

DOCKET NO. 223-SE-0517

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

DECISION OF THE HEARING OFFICER

Student, STUDENT, b/n/f PARENT (***) (collectively, Petitioner), filed a request for an impartial expedited due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA). The request (the complaint) was received by the Texas Education Agency (Agency) on May 18, 2017, and assigned to this hearing officer on the same date. The respondent to the complaint is the El Paso Independent School District (District). Petitioner alleges the District deprived Student of a Free Appropriate Public Education (FAPE).

After review of the evidence, 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

A. Legal Representatives

Petitioner was self-represented throughout this litigation by Petitioner's ***, *** Respondent was represented throughout this litigation by its legal counsel Evelyn Howard-Hand with the law firm of Walsh, Gallegos, Trevino, Russo & Kyle.

B. Resolution Session and Mediation

On May 30, 2017, the Parties agreed to bypass the Resolution Session in writing in favor of mediation. 34 C.F.R. § 300.510(a)(3)(ii). The Parties participated in an unsuccessful mediation session on June 19, 2017.

C. Continuances

This case was continued and the decision deadline extended once at the joint request of the parties upon a finding of good cause in Order No. 4 issued on June 16, 2017. 19 Tex. Admin. Code § 89.1170(b).

D. Disclosure

On August 27, 2017, the Hearing Officer reminded the Parties via email that disclosures were due the following day. On August 29, 2017, *** notified the Hearing Officer *** had no disclosures due to ***. The Hearing Officer explained the process for requesting a continuance and the consequences of proceeding to hearing without satisfying the disclosure requirement. *** replied *** understood Petitioner's case-in-chief would be limited to *** sworn testimony; *** did not want a continuance and wished to proceed to hearing as scheduled.

E. Presentation of the Evidence

Order No. 6 was issued on August 29, 2017 reversing the presentation of evidence during the hearing. Because Petitioner demonstrated difficulties understanding and complying with procedural requirements, the presentation of evidence was reversed to model hearing etiquette, document handling, and witness questioning. Respondent objected to Order No. 6. The objection was overruled in Order No. 7.

F. Due Process Hearing

The hearing convened on September 5, 2017. Petitioner continued to be self-represented by Petitioner's *** **. The District continued to be represented by its legal counsel Evelyn Howard-Hand of Walsh, Gallegos, Trevino, Russo and Kyle, P.C. The hearing was completed the same day.

II. ISSUES, PROPOSED RELIEF, AND BURDEN OF PROOF**A. Issues**

Petitioner alleges the District denied Student a FAPE and raised the specific following issues:

1. Did the District fail to implement the Individualized Educational Program (IEP) and the Behavior Intervention Plan (BIP) approved for Student by the Admission, Review, and Dismissal Committee (ARDC);
2. Did the District impede meaningful parental participation during the ***, 2016, ARDC meeting by not permitting Parent to raise classroom concerns during the meeting;
3. Did the District fail to identify and implement appropriate *** and *** ** for Student based on Student's unique needs;
4. Did the District permit and/or fail to investigate pervasive bullying of Student by other students and staff adversely effecting Student's educational program and causing educational harm; and
5. Did Student regress due to the District's alleged failure to implement student's approved IEP and BIP?

B. Proposed Remedies

Petitioner requested that the Hearing Officer order the following relief:

1. A finding that Student was denied a FAPE;
2. An order directing that video cameras be installed in Student's classrooms to monitor the behavior and interactions of students and staff.
3. An order directing a cessation to the alleged bullying and/or harassment.
4. An order directing the full implementation of the approved IEP and BIP based upon Student's unique needs and circumstances.
5. That District's employees involved with Student be held responsible and ordered to compensate Petitioner.

III. FINDINGS OF FACT

1. Student resides within the geographical boundaries of the District.¹
2. Student is ***-years-old.²
3. Student transferred to the District from *** (***) , *** , and enrolled on *** , 2016.³
4. *** evaluated Student on *****, 2014.⁴
5. On *** ***, 2016, the District conducted an initial ARDC meeting for Student and conducted a Review of Existing Data, and adopted an IEP that included a behavior intervention plan (BIP).⁵
6. Student has been identified as qualifying for special education as student with autism, an intellectual disability, and a speech / language impairment.⁶

¹ RE-19.

² *Id.*

³ *Id.*

⁴ RE-19.

⁵ *Id.*

⁶ *Id.*

7. Student's cognitive ability is below a standard score of ***, placing Student in the bottom *** of cognitive ability.⁷
8. The District timely provided Petitioner with copies of the Procedural Safeguards on *** ***, 2016, and *** ***, 2017.⁸
9. Student's ARDC accepted the cognitive assessment from *** and requested additional evaluations for speech / language, fine motor skills, autism, psychological, and adaptive behavior.⁹
10. *** consented to the additional evaluations on *** ***, 2016.¹⁰
11. The additional evaluation was completed on *** ***, 2016.¹¹
12. On *** ***, 2016 the ARDC met to review the *** ***, 2016 evaluation and at that time Student's IEP was reviewed and revised.¹²
13. During the relevant time period, Student's placement has been in a self-contained special education classroom for all classes except *** and ***. Student has received *** minutes of occupational therapy *** per week, speech therapy and transportation *** minutes per week, and *** minutes per day of *** for ***, *** ***, ***, ***, and ***.¹³
14. Student was evaluated for *** on *****, 2017. The ARDC reviewed the *** evaluation on *** ***, 2017 and determined that Student does not qualify for ***.¹⁴
15. Petitioner requested a *** IEE on *** ***, 2017, and the District approved the request on *** ***, 2017.¹⁵
16. Petitioner never selected an independent evaluator to conduct the approved *** IEE.¹⁶

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ RE-19.

¹² *Id.*

¹³ RE-19.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

17. Student missed *** days of school between *****, 2016 and *** **, 2016.¹⁷
18. Student missed *** days of school during the 2016-2017 school year and was late to school *** days.
19. Many of Student's unexcused absences and unexcused late arrivals were due to ***'s ***.

IV. DISCUSSION

A. 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 all times.¹⁸ Petitioner must, therefore, establish that the alleged violations resulted in a denial of FAPE or other substantive violation of the IDEA.¹⁹

B. Duty to Provide FAPE

The primary purpose of the IDEA is to ensure that children with disabilities receive a FAPE.²⁰ In this jurisdiction FAPE "need not be the best possible one, nor one that will maximize the child's educational potential."²¹ 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

¹⁷ *Id.*

¹⁸ *Schaffer ex rel. v. West*, 546 U.S. 49, 126 S. Ct. 528, 537, 163 L.Ed.2d 387 (2005), *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. V. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

¹⁹ *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *see also White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003).

²⁰ *See White*, 343 F.3d at 378.

²¹ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) (hereinafter *Michael F.*); *see also Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003).

the child's unique circumstances.²² The District is not required to implement the "best" program designed by an expert to remediate or maximize a child's educational potential.²³

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."²⁴ "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 with a disability.²⁵ "Specially designed instruction" means adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of the instruction:

- To address the unique needs of the child that result from the child's disability; and
- To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.²⁶

C. Test to Determine FAPE

In evaluating the provision of FAPE, the Hearing Officer must determine whether the educational plan developed through the IDEA's procedures was designed to facilitate Student's educational progress appropriate in light of the child's circumstances.²⁷ In determining whether the District has provided the requisite educational benefit in light of Student's circumstances," the Fifth Circuit utilizes a four part test: (1) is the program individualized on the basis of the student's assessment and performance; (2) is the program administered in the least restrictive environment

²² *Andrew F. v. Douglas County School District*, 136 S. Ct. 2405 (2016).

²³ *See Kings Local Sch. Dist Bd. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003) (stating expert's program showed district how to maximize student's potential but IDEA does not require it be implemented).

²⁴ 34 C.F.R. § 300.17(c).

²⁵ 34 C.F.R. § 300.39(a)(1).

²⁶ 34 C.F.R. § 300.39(b)(3).

²⁷ *Andrew F. v. Douglas County School District*, *supra*.

(LRE); (3) are the services provided in a coordinated and collaborative manner by the key “stakeholders;” and (4) are positive academic and non-academic benefits demonstrated.²⁸

D. Petitioner Failed to Meet Petitioner’s Burden of Proof

The Hearing Officer concludes the District designed and implemented an educational program based upon Student’s unique circumstances that resulted in behavioral and academic progress for Student. Student failed to prove the educational program did not meet the Fifth Circuit’s four part test.

Despite explicit warning from the Hearing Officer on the consequences of failing to meet the disclosure deadline, Petitioner chose not to make disclosures and was barred from presenting documentary evidence or calling undisclosed witnesses.²⁹ Petitioner presented no evidence on the issues set out for hearing. *** exercised *** right to cross-examine District witnesses and testified on *** own behalf; however, the testimony elicited during cross examination and during ***’s testimony did not address any of the issues set for the due process hearing.

Despite having no burden of proof the District presented sufficient evidence that it timely reviewed the *** assessment and IEP, began implementing the *** IEP and began a new series of evaluations, timely convened an ARDC to review the new data and evaluations, devised and implemented an updated IEP and BIP, and provided transportation and support services. The preponderance of the evidence demonstrates that the District provided Student a FAPE during the relevant time period and provided an adequate educational program based upon Student’s unique circumstances.³⁰

²⁸ See *Michael F.*, 118 F.3d at 247; *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), cert. denied, 531 U.S. 817 (2000).

²⁹ 34 C.F.R. § 300.512(a)(3).

³⁰ *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Andrew F. v. Dougals Cnty. School Dist.*, 137 S.Ct. 988, 197 L.Ed. 335 (2017).

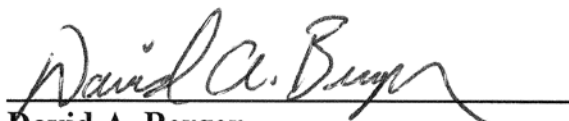
V. CONCLUSIONS OF LAW

1. The District is a local education agency (LEA) responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Student, by next friends, Parent, (collectively, Petitioner) bears the burden of proof on all issues raised in Petitioner's complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. Petitioner did not meet their burden of proof on any of the designated issues for hearing. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

VI. ORDER

After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, Petitioner's requested relief is hereby **DENIED**.

SIGNED September 25, 2017.



David A. Berger
Special Education Hearing Officer
For the State of Texas

VII. NOTICE TO THE PARTIES

This Decision of the hearing officer is a final and appealable order. Any 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.³¹

³¹ 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).