

DOCKET NO. 228-SE-0518

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

v.

HOUSTON INDEPENDENT SCHOOL
DISTRICT,
Respondent

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BEFORE A SPECIAL EDUCATION

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Child Left Behind Act (NCLBA), Section 1983 of the Civil Rights Act of 1964, and Title VI of the Civil Rights Act of 1964.

B. Respondent's Legal Position and Additional Issues

Respondent contends that Student was provided FAPE with an appropriate placement in general education classes because Student was performing with grade level work

The school district raised the following additional issues:

1. Whether the school district's Full Initial Evaluation (FIE) is an appropriate assessment and whether the Student is entitled to an Independent Educational Evaluation (IEE) or Functional Behavioral Assessment (FBA) at school district expense.
2. Whether the hearing officer should enter an order overriding the refusal of parents to consent to a new FIE in all areas of suspected disability and whether parents should be ordered to produce Petitioner for evaluation.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. The hearing officer determine the Student was denied FAPE.
- 2.

B. Respondent's Requested Relief

1. Dismiss any claims arising outside the one ~~year~~ ~~statute~~ of limitations rule as applied in Texas;
2. A finding that the school district timely and appropriately identified, evaluated and provided educational services to Petitioner ~~and~~
3. An order overriding parents' refusal to consent to reevaluation.

VI. STATUTE OF LIMITATIONS

Petitioner limited the relevant ~~time~~ period for the Complaint to ~~May~~ 2017 through the proposed IEP for the 201~~8~~2019 school year. The Complaint was filed in May of 2018. Therefore, the time period falls ~~within~~ the one year statute of limitations period as applied in Texas.

VII. CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

All of Petitioner's claims arising under law other than the IDEA ~~are~~ dismissed for want of jurisdiction on May 30, 2018, in Order No. 2.

VIII. FINDINGS OF FACT

1. Student is *** years old and eligible for special education services from the school district as a student with Autism.

3. Student has struggled with socializing with peers, misreading social situations leading to

settings.¹⁸ It recommended direct instruction in pragmatics and social skills, a structured environment with clear limits, praise when appropriate behavior is shown, and participation in social skills groups with peers should be provided to Student.¹⁸ It also concluded Student's pragmatic language should be addressed across settings in structured and non-structured situations.²⁰

8. As a *** grader, student was placed in the (***) class.²¹ The

15. The Achievement/Development/Functional Section of the evaluation ~~data~~ data from state assessments ~~is~~

being put down or made fun of and pretending.⁵¹ Student has difficulty in abstract thinking, Students rigid and concrete in Students thinking.⁵²

20.

24. The 2011–2018 BSIPs stated Student will ***. Student does it one to two times per week. Student will do it during any activity. Sometimes***.

“huge battle. Parents did not inform the school district of the difficulties with homework.”⁷²

28. Student was diagnosed with *** in 2017.⁷³ Student has refused to ***.⁷⁴ ***.⁷⁵ ***.⁷⁶ ***.⁷⁷ ***.⁷⁸
29. In *** and *** grade, Student performed well academically and did not have significant behavior issues. Most of Student’s issues were controlled by the teachers in the classroom; however, Student exhibited difficulty with impulse control and would make inappropriate comments ***. Typically Student was contrite afterwards.⁷⁹
30. During *** grade, ***. ***. ***. The principal stated Student always admitted wrong doing. Student received detentions for Student’s behavior.⁸⁰ Student generally got along with other students except for once every several weeks.⁸¹
31. Student exceeded the maximum number of tardies in *** grade and Student received lunch detentions and Saturday detentions for those. The principal would speak to the parents when there was an issue with Student and they were supportive of the school’s handling of the issues.⁸³
32. Parent testified Student refused to go to school after ***. Student refused to go to school three times in the 2017-2018 school year: once for a day, ** Parents spoke to Student’s *** two or three times regarding this issue. The school did not do a home assessment to address the issue.⁸⁴
33. Student’s *** grade *** teacher described Student as intelligent and using vocabulary not typically used by *** year old.⁸⁵ This .

and was able to redirect Student easily.⁸⁶ Student had difficulty interacting with other students. ***.⁸⁷ This teacher would address the issues by giving Student time to cool down, giving the other student time to cool down, and conferencing with Student. This teacher at times would give preferential seating to Student and have Student by the door or the teacher.⁸⁹

34.

Student's *** grade *** teacher described Student as a good student and a strong student academically.⁹⁰ This teacher indicated working on s4.32 Tmking 7 Tme otda5 0(7 Tm

41. Student's only academic goal for the 2017-2018 school year was during the school year, when provided with appropriate accommodations deemed necessary by the ARD committee and assistance from a Special Ed case manager, Student will demonstrate a mastery of grade level Texas Essential Knowledge and Skills (TEKS) earning an average of at least **% in all general education classes. Student's baseline score was ***% with goal of ***% by April ***, 2018.¹¹⁰ This goal was to be implemented by special education teacher and general education teachers. The schedule of evaluation for progress was every 6 weeks. The IEP stated this goal was designed to address academic and functional concerns.¹¹¹
42. The May ***, 2017 ARD described how Student's disability affects Student's e 2 2

45. Student *** for the 2017¹¹⁸2018 school year. ***. ¹¹⁹ ***. ¹²⁰ ***. ¹²¹ ***. ¹²²
46. ***. ¹²³ The students participate in cross curricular learning group work, changing of schedules, rotations, and field trips. ¹²⁴ Student had some struggles working with other students in collaborative groups on projects. ¹²⁵ According to Student's teachers, this is common with ***. ¹²⁶
47. The August *** , 2017 IEP removed the social skills goal of transitioning to the next scheduled activity with no maladaptive behavior. ¹²⁷ All other social skills goals and academic goals remained the same in the May *** , 2017 IEP with the same present level of academic achievement and functional performance (PLAAFPs), same dates to achieve goals same implementation, and schedule of evaluation.
48. The most recent IEP from April *** , 2018, for the 2018¹²⁸2019 school year listed only one social skills goal of independently using coping strategies. Student's baseline score was ***% as of April *** , 2018 with a goal of ***% by April *** , 2019. ¹²⁹ This IEP listed no general education goals. ¹²⁹ The same accommodations of visual, verbal, and tactile

56. Student had an incident referral in ~~***~~ class in ~~January~~ 2018. Student was not ~~***~~. The ~~***~~ attempted to speak with Student ~~about~~ the incident; however, Student ~~forbade~~ her.¹⁴⁸
57. Student received a discipline referral from ~~***~~, 2018, for ~~***~~.¹⁴⁹ Student was given a verbal warning and removed from the room.¹⁵⁰
58. On ~~***~~, 2018, teachers were worried about Student's behavior ~~the~~ previous day and were concerned ~~Student was~~ "headed down the same road as before" ~~the~~ ~~***~~ reached out to the parents by email on the ~~saturday~~.¹⁵¹
59. On ~~***~~, 2018, Student ~~***~~. ~~***~~.¹⁵² ~~***~~.¹⁵³ ~~***~~. Student was suspended from ~~***~~, 2018 for these incidents.¹⁵⁴
60. On ~~***~~, 2018, Student ~~***~~. Student mentioned ~~Student's~~ parents are looking at alternative schools and programs to help Student ~~with~~ Student's behavior issues.¹⁵⁵ Student stated on this day Student ~~did~~ not want to return to school.¹⁵⁶ During a discipline meeting on ~~***~~, 2018, with the principal, ~~***~~, the special education coordinator, and parents, parents stated they are looking at other schools for Student, but they are expensive.¹⁵⁷
61. A MDR was held on ~~***~~, 2018. Student, parents, teachers, and principal were in attendance. During the meeting parents stated they believed sending Student to the DAEP would make Student behave worse.¹⁵⁸ Student, principal, and t /LBody <</MCID 87 >>BDCj 0.03 Tw

62. On March ¹⁶²***, 2018, Student's parents received an email with Notice of the DAEP assignment attached. The email informed them of Student's 45 day assignment to the DAEP and the 5 day deadline to appeal the decision. There was a miscommunication between the administration of ¹⁶³*** and the parents regarding whether or not Student had to attend the DAEP. The principal thought she verbally communicated with parents Student did not have to attend the DAEP. A letter was never sent to the parents officially saying Student did not have to attend DAEP. ¹⁶⁴
63. ¹⁶⁵***. ¹⁶⁶***. ¹⁶⁷***. ¹⁶⁸***. ¹⁶⁹***.
64. Student was ¹⁷⁰*** for impulsivity, aggression, and danger to others ¹⁷¹***. ¹⁷²***. Student admitted difficulty in integrating techniques to avoid losing Student's temper in the moment. ¹⁷³*** in order to address Student's oppositional behaviors and allow Student's parents time to receive the support and treatment necessary to successfully reintegrate Student into the home. ¹⁷⁴
65. ¹⁷⁵***. ¹⁷⁶*** Student has limited ability for empathy and recognition of the perspective of others. ¹⁷⁷
66. Student was ¹⁷⁸***. Student's goals at ¹⁷⁹*** were to increase in flexibility towards change and new experiences, learn new coping skills for dealing with anxiety and challenging social situations, and demonstrate improvement and increased awareness of communication skills and the impact on significant relationships in Student's life. ¹⁸⁰ Another goal was to decrease manipulative behavior and experience empathy towards others. Student was also to focus on how poor impulse control affects Student socially, academically, emotionally, cognitively, and with Student's family and improve Student's working memory. ¹⁸¹

¹⁶² PE 10 at 20., T IV at 87, PE 282.

¹⁶³ T III at 775

¹⁶⁴ PE 1 at 8, 9.

¹⁶⁵ PE 1 at 8

¹⁶⁶ PE 1 at 8

¹⁶⁷ PE 21 at 8, RE 12 at 101.

¹⁶⁸ RE 11 at 85.

¹⁶⁹ RE 11 at 90.

¹⁷⁰ RE 11 at 75, PE 1 at 31.

¹⁷¹ RE 11 at 77.

¹⁷² RE 13 at 103.

¹⁷³ RE 13 at 105, 106.

67. Student made relatively minimal progress while at *** and still needed more intervention.¹⁷⁴ Student had difficulty managing Student's feelings and would ***. This occurred at least a couple of times a week.¹⁷⁵
68. On April ***, 2018, parents sent an email to the *** principal notifying the school district of Student's placement at *** and their intent to seek reimbursement for the private services from the school district.¹⁷⁶ Parents sent an email on May ***, 2018, which stated they are not withdrawing Student from the school district.¹⁷⁷
69. On April *** 2018, parent requested IEE to determine present levels in reading, oral reading fluency, comprehension, phonemic awareness, phonics and math skills, expressive and receptive speech, sensory issues, social thinking, occupational therapy, assistive technology, ***, written language, pragmatic language, ***, physical therapy, parent training, parent counseling, in-home training, therapeutic counseling for the student, and other areas of alleged need.¹⁷⁸
70. Student went to *** before an IEE could be completed ***. Parent requested the school district pay for the provider to travel to conduct the IEE, but the school district declined to do so.¹⁷⁹ During the April ***, 2018 ARD meeting, the school district proposed to have Student reevaluated including a psychological evaluation. Student returned from ***, enrolled, and the school district had parental consent.¹⁸⁰ Mother is unsure if she returned the consent form.¹⁸¹
71. Student was admitted to *** on July ***, 2018.¹⁸² *** is a residential treatment center where Student is in the *** program.¹⁸³ The *** program is for students on the Autism spectrum and it focuses on the key areas of: executive functioning, sensory, self emotional regulation, communication, and empathy.¹⁸⁴ While at ***, Student ***. ***.¹⁸⁵ Student is better behaved in school than in ***.¹⁸⁶

¹⁷⁴ T. I. p. 201

¹⁷⁵ T I p. 203

¹⁷⁶ RE 18 at 158.

¹⁷⁷ RE 18 at 171.

¹⁷⁸ PE 22 at 1, PE 10 at 50.

¹⁷⁹ PE 10 at 55, 56.

¹⁸⁰ JE 18 at 629630, 634.

¹⁸¹ Transcript Vol. 1 p. 88.

¹⁸² RE 15 at 113.

¹⁸³ T I at 260

¹⁸⁴ PE 5 at 1

¹⁸⁵ T II at 560

¹⁸⁶ T II at 562, T I at 2856.

72. ***'s major concern with Student is Student's lack of empathy and how it will affect Student's ability to function in society, get along with family, and *** others.¹⁸⁷ Student will do things just to create chaos because Student finds it personally fulfilling and entertaining.¹⁸⁸ Typically, students leave within a year of being at ***. However, *** staff suggested Student needed approximately an additional year before Student is ready to leave ***. Student had been in the program for *** months at the time of the hearing.¹⁸⁹
73. An independent psychologist performed an IEE on Student and issued a report on November ***, 2018.¹⁹⁰ He indicated Student is challenged with executive control, which leads to problems with regulating emotions, regulating Student's impulses, cognitive rigidity, and a distrustful and oppositional stance. Student tends to have more appropriate behavior in educational settings due to Student's high-to-desperate level of motivation to perform well academically.¹⁹¹ Student tends to do better in a more structured environment and in situations where Student is motivated to perform.¹⁹²

B. IEP

In meeting the obligation to provide FAPE, the school district must have in effect an IEP

DOCKET NO. 228-SE-0518

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 for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

1. Individualized on the Basis of Assessment and Performance

First, the evidence showed the IEP implemented during the relevant time period was somewhat individualized on the basis of assessment and performance. IEP goals and objectives were developed to address Student's area of need in how Student interacts with Student's peers. The PLAAFPs used as the basis for formuro(u)]T4(hool)]TJ 0 To0d22el2 9.55.33iea of nemsesSm1f()4

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possible education. Student does not need to improve in eve

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. *Goal Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012).

The discussion above about Student IEP leaves a mixed result at the conclusion of the first Michael F. factor; however, the analysis does not end there. IEP may not have addressed Student’s needs in pragmatics or social skills and it used some information from previous years that was no longer correct, but teachers and administrators testified that student was easily redirected and typically well behaved in class. 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 that is likely to produce progress not regression or trivial advancement. *V.P. 582 F. 3d at 583*; *Andrew F.*, 137 S. Ct. at 988.

The IEP may not have been as individualized as it should have been, but given the evidence, the lack of individualization did not impede Student in receiving an educational benefit and in fact Student was highly successful academically. Even when the IEP factor is weighed in the petitioner’s favor due to lack of individualization, the court looks at all relevant factors together to determine FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 814–15 (5th Cir. 2012). Whether a student demonstrates positive academic and non-academic benefits is “one of the most critical factors in this analysis.” (citing *V.P. 582 F. 3d at 588*) In this case, Student received positive academic and non-academic benefit as evidence Student’s grades, STAAR testing, performance in class, and limited inappropriate behaviors in class.

F

C.F.R. § 300.304(c)(4).

The evidence showed Student had difficulties in handwriting, pragmatics, and social skills. The school district was aware of these issues since ***, yet the school district never performed evaluations in the following areas: assistive technology, speech therapy, or pragmatics or social skills. Student's *** grade *** teacher testified Student's handwriting was similar to other graders and not an issue. There is no evidence to suggest Student's handwriting caused difficulties receiving an educational benefit; therefore, an assistive technology evaluation is not necessary. The 2016 FIE noted Student can have difficulty in pragmatic skills and that Student could benefit from instruction on social conversation. This area is tied to social skills as well because it relates to how Student interacts with Student's peers. The school district's own LSSP testified after a student is removed from school for over 10 days or assigned to the DAEP, she would recommend an FBA. The school district never performed an FBA.

Parents did struggle with Student's behavior at home and felt as if they were walking on egg shells with Student. The emails between parents and school staff touched on the difficulty Student had at school and getting to school on time in the mornings during grade. A school district may provide related services that address parental needs. C.F.R. § 300.34(a) Parents testified they wanted a home assessment to take the 1412 (consent) (re) 11-01-14 (d) 12 (e) 1-13-14 (s) MCO

Student's ability to function at school. In this case, Student's behaviors at home were much worse than Student's behaviors at school and did not impede Student's access to Student's education.

Per the 2016 FIE, the school district was aware of Student's lack of social conversational skills and Student's use of inappropriate comments or actions at times. They should have performed the following evaluations: speech therapy pragmatics or social conversation; social skills to assist with Student's interaction with peers; and an FBA to determine the function of Student's inappropriate comments or actions. Student made significant progress in school; however, the school district under 34 C.F.R. § 300.304 should have conducted additional evaluations in these areas to consider whether Student's IEP should have been revised.

G. Bullying as a Denial of FAPE

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

2d 289, 316 (S.D. N.Y. 2011) school district's motion to dismiss denied where allegations that 12-year-old with learning disabilities was denied a FAPE due to persistent bullying by peer student was ostracized, pushed, peers refused to touch items student touched, and student was ridiculed daily).

The bullying need not be outrageous but it must be sufficiently severe, persistent, or pervasive that it creates a hostile environment for the student with a disability. It is not necessary that Petitioner show the bullying prevented all opportunity for an appropriate education but only that it is likely to affect the opportunity of the student for an appropriate education. 779 F. Supp. 2d at 317.

Student was picked on at times and Student picked on others. The evidence did not show the bullying from others toward Student to be severe, persistent, or pervasive. Student did not indicate an unwillingness to go to school because Student felt Student was bullied nor did it affect Student's ability to obtain an appropriate education. The bullying arose during **. There is no credible evidence bullying was a behavioral issue during ** grade Student received an appropriate education based on Student's grades and teacher testimony of Student's success. The school district did not fail to protect Student from bullying or harassment. Petitioner did not put on any evidence of discrimination or retaliation.

H. Procedural Issues

Petitioner did meet Petitioner's burden on proving the school district violated Student's or Student's parents' procedural rights under the IDEA. Under the IDEA, a denial of FAPE can only be found if the procedural violations: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i)

The record reflects Petitioner's right to a FAPE was not impeded based on the facts and analysis listed above. The parents were active participants in all ARD meetings. The parents communicated with administration and teachers during the relevant time period. Parents also never sent any emails or raised any issues in ARD meetings stating they were unsatisfied with Student's program or requested changes to Student's program. Parents received the procedural safeguards and prior

written notice at all appropriate times

The failure of the school district to provide progress reports for the 2017 school year failure to provide an official letter notifying parents Student did not have to attend the DAEP, or any of the alleged procedural violations did not result in the denial of FAPE Parents were in regular contact with the school district They sent emails to teachers and administrators and participated in all ARD meetings The lack of IEP progress reports did not preclude them from learning of Student's progress through the emails, ARD meetings Student's report cards

No procedural violations impeded Student's right to FAPE, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. §300.513 (a)(2) the evidence showed, Student was easily redirected, behavioral incidents were not so frequent as to interfere with learning, and Student was academically successful. ***.

I. Residential Placement at School District Expense

1. Two-part Test

Student must meet a two-part test in order to secure continued placement at school district expense First, Student must prove the school district's proposed program was not appropriate under the IDEA. See ()Tj EMC 0 Tc 0 Tw ()Tj[(510 0.173 Td -Tw ()Tj-28/P <</MCc)6(t)1U Td 2()1. 7-

DOCKET NO. 228-SE-0518

the school district Unfortunately, there is no evidence of the school district's evaluation criteria except for their denial of payment for the independent psychologist to provide testing in the parents unilaterally placed Student in **and** . The school district is willing to provide a reevaluation and psychological evaluation upon Student's return to the school district; therefore, the school district should not have to pay for psychological evaluation conducted** . The school district is not required to pay for an outside FBA until an FBA is conducted by the school district and Petitioner disagrees with the evaluation.

The school district's 2016 FIE was appropriate and complied with the requirements under the Federal Regulations; therefore, parents are not entitled to an IEE at public expense. The parents are entitled to an FBA provided by the school district as discussed above in regard to evaluations.

K. Override parental consent to new FIE and produce Student for evaluation

A school district may file a due process complaint to override a parent's refusal to consent to a reevaluation 34 C.F.R. 300.300(c)(ii) The question in this case is whether or not this issue is ripe for decision. Ripeness separates those ~~cases~~ that are premature because the injury is speculative and may be. Tweme 3al Re1()]mo or44(t)-2-16.43j3(d td)1(a)4(tal)014 re 3alvnd cat.

X. CONCLUSIONS OF LAW

1. Student was provided FAP 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; *Endrew F.*, 137 S. Ct. 988.
2. Petitioner failed to meet Petitioner's burden of proof alleging Respondent failed to protect Student from bullying. *T.K.*, 779 F. Supp. 2d at 316. Petitioner did not put on any evidence of discrimination or retaliation and therefore did not meet Petitioner's burden on these issues. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Page Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).
3. Respondent failed to timely and appropriately evaluate Student in all areas of suspected disability. 34 C.F.R. § 300.304.
4. Respondent complied with parental and student procedural rights under the IDEA. Any procedural violations did not impede Petitioner's right to FAP or significantly impede the parent's opportunity to participate in decision-making regarding the provision of FAP or cause a deprivation of educational benefits. 34 C.F.R. §§ 300.503(a), 300.504(a)(d), 300.513(a)(2).
5. All of Petitioner's claims arising under any laws other than the 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).
6. Respondent's June 2016 FIE was appropriate under the IDEA and, therefore, Petitioner is not entitled to reimbursement for the cost of FIE secured at parental expense. 34 C.F.R. § 300.502(b)(3).
7. Respondent's request to override parental consent to a new FIE and produce Student for the evaluation is not ripe for decision. 34 C.F.R. § 300.300(c)(ii), [(5(D I(i)--u(q9 28))TJ -0.0414(/.

2.