

Before the  
Administrative Hearing Commission  
State of Missouri



, in the interest of , )  
 )  
 Petitioner, )  
 )  
 vs. ) No. 19-1027  
 )  
 FRANCIS HOWELL R-III SCHOOL )  
 DISTRICT, )  
 )  
 Respondent. )  
 )

**DECISION**

(Parent) filed a due process complaint against the Francis Howell R-III School District (District) alleging that the District failed to provide (Student) with a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., because the District failed to re-evaluate Student triennially; failed to make goals in the Individual Education Plan (IEP) that were reasonably calculated to make academic progress appropriate in light of his circumstances; failed to provide the necessary services, supports and accommodations for his disability generally; failed to provide Student with a Behavior Intervention Plan (BIP); and failed to address bullying and harassment concerns in the 2018-2019 school year by allowing a boundary exception<sup>1</sup> and denying a transportation accommodation, all of which led to the denial of FAPE.

---

<sup>1</sup> This was a request to transfer to another school within the same school district that was outside the boundaries based on Student's home.

The issue of the re-evaluation was resolved at the hearing. The District agreed to re-evaluate Student as requested by Parent. Parent agreed that the issue of a BIP was also resolved. Therefore, those issues were dismissed.

We conclude that the goals in Student's IEP were reasonably calculated to make academic progress in light of Student's unique circumstances, that the District provides the services, support and accommodations necessary for Student, and that the District provided FAPE to Student in the 2018-2019 school year. We further find that the District adequately addressed the alleged bullying and harassment concerns as presented by Student and Parent and provided a boundary exception to further address Parent's concerns. There was no denial of FAPE with regard to these issues.

#### **Procedure**

On August 6, 2019, Parent filed her due process complaint against the District. On August 16, 2019, the District filed a response to the complaint. We held a prehearing conference by phone on August 26, 2019. On August 30, 2019, Parent filed an amended complaint, and on September 4, 2019, District filed a response to the amended complaint. On September 23, 2019, Respondent filed a request for continuance and extension of the decision due date. We granted the request and in accordance with the parties' request, reset the hearing for November 18-19, 2019, with a decision due date of December 19, 2019. On November 6, 2019, we held another prehearing conference to address a request to shorten the time for a deposition.

On November 18, 2019, we held a hearing. Attorney Daniel J. Rhoads, The Rhoads Firm, LLC, represented Parent. Attorney John F. Brink, Thomeczek & Brink, LLC, represented the District. The case was ready for decision following briefing that ended on December 5, 2019.

On December 5, 2019, we received correspondence from a third party that appears to be from Rachel Shakofsky, M.D., and that was retained in our file; however, we did not consider or rely upon this correspondence, nor is it evidence in this case.

### **Findings of Fact**

1. At the time of the hearing, Student had an educational diagnosis of intellectual disability. He had medical diagnoses of Down’s syndrome, thyroid disease, sleep apnea, audiology issues, and eczema, and was under the care of a cardiologist, a pediatric psychiatrist, and a gastroenterologist. Student is treated by a psychiatrist for chronic depression, inability to sleep, and severe anxiety. Student has been diagnosed with having behavioral constipation.

2. Student is 16 years of age and in the 10<sup>th</sup> grade special education classroom at Francis Howell High School in the District.

### **Parent’s Witnesses**

3. David Guckes is a private licensed professional counselor with 35 years of experience and specializes in ADHD, behavioral disorders, and educational issues such as learning disabilities and emotional disturbances, with a focus for helping students develop success in schools. He has a master’s degree in counseling education as well as experiential education from Minnesota State. He has had experience as a special education advocate. In addition to being a private counselor. Guckes is also certified as a school counselor.

4. Parent testified.

5. Student testified.

### **District’s Witnesses**

6. Jessie Altman is an assistant principal at Francis Howell High School and is assigned to certain students and families to work with in the educational setting referred to as an “alpha” set. Student is in Altman’s alpha set. Altman supervises the special education teachers and paraprofessionals. Altman has prior experience as a dean of students and as an English

teacher. She has a master's degree in administration and will graduate with her doctorate in December, 2019.

7. Kelli Connor has been a speech and language pathologist (SLP) at the District for 25 years. She has a master's degree in speech and language and communication disorders as well as a certificate of clinical competency from the American Speech and Language Hearing Association and state license. She has been Student's SLP.

8. David Craig is a resource teacher at the District and special education teacher. He has an associate's degree in liberal arts, a bachelor's degree in Russian language, and a master's degree in autism and spectrum disorder with an education specialist certificate and special education administration certificate. He was Student's middle school teacher and high school teacher in 2018-2019.

9. Brenna Gerke is a special education teacher who teaches essential skills, English and math. Her bachelor's degree is in special education, she has a master's degree in learning, teaching and curriculum, and she is currently working on plus 15, which are additional hours applicable to her students in her classroom. Student is in her class this year in high school. She also taught Student during the 2018-2019 school year.

10. Claire (Lovercheck) Higgins is a special education teacher in the special skills department at the District. She was a paraprofessional before becoming a teacher and works with transition skills. She has a bachelor's degree in special education, physical education, and health education. She has been Student's teacher for the last two years.

#### IEP Goals and Academic Progress

11. The IEP team met on November 27, 2018. Parent's concern was for Student to have a keyboarding class and work experience, to learn fractions and decimals and fundamental math skills, and improve his pronunciation as well as having a more specific comprehension goal.

12. As a result of the meeting, Student's IEP goals for the 2018-2019 school year included:

**Goal #1:** [Student] will increase his essential reading skills by attaining 75% accuracy on the following objectives.

1. [Student] will read a multi-step passage and will answer WH comprehension questions with 75% accuracy.
2. [Student] will read a list of 50 environmental print words/symbols (found in school, and the community including grocery words, survival signs, and department store) and he will explain their meaning with 8-% accuracy.
3. [Student] will read and participate in a cooking activity with 80% accuracy.

**Goal #2:** [Student] will increase his essential writing skills by obtaining 75% accuracy on the following objectives.

1. [Student] will make a list of needed items to complete a recipe, shopping list or project on 3 out of 4 opportunities.
2. [Student] will complete a graphic organizer and write/type a letter or email containing with more than 3 details about a topic of his choice to a family member, teacher, or friend on 3 out of 4 opportunities.

**Goal #3:** [Student] will increase his essential math skills by obtaining 80% accuracy on the objectives below.

1. [Student] will use a proven (non-electronic) strategy to correctly count mixed coins and bills amounting up to 3 dollars with 80% accuracy.
2. [Student] will match the digital and analog time from a watch or clock to the minute mark with 80% accuracy.
3. [Student] will make a purchase of up to \$10 in the school or community by opening his wallet, taking out the money, giving it to the cashier, and waiting for change with 80% accuracy.
4. [Student] will be able to add and subtract fractions with a common denominator with 80% accuracy.
5. [Student] will be able to add and subtract decimals up to 10 while using a calculator with 80% accuracy.
6. [Student] will make change for amounts up to \$3.00 with 80% accuracy with the use of a calculator.

**Goal #4:** When in a small group setting, [Student] will increase his comprehension of language by answering questions after listening to orally presented directions or problem situations on 2 out of 3 trials over three data days.

1. When given a series of directions, [Student] will answer questions about the instructions using sequential words on 2 out of 3 trials.
2. [Student] will make simple inferences or predictions and determine solutions about problems that occur in daily living activities on 3 out of 5 attempts and given a choice of three possible answers.

**Goal #5:** Within the simulated work setting, [Student] will increase his pragmatic language skills by working collaboratively with others on 3 out of 4 attempts.

1. [Student] will participate in simulated work activities without complaining on 3 out of 4 attempts.
2. [Student] will stay with a teacher directed activity until completion on 3 out of 4 turns.
3. [Student] will maintain a conversational topic for 3-4 turns with one or less prompts on 7 out of 10 attempts.

13. Student's special education services included 42 minutes of Howell time, 1,235 minutes of essential skills, 247 minutes health and PE, 25 minutes language therapy and required transportation as a necessary related service with accommodations/modifications for transportation that included curb to curb pick up and drop off.

14. Guckes felt that Student could make academic progress at the District if the educational program was individualized. After reviewing Student's November 27, 2018 IEP at the hearing, Guckes' opinion was that all of the goals for Student were appropriate given his disability and level of skills.

15. Altman described Student as being sociable, positive, and generally happy. Altman has not observed any negative changes with Student.

16. Connor found Student was motivated to complete tasks and was a social person. She works with him in the simulated work setting, and Student is able to complete 2/3 trials for the first objective of the IEP. She has seen positive improvement in Student in appropriate communication in the work setting. Connor agreed with Student's IEP goals and found Student to be very motivated and that he makes steady improvement toward his IEP goals.

17. Craig worked with Student on his IEP goals and found them to be appropriate for Student. Student worked hard in his classroom and interacted appropriately with other students and teachers. Craig wrote the IEP goals to challenge Student to make sufficient progress toward the goals during the school year. Craig works with Student on essential skills. While progress is slower with students with intellectual disabilities, Connor stated that Student always made progress toward his goals and believed Student's goals were appropriate.

18. Gerke taught Student science, social studies, social skills and transition for essential skills in 2018-2019. In 2019-2020, Gerke has Student in her classes for essential skills, English and math. She described Student as the most popular student in the group and that he knew more kids at school than she did.

19. Gerke works with Student in Community Based Instruction (CBI) where Student works to obtain job skills in various settings within the school and within the community.

20. Gerke described Student as being very fluent while reading; however, he fails to comprehend what he is reading, which is very common for a student with his type of cognitive ability. In her opinion, Student is functioning where she expects him to be. She works with him for writing functionality versus sentence structure. Student speaks very fluently and can get his ideas across.

21. Gerke has continued to work on the IEP goals with Student and breaks down the goals as needed into areas that Student can master. Gerke believes that Student has met several of the benchmarks for Goal #2 and #3.

22. Student works and progresses in the classroom if he likes what they are doing, but otherwise needs additional encouragement.

23. Higgins teaches essential skills with Gerke, as well as science, social studies, and transition skills. She sees Student as being a unique person who is fun to be around and has a lot of energy. Higgins has observed that Student has made progress in many areas such as communication and work skills. Student continues to make growth and progress toward his goals.

24. After the due process complaint had been filed, the District held the annual IEP meeting for Student on October 9, 2019. According to the notes of the meeting and the IEP, Student had been working on computer skills in his English class since last November, called "Keyboarding without Tears." All of Student's teachers reported progress toward goals. The goals were modified to continue to work on some of the same areas as the prior IEP; however, due to the stay put from the due process case, this IEP has not been implemented.

25. Student made progress on his IEP goals in the 2018-2019 school year and during the current school year. The IEP goals are reasonably calculated for Student to be able to make

progress and learn essential skills that he will need upon graduation. The IEP goals are sufficiently ambitious and are appropriate given Student's unique circumstances.

26. Student has shown he is successful at his current high school.

27. Student found some work at school easy and some hard. He liked his classes. He receives good grades.

### Bullying

28. Parent, Student, and Altman met on January 10, 2019, and Student filed a complaint of bullying by "Z."

29. Altman recorded that the bullying occurred in health class, which included name calling and being hit with a pencil a couple of times per week, and that he had not missed school, nor had his schoolwork been affected. The bullying investigation report included that:

"[Student] frequently struggles with recalling facts appropriately." Ex E at 63. Altman investigated the bullying by speaking with "Z" and with the health teacher, and she determined that it was unfounded based on the information presented. Neither Student nor Parent told Altman that the bullying concerned the use of the bathroom. Altman was not given any information from medical providers regarding the bullying.

30. Parent believed the bullying continued in the spring of 2019 because Student would not eat his lunch and reported "Z" would not leave him alone.

31. Altman did not find the bullying complaint substantiated. The only class that "Z" and Student had together was health. Student and "Z" had no classes together in the semester starting in January, 2019. Her investigation determined that many of the details, such as how frequently and when the bullying occurred, were contradictory. Altman had previously experienced Student making up facts about what had happened in a classroom setting and reporting to a teacher.

32. Student never complained to Craig about bullying.

33. Student never complained to Gerke about bullying.
34. Gerke has not seen any anxious or negative type of behavior from Student.
35. Higgins' experience with Student is that he will tell you if something is bothering him.
36. All of Student's teachers described Student as positive, friendly, and outgoing.

No one observed any negative reactions from Student other than when he needed redirection and when he complains about something he does not enjoy, such as working in a CBI employment setting.

37. When Student testified at the hearing, he seemed confused between a recent incident that happened during the current school year and being bullied by "Z."

38. Student told Parent and Guckes that he was being bullied.

39. Parent believed that Student was being bullied by "Z" by following Student into the bathroom and by "Z" cussing, hitting, pushing, shoving and kicking. Student also complained to Parent that no one helped him and that he scribbled on his homework. Student told Parent that his teachers and other classmates made fun of him and laughed at him.

40. Guckes saw Student about eight times from January 2019 to the present. Student complained of "Z" picking on him, and Parent informed Guckes about the gastrointestinal issues. Student confirmed his stress over "Z" and how it made him feel. Student told Guckes that "Z" was threatening him, teasing him, and calling him names. His impression was that Student was very scared of "Z." As a result, Guckes talked with someone (case manager or counselor) at the District who advised that the problem was under control, but in Student's mind, the problem

continued. The District also advised that Student was jovial, getting along with everyone, and high fiving other students. Guckes' overall impression was that Student was friendly, but internalizing anything that he viewed as being mean. Guckes relied on information he received from Student and Parent.

41. Student testified that last semester "Z" pushed him, and it made him feel better to talk about it with Guckes. Student knew that if someone was bothering him, he should tell a teacher, and he would do that.

42. Based upon the information from Parent and Student, Guckes supported Parent's request that Student transfer to another school.

43. No other medical providers besides Guckes testified.

44. Student's attitude toward school and school activities did not change during the year 2018-2019 or during the present year.

45. Parent has known Student to lie about what happens at school. She can tell because he mentions something once and then does not mention it again, and he lacks consistency.

46. Student's IEP from November 27, 2018 was amended on February 18, 2019; however, the amendment was based on the prior meeting where it was determined that he no longer required an aide on the bus.

47. No IEP meeting was held from November 27, 2018 to September 24, 2019. Therefore, the IEP team did not review the effect of any alleged or perceived bullying of Student.

48. Based on the bullying reported to Parent, Parent requested a boundary exception from the District on March 18, 2019 and attached letters of support from Student's medical providers. Parent stated that there was "on-going bullying, stalking (physical contact), and

harassment [by] another male . . . student.”<sup>2</sup> The exception was originally denied on April 3, 2019, then appealed in May and granted by the District, but without transportation.

49. Questions regarding the boundary appeal included whether Parent had addressed concerns raised in the appeal that Student was not being educated and whether the IEP team had reviewed the possibility of transfer. In response, Parent stated that “[Student] was literally followed by “Z” to whatever bathroom he utilized. . . . [Student] has reported to me daily that he was still being followed to the boys bathroom by “Z” and the stated unwelcome behavior continues on and never stopped. [Student] has also reported that he is still a victim of “Z’s” unwelcome behavior during their same lunch period daily.”<sup>3</sup> Further, Parent said that this had not been discussed with the IEP team because she was seeking his immediate removal from his current school and believed that transportation services went along with the request.

50. Between November 27, 2018 and September 24, 2019, Parent did not share any information with the IEP team regarding bullying and Student’s medical conditions and new diagnoses and the requested boundary exception.

51. Student told Higgins within a week before the hearing that someone was bullying him and that “my mom, she told me to lie about it.” Tr. at 266.

52. In rebuttal, Parent testified that she did not tell Student to lie about the bullying, and that Student was confused about another incident that he had very recently involving a different student.

53. Student told the IEP team at the October 2019 meeting that he did not want to transfer to another school.

---

<sup>2</sup> Ex. 1.

<sup>3</sup> Ex 4. This appears to be the only time that Parent mentioned the bathroom allegation with regard to the bullying. The due process amended complaint mentions bullying but contains no specifics other than Student’s anxiety.

54. There was no medical evidence presented linking Student's health conditions to bullying other than the testimony of Parent and Guckes.

### **Conclusions of Law**

This Commission has jurisdiction over this case. Section 162.961.<sup>4</sup> The burden of proof is on the party seeking relief, in this case Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Parent must prove her case by a preponderance of the evidence. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 8 (Mo. App., E.D. 2000). A preponderance of the evidence is "evidence which as a whole shows the fact to be proved [is] more probable than not." *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D., 2000).

### Evidentiary Issues

Parent's Exhibits 1-4 were admitted subject to a relevance objection. We overrule the relevance objection and admit Exhibits 1-4.

Parent's Exhibits 5, 6, and 7 were admitted subject to a hearsay objection and the objection that the IEP team did not have the information contained in the exhibits to consider. These appear to be medical records from Dr. Mahal, who did not testify in this case. Further, there is no affidavit from any custodian of records for these exhibits. The objections to Exhibits 5, 6, and 7 are sustained, and these exhibits will not be considered in this case. The exhibits will be retained as a part of the hearing file.

Parent's Exhibits 8-11 are letters in support of a boundary exception request she made to the District. Exhibit 10 is a letter from Guckes, who testified. The District objected to these exhibits on the basis of hearsay and relevance. Exhibit 10 is admitted into evidence because there is no prejudice to the District regarding this exhibit written by a witness who testified. The District's objections to Exhibits 8, 9, and 11 are sustained.

### Dismissal of Claims

---

<sup>4</sup> Statutory references are to RSMo 2016 unless otherwise noted.

The claims concerning the need for triennial evaluation and a BIP are dismissed.

### Credibility

We must judge the credibility of witnesses, as well as the weight and value of the evidence. *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App., W.D., 2014). We have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Reg'n for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001). Our Findings of Fact reflect our credibility determination.

### IDEA Overview

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri's State Plan for Special Education (2019) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the student's IEP. *State Plan*, Regulation I, §, page 3.<sup>5</sup> The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176 (1982). It does require the school district to "provide a disabled child with such special education and related services 'in conformity with the [child's] individual education program.'" *Andrew v. Douglas County School District RE-1*, 137 S. Ct. 988, 994 (2017).

Accordingly, it is well established that "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Id.*, quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988). An IEP is a specialized course of instruction developed for each disabled Student, taking into account the "unique needs" of a particular child. *Id.*, citing *Rowley*, 458 U.S. at 181. The

---

<sup>5</sup> See also, 20 U.S.C. § 1401(9).

IEP is not required to maximize the educational benefit to the child, but must be “reasonable” and “not ideal.” *Rowley*, 458 U.S. at 199 and *Endrew*, 137 S. Ct. at 999.

Children such as Student must have an IEP that provides an educational program “appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Endrew*, 137 S. Ct. at 1000. “To meet its substantive obligations under the IDEA” an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew*, 137 S.C. at 999. This is not a bright-line rule and it “requires a prospective judgment by school officials” that is a “fact-intensive exercise” incorporating information from both school officials and input from the child’s parents. *Id.*, citing *Rowley*, 458 U.S. at 207.

However, an absence of the court providing a “bright-line rule” is not “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review” and such deference is “based on the application of expertise and the exercise of judgment by school authorities” and “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decision that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew*, 137 U.S. at 1001-1002, citing, in part, *Rowley*, 458 U.S., at 206. Nevertheless, this does not negate a hearing officer’s duty to weigh the credibility of the witnesses and consider the impact of the testimony of expert witnesses. *Bd. of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D. Md. Mar. 6, 2006).

Educational authorities must identify and evaluate disabled children, develop an IEP for each one, and review every IEP at least once a year. §§1414(a)-(c), (d)(2) and (4). They must also re-evaluate a Student every three years. 20 U.S.C. §1414(a)(2)(B)(ii); 34 C.F.R. §300.303(b)(2). Each IEP must include an assessment of the child’s current educational

performance, articulate measurable educational goals, and specify the nature of the special services that the school will provide. §1414(d)(1)(A).

The primary mechanism for delivering a FAPE is the development of a detailed instruction plan, IEP, for each child classified as disabled. 20 U.S.C. Section(s) 1401(18). An IEP consists of, inter alia, a specific statement of a student's present abilities, goals for improvement, services designed to meet those goals, and a timetable for reaching the goals via the services. *Id.* Section(s) 1401(a)(20). The creation of an administrative structure capable of producing IEPs is a requisite to receiving IDEA funds. *Id.* Section(s) 1414(a)(5).

### Issues of the Case

Parent's due process complaint addressed her belief that Student's IEP goals were not reasonably calculated to make academic progress in light of Student's circumstances. Parent also raised the boundary exception, which was requested based upon concerns about bullying. The bullying, according to the due process complaint, was creating an inability for Student to receive FAPE. The boundary exception was granted, but it was without transportation. Therefore, Parent seeks transportation.

Parent explained the concern differently in her brief: "The primary issue in this case is whether or not Respondent's refusal to provide [Student] with transportation to [Other High School], in connection to a boundary exception, violates Respondent's duty to deliver a free, appropriate public education to [Student]. ...The evidence adduced at the hearing shows that, in fact, the bullying did happen and that [Student] failed to make academic progress in Reading and Math during the time when he was suffering as a result of the bullying." Pet. brief at 1.

The District argues that the primary issue in this case is whether Student "is unable to receive FAPE...because of anxiety he allegedly experiences as a result of bullying he allegedly experienced sometime during the 2018-2019 school year." Resp. reply to Petitioner's brief at 5. Respondent also believes that Parent dropped the allegation that the IEP goals were not

reasonably calculated to provide academic progress. Because FAPE was being provided at the current school, the District argued it was not responsible for transportation to the school where the boundary exception was obtained.

While Parent argues that the District was taking the position that bullying did not occur, the District negates that argument and clarified that there is a lack of evidence of bullying.

In order to address all of these concerns, we break down these issues and address them separately.

#### Goals and Progress on Goals

Parent complained that the goals for Student were not designed for him to make progress. Parent testified that she believed Student was not able to do his work in the classroom. Parent felt that Student had not received any type of education at his current school. In contrast, Parent's own expert found the goals of the IEP to be appropriate to address Student's needs given Student's unique circumstances. We find Parent's expert reliable and credible with regard to the goals that he reviewed at the hearing. There was not any goal that Guckes found to be inappropriate in any way. It was clear that Guckes had not previously been provided the documentation on the IEP and that all of his opinions were based mostly on what he had been told from Parent and Student.

Parent appeared to actively participate in Student's IEP team meetings up until the most recent one in October while this case was pending. Parent raised no concerns about the goals of the IEP to the team other than wanting Student to obtain keyboarding (which he indirectly did through his teacher's efforts) and wanting to be sure that Student had adequate math skills. Meanwhile, Student made progress and obtained good grades in his special education classes.

All of the District's witnesses found the IEP goals to be appropriate for Student. Student was making slow, but steady, progress in light of his intellectual disability. In situations where Student was not making as much progress as his teachers might have expected, teachers were

further breaking down the goals into subparts to assist in Student's learning. Student was described to be engaged and attentive and making progress with all of his goals.

We have reviewed this IEP in light of the evidence presented and do not find Parent's concerns to be borne out by the evidence before us. Parent presented no credible evidence upon which we could find that the IEP goals were not appropriate for Student, or that Student was making no progress toward his goals. We conclude that the goals of the IEP were reasonably calculated to provide meaningful benefit to Student in light of Student's unique circumstances for the school year at issue, 2018-2019.

### Bullying

Bullying has been defined as "characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target and the aggression is repeated or has the potential to be repeated over time." *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013).

Once a school has notice of bullying, it must take prompt steps to determine what occurred and to end any harassment so that it does not occur again. *Westfield (MA) Pub. Schs.*, 53 IDELR 132 (OCR 2009). *See Williamston (MI) Cmty. Schs.*, 56 IDELR 22 (OCR 2010). Bullying may also, but not necessarily, lead to a denial of FAPE. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013) (Bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE.).

We conclude that the District took real and appropriate steps to determine what occurred. Altman took steps to investigate the bullying by talking with "Z" and with teachers who were involved in the one class that Student had with "Z". The information about the exact bullying (whether it included incidents of harassment in the bathroom) are inconsistent and were not supported by any documentation on the bullying or by Parent's expert. Parent brought up the

bathroom incident after talking with Altman and did not go back to Altman with any additional information.

We are concerned, however, that both the Parent and the District failed to bring the bullying and any additional, new medical conditions of Student to the attention of the IEP team to make sure that any reactions to the real or perceived bullying had been adequately addressed. The District appropriately and immediately investigated the allegation of bullying. Bullying allegations that involve a student with a disability necessarily require additional inquiry. The most appropriate response should include convening the IEP team to determine whether, as a result of the actual or perceived bullying, the Student's needs have changed or whether FAPE is still being provided. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013); and *Dear Colleague Letter: Responding to [Bullying] of Students with Disabilities*, 64 IDELR 115 (OCR 2014). *See also, e.g., J.M. v. Department of Educ., State of Hawaii*, 69 IDELR 31 (D. Hawaii 2016), *aff'd*, 72 IDELR 145 (9th Cir. 2018, *unpublished*).<sup>6</sup>

Parent failed to meet her burden of proof to show that the alleged or perceived bullying caused adverse performance of Student with regard to his behavior or his academic progress toward his IEP goals. Parent failed to present evidence as to how Student's medical conditions were caused by real or perceived bullying. There was no medical evidence to establish that Student's conditions were caused by bullying. With regard to Parent's expert on this issue, we do not find him credible because all of his information came from Student and Parent. Guckes had no information from the school about Student's behavior or academic progress. Further, Guckes' expertise is limited to that of a professional counselor. He is not a medical provider.

---

<sup>6</sup> While we believe that the IEP team should have been convened to discuss the alleged or perceived bullying and its effects (including medical health concerns and psychological/psychiatric concerns), Parent failed to allege this in the due process complaint, and therefore, there was no notice to the District to the extent that Parent claims a denial of FAPE. We also believe that Parent should have provided additional information to the IEP team to support what amounts to a change in placement for Student, which then might have allowed related transportation to be considered. Again, there was no evidence that Parent addressed any belief that Student lacked FAPE with the IEP team and for consideration of another school with transportation to be provided as a related service. We are bound by the allegations contained in the due process complaint.

We do not need to conclude whether or not the bullying occurred in this case because 1) the District immediately addressed and investigated it and found it to be unsubstantiated; 2) Student continued to receive meaningful educational benefit; and 3) there was no denial of FAPE.

Additionally, the District took steps to allow for an optional transfer of Student by Parent by ultimately approving a boundary exception. This was at Parent's request. Parent chose not to carry through with her request because she also wanted transportation. Because there was not a denial of FAPE, the election of a different school within the school system was at the request of Parent and her personal choice. It was not related to a denial of FAPE or Student's disability. *See Fick v. Sioux Falls Sch. Dist. 49-5*, 39 IDELR 151 (8th Cir. 2003); *Timothy H. and Brenda H. v. Cedar Rapids Cmty. Sch. Dist.*, 30 IDELR 535 (8th Cir. 1999); and *Richland (WA) Sch. Dist. No. 400*, 22 IDELR 992 (OCR 1995). Districts are only required to provide transportation as a related service when the present school is not providing FAPE.

### **Summary**

We conclude that the goals in Student's IEP were reasonably calculated to make academic progress in light of Student's unique circumstances, that the District provides the services, support, and accommodations necessary for Student, and that the District provided FAPE to Student in the 2018-2019 school year. The District was not required to provide transportation as a related service in connection with the boundary exception. The District did not violate the IDEA.

SO ORDERED on December 19, 2019.

---

AUDREY HANSON MCINTOSH  
Commissioner

## **Appeal Procedure**

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per §162.962, when a review of this decision is sought, either party may appeal as follows:

- (1) The court shall hear the case without a jury and shall:
  - (a) Receive the records of the administrative proceedings;
  - (b) Hear additional evidence at the request of a party; and
  - (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence;
- (2) Appeals may be taken from the judgment of the court as in other civil cases;
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision;
- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same;
- (5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. §300.516.