circuit has articulated a four factor test to determine whether a Texas district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and
- Positive academic and non-academic benefits are demonstrated. Cypress Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any 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).

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the

accommodations. The only completely new prevention was to create and implement a preventive plan to remove Student to a safe place prior to escalation. While this was not listed in Student's original accommodations Student's *** teacher attempted to do this as explained by her testimony that she tried to stay ahead of Student's frustrations. If she knew a particular assignment may cause Student stress, she would *** to Student had ***.

2. Implementation

Special education and related services must be provided in conformity with a child's IEP. 20 U.S.C.1401(9); Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988, 994, 197 L.Ed.2d 335 (2017). A school district's lack of implementation denies a child a FAPE if it amounts to a substantial failure to provide the IEP services. HISD v. Bobby R., 200 F. 3d 341, 348-349 (5th Cir. 2000). A material failure is one that is more than a minor discrepancy between the services provided and the services required by an IEP. Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). A school district's failure to implement those parts of a child's IEP designed to assist a child with behavioral issues can be a material failure. See Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003).

Student's IEP was implemented by Student's general education teacher, Student's special education teacher, and the School District staff. The School District implemented each accommodation across settings. Student's *** teacher gave thorough testimony of how she implemented every accommodation. She allowed enrichment opportunities when Student was finished with grade-level work, Student was allowed to move around in the classroom as Student needed, Student had built in sensory breaks during class and access to sensory items while in the classroom and in the ***. Student was consistently told before changes in activities and even if the *** teacher was going to miss school. Student was allowed access to a Chromebook for writing assignments and was not penalized for poor penmanship. Student had *** ***. When Student was frustrated or Student's behavior began to escalate, Student was offered breaks in an effort to reduce the frustration.

Petitioner argues the School District did not act in a preventive way, but rather a reactive

Student made all As in Student's classes and was **** at Student's school. Student was successful in academics and was at or above grade level in all of Student's classes.

Appropriate behavioral interventions are an important component of FAPE. A need for special education and related services is not limited to academics, but includes behavioral progress and learning appropriate social skills. Venus Ind. Sch. Dist. v. Daniel D., 36 IDELR 185 (2002). Student's behavior progress began to decline in November and December 2018. This decline in behavior coincided with ****. The School District was planning on addressing this decline in the proposed IEP from January 2019. The BIP the School District developed was not implemented due to Student's withdrawal from the School District. Student did not attend the **** program either. A school district is allowed to change a Student's program without it being a denial of FAPE. Otherwise, the result would be any suggested change in a Student's program would be an automatic admission of denying FAPE to a student.

Student was provided FAPE by the School District. The courts have never specified the four factors must be considered or weighed in any particular way. Richardson Indep. Sch. Dist. v. Michael Z., 580 F. 3d 286, 293 (5th Cir. 2009). The whole educational experience, and its adaptation to confer "benefits" on the child, is the ultimate statutory goal. Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 397 (5th Cir. 2012).

Student's IEPs for the Spring of the 2017-2018 school year, the Fall of the 2018-2019 school year and the proposed IEP for the Spring of the 2018-

Committee v. Dept. of Educ., 471 U.S. 359, 370 (1985); Florence Cnty. v. Carter, 510 U.S.7 (1993).

In this case, I have concluded the School District's program and proposed placement in the *** program were appropriate and provided Student with FAPE in the least restrictive environment. Student made meaningful educational progress and was educated with disabled peers to the maximum extent appropriate. 34 C.F.R. §300.114. Therefore, there is no need to consider whether Student met the second prong of the private placement test.

VIII. CONCLUSIONS OF LAW

1. Student was provided FAPE during the relevant time period and Student's IEP's was