

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENT,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
BAY CITY INDEPENDENT	§	
SCHOOL DISTRICT	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

**ORDER GRANTING RESPONDENT'S  
MOTION FOR SUMMARY JUDGMENT**

**I.  
PROCEDURAL HISTORY**

On December 20, 2007, the Texas Education Agency (“TEA”) received the Request for Due Process Hearing filed by Student *b/n/f* Parent (“Petitioner”) against Bay City Independent School District (“Respondent” or “the District”) and assigned the case Docket No. 080-SE-1207.

On December 20, 2007, the undersigned Hearing Officer issued the Initial Scheduling Order, setting forth all relevant deadlines pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), amending the Individuals with Disabilities in Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* Pursuant to that Order, the prehearing telephone conference was set for January 9, 2008; the Due Process Hearing was set for February 4, 2008; and the Decision deadline was set for March 4, 2008.

Respondent filed a Challenge to the Sufficiency of Petitioner’s Complaint on December 21, 2007, that was overruled by the Hearing Officer. Additionally, Respondent submitted its Motion for Relief from a Scheduling Order Date, requesting a change from the deadline for the Resolution Meeting. According to Respondent, Petitioner’s timing for the Request for Due Process Hearing made it impossible to consider the complaint and conduct a meaningful Resolution Meeting. December 20, 2007, was the last day of school for the 2007 semester for Respondent, and the District did not resume classes until January 7, 2008; therefore, conducting a Resolution Meeting by January 4, 2008, was not possible. Respondent offered to meet with Petitioner on January 8, 2008, but Petitioner declined.

On January 24, 2008, the parties submitted their agreed first motion for continuance, based upon an agreement to participate in mediation. The mediation conference was scheduled for February 14, 2008. The Hearing Officer granted the motion for continuance, and on February 13, 2008, entered an Order setting forth new deadlines in the case: the Due Process Hearing was set for

March 27, 2008; the Disclosure deadline was set for March 20, 2008; and the Decision Deadline was extended until April 19, 2008.

The parties participated in a mediation conference on February 14, 2008, but were unable to resolve the case.

The Hearing Officer convened the prehearing telephone conference on March 6, 2008. In attendance were the following: (1) Mr. Christopher Jonas, counsel for the Petitioner; (2) Ms. Charlotte Salter, counsel for the Respondent; (3) the court reporter, who made a record of the telephone conference; and (4) the Hearing Officer. During the conference the parties discussed rescheduling the hearing and agreed to the following dates: the Due Process Hearing would be rescheduled to May 15-16, 2008, with Disclosures due May 8, 2008; the Decision deadline would be extended to June 16, 2008.

During the prehearing telephone conference the parties discussed the issues to be submitted to the Due Process Hearing. The Hearing Officer issued the Order Following Prehearing Conference and Order Extending Decision Deadline, dated March 10, 2008, and identified Petitioner's issues: (1) whether Respondent has failed to timely evaluate Petitioner with a Functional Behavioral Assessment ("FBA"); and (2) whether Respondent has failed to implement an appropriate Behavior Intervention Plan ("BIP") for Petitioner?

On May 5, 2008, the Hearing Officer received Respondent's Motion for Summary Judgment, Motion to Dismiss with Prejudice to Refile Same or Plea to the Jurisdiction. Petitioner's Response to Respondent's Motion for Summary Judgment was received by the Hearing Officer's office the morning of May 13, 2008. Petitioner's counsel provided an additional citation to the Hearing Officer during the afternoon of May 14, 2008. After considering all of the parties' pleadings and the record in this case, the Hearing Officer determined that the case should be dismissed and notified the parties of her decision the afternoon of May 14, 2008 by letter. This Order setting forth the reasons for the decision now follows.

## **II**

### **RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, MOTION TO DISMISS WITH PREJUDICE TO REFILE SAME, OR PLEA TO THE JURISDICTION**

Respondent contends Petitioner's claims should be dismissed for the following reasons:

- (a) Petitioner failed to exhaust her administrative remedies prior to filing a Request for Due Process Hearing. This deprives a special education hearing officer of jurisdiction over this dispute;
- (b) Petitioner's causes of action and requests for relief are state or moot;
- (c) Petitioner's claims are pretextual and do not devolve from a dispute related to IDEA 2004; Petitioner is seeking another forum to air her grievances against a specific teacher in the District; and

- (d) Petitioner's claims must fail as a matter of law; Respondent had no duty to perform an FBA or develop a BIP during the actionable time period.

Petitioner asserts that the Respondent's arguments fail to take into consideration the full implications of a school district to provide a free appropriate public education (FAPE). Petitioner contends that Respondent did not *timely* conduct an FBA and did not *timely* implement a BIP. A school district is required to implement a BIP when it is needed in order for a student to receive (FAPE).

### III STATEMENT OF FACTS

A brief statement of the facts is necessary to explain the context of the ruling in this case. On November 20, 2007, an Admission, Review and Dismissal Committee ("ARDC") convened to discuss whether the school should conduct an FBA and develop a BIP. Student's Parent was present for the November 20, 2007, ARDC meeting. This meeting was precipitated by a series of incidents in October 2007 – for which Student was disciplined, but none of which resulted in a change of placement – culminating with the most serious incident on October 24, 2007.<sup>1</sup>

At the November 20, 2007, ARDC meeting Parent consented to an FBA, and the District agreed to complete the FBA on or before January 20, 2008. On December 20, 2007, the Request for Due Process Hearing was filed with Texas Education Agency, as detailed in the procedural history above. On December 21, 2007, the District sent Parent a written invitation to an ARDC meeting set for January 7, 2008, indicating its interest in discussing the issues raised in the Request for Due Process Hearing.

On January 4, 2008, Parent issued a written refusal to attend the January 7, 2008, ARDC meeting. She wrote: "I am unable to attend the meeting. My attorney is also unavailable. Notification for availability will be sent at a later date." Nothing else ever came from Parent.

On January 8, 2008, the District again wrote to Parent offering an ARDC meeting on January 14, 15, or 17, 2008. There was no response.

On January 22, 2008, the District yet again wrote to Parent identifying February 4, 5, or 11, 2008, as possible dates for an ARDC meeting. Again, no response was received from Parent.

Finally, on January 28, 2008, the District notified Parent that the annual ARDC meeting was required by law to be held on or before February 11, 2008, and offered to hold the meeting at 10:00 on February 11. The notice was hand-delivered to Parent, an employee of the District. Parent did not respond.

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<sup>1</sup> Parent filed a grievance against one of the teachers involved in the incident that occurred on October 24, 2007. The Hearing Officer has no jurisdiction in this area, and therefore, makes no findings or judgments concerning the grievance. It is irrelevant to this matter.

At 10:00 a.m. on February 11, 2008, the ARDC convened as the notice had provided. The appropriate ARDC members from the school attended, including the certified behavioral therapist who had developed the FBA and the BIP. In one final effort, the District's diagnostician telephoned Parent from the ARDC meeting and urged her to attend. Parent stated that her attorney had advised her not to attend the ARDC meeting. The diagnostician emphasized that this was an annual ARDC meeting and the behavioral therapist was in attendance, especially for the purpose of discussing the FBA and the BIP. Parent declined to attend.

The ARDC meeting continued. The behavioral therapist presented her findings and discussed the FBA and the BIP. The ARDC's minutes reflect the actions taken concerning the FBA and the BIP on February 11, 2008.<sup>2</sup>

#### IV ANALYSIS

##### A. Standard of Review

Respondent seeks either summary judgment or dismissal with prejudice. As the summary judgment movant, Respondent has the burden to prove there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a. This may be accomplished by: (1) disproving at least one element of each of Petitioner's claims, or (2) establishing each essential element of an affirmative defense. *Montgomery v. Kenney*, 669 S.W.2d 309, 310-311 (1984).

Once a movant produces competent evidence to establish a right to summary judgment, the burden then shifts to the non-movant to introduce evidence to raise an issue of fact that would preclude the entry of judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (1979). In deciding whether there is a disputed issue of material fact, evidence favorable to the non-movant will be taken as true, and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (1985).

##### B. Exhaustion of Administrative Remedies

Respondent cites IDEIA 2004 as requiring parents to exhaust administrative remedies in order to give schools the opportunity to cure and resolve disputes. 20 U.S.C. § 1415 (e)(f)(i). As additional support for its argument, Respondent points to *Ellenberg v. N.M. Military Institute*, 478 F.3d 1262, 1275 (10<sup>th</sup> Cir. 2007).

Although the *Ellenberg* case is not controlling authority in Texas, its logic is nonetheless instructive.

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<sup>2</sup> The minutes state the following: "The FBA and BIP was [sic] completed and was [sic] reviewed by the behavior specialist. Changes were made as needed. The committee agreed that the baseline for this FBA/BIP was low frequency[.] [sic] Ard [sic] recommends that the BIP should be implemented across all settings[.] [sic] Parent Training will be provided if requested.

We have interpreted the IDEA's exhaustion requirements broadly, noting Congress' clear intention to allow those with experience in educating the nation's disabled children "at least the first crack at formulating a plan to overcome the consequences of educational shortfalls." . . . see also *Hayes ex rel. Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 814 (10th Cir.1989) (noting the "philosophy of the [IDEA] is that plaintiffs are required to utilize the elaborate administrative scheme established by the Act before resorting to the courts to challenge the actions of the local school authorities").

*Ellenberg*, 478 F.3d at 1275, quoting *Cudjoe ex rel Cudjoe v. Indep. School Dist. No. 12*, 297 F.3d 1058, 1065 (10<sup>th</sup> Cir. 2002). The Court in *Ellenberg* interpreted the exhaustion requirement to include the IEP team<sup>3</sup> meeting process as well as the administrative hearing, prior to seeking relief before the district court. "If plaintiffs believed [student] required a new educational placement, the proper course would have been for them to request a change to her IEP." *Id.* at 1276. The Court further stated that if the IEP team did not select the New Mexico Military Institute as the placement, then it would be appropriate to challenge that decision via the state administrative proceedings. *Id.* at 1276.

Implicit in invoking IEP team process, or the ARDC meeting as it is known in Texas, the parent must actually meet with the team. The fact is undisputed that Parent did not meet with the Respondent District when the chance was provided.

### **C. Mootness**

Respondent additionally claims that at the time Petitioner filed the Request for Due Process Hearing, the complaint was moot.

It is well-settled that a court may not adjudicate disputes that have been rendered moot. A court may adjudicate only actual, ongoing controversies. Mootness can arise in either of two ways: (1) a controversy may become moot when the issues are no longer live, or (2) when the parties lack a legally cognizable interest in the outcome. *Chevron USA v. Traillour Oil Co.*, 987 F.2d 1138 (5th Cir. 1993). Texas Special Education Hearing Officers have complied with this practice of dismissing cases on ground of mootness. See, *Student v. Texas City ISD*, Docket No. 439-SE-797 (1997).

Petitioner presented two issues for the Hearing Officer to determine: (1) whether Respondent has failed to timely evaluate Petitioner with a Functional Behavioral Assessment ("FBA"); and (2) whether Respondent has failed to implement an appropriate Behavior Intervention Plan ("BIP") for Petitioner?

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<sup>3</sup> 34 C.F.R. § 300.320 defines Individualized Education Program as a written statement for each child with a disability that is developed, reviewed, and revised in a meeting with a team that is defined in 34 C.F.R. § 300.321. In many states that group is referred to as the IEP team, and the meeting is known as the IEP team meeting. In Texas the group is most commonly referred to as the "ARD", and the meeting as the ARD meeting. For consistency in this Order the term ARDC meeting has been used.

On February 11, 2008, the ARDC convened to review the FBA and the BIP prepared by the behavioral specialist, precisely what Parent requested in the Request for Due Process Hearing on December 20, 2007. Moreover, the ARDC recommended the BIP be implemented for Student in all settings. The FBA and BIP were more than merely *offered* they were *acted upon* by the ARDC.

Petitioner argues that timeliness is an essential element of the claim. According to Petitioner, it was clear to Respondent that Student exhibited behaviors based on Student's disability that would require a BIP, and that Respondent failed to timely implement a BIP including, but not limited to, the entire fall semester of 2007. According to this theory Petitioner should be entitled to compensatory services for that semester.<sup>4</sup>

Petitioner's theory survives only if a legal duty to provide an FBA or a BIP ever arose. Petitioner cited the Hearing Officer to the TEA Special Education case of *Student v. Lake Travis ISD*, Docket No. 332-SE-0505, in support of Student's contention concerning an FBA. However, this case has been overruled by the U.S. District Court in *Lake Travis ISD v. Student*, Civil Action No. A-06-CA-046-SS (W.D.TX - October 24, 2007). The District Court in *Lake Travis* stated, "However an FBA is 'triggered' by law only when certain disciplinary actions related to the child are taken. .... It is also within the ARDC's discretion to determine whether an existing FBA is current and valid or a new FBA is needed." *Id.* at pp. 18-19.

With respect to Petitioner's argument concerning the BIP, a BIP is required when there has been a disciplinary change in placement and a concomitant determination that the behavior is a manifestation of a child's disability. 20 U.S.C. § 1415(k)(1)(F); 34 U.S.C. § 300.530 (f). Otherwise, a BIP is not a required element for a student's IEP when a change of placement is not implicated.

However, a BIP *may* be considered by the ARDC when a student's behavior impedes his learning or that of others. 20 U.S.C. § 1414 (d)(3)(B)(i); 34 C.F.R. § 300.324 (a)(2)(i). The ARDC should consider the use of positive behavioral interventions and supports and other strategies to address behavior, but the term, BIP, is not specifically used. 20 U.S.C. § 1414 (d)(3)(B)(i); 34 C.F.R. § 300.324 (a)(2)(i). In other words, because no change in placement had occurred, under the limited facts of this case the BIP was not an automatic legal right. If not an automatic legal right, there was no legal duty to provide the BIP.

#### **D. Pretext and Non-IDEA Claims**

Respondent asserts that Petitioner's true motivation in this case relates to a claim filed in an unrelated grievance over which the Hearing Officer has no jurisdiction. The Hearing Officer expresses no conclusions concerning those assertions exactly because of the lack of jurisdiction over the unrelated matter.

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<sup>4</sup> No evidence was submitted concerning what evidence would be appropriate as compensatory services, but Hearing Officer draws all inferences in favor of the non-moving party.

**V.  
CONCLUSION**

The Hearing Officer has reached the following conclusions based upon the record in this case:

1. Parent failed to attend the ARDC meeting on February 11, 2008. Parent had other opportunities for ARDC meetings but chose not to take advantage of those opportunities. Under these circumstances failure to attend the ARDC meeting constitutes a failure to exhaust administrative remedies.
2. The ARDC met on February 11, 2008, and reviewed the FBA and BIP for Student. The BIP was implemented across all settings.
3. The District had no legal duty to provide an FBA or BIP to Student.
4. The legal issues have become moot by virtue of the Respondent's performance of the FBA and the BIP, because the Hearing Officer could have awarded no further remedy to Petitioner.
5. The legal issues have become moot because Petitioner has no legally cognizable interest in the outcome.

**ORDER**

IT IS THEREFORE ORDERED that Respondent's motion for summary judgment is hereby granted. Docket Number 080-SE-1207 is hereby dismissed with prejudice.

SIGNED this 16<sup>th</sup> day of May 2008.

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*Lucetia Dillard*  
Special Education Hearing Officer