IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

C.C. INDIVIDUALLY, BY AND THROUGH HIS NEXT FRIENDS, CHARLES CRIPPS AND KRISTIE CRIPPS,	§	
Plaintiff,	§	
VS.	§	NO. 4:14-CV-1042-A
HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT,	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

Came on for consideration in the above-captioned action the complaint of plaintiff, C.C. individually, by and through his next friends, Charles Cripps and Kristie Cripps, seeking vacatur of the findings, decisions, and rulings made in the underlying Due Process Hearing by a Special Education Hearing Officer ("SEHO"), and rendition of judgment in favor of plaintiff as to the issues presented in that hearing. Having considered the complaint, the answer of defendant, Hurst-Euless-Bedford Independent School District ("the District"), the written contentions and briefs filed by the parties, the administrative record, and applicable legal authorities, the court concludes that the relief sought by plaintiff should be denied, and that

the findings, decisions, and rulings of the SEHO should be affirmed.

I.

IDEA Statutory Framework

As a condition of the State of Texas's receipt of federal education funding under the Individuals with Disabilities Education Act ("IDEA"), the District must (1) provide each disabled child within its jurisdictional boundaries a Free Appropriate Public Education ("FAPE"), and (2) assure that such education is offered, to the greatest extent possible, alongside children who are not disabled in the "least restrictive environment" suitable for the disabled student's needs. 20 U.S.C. §§ 1412(1) & 1412(5). In order to provide a FAPE to a student with a disability, the student's education "is required to be tailored to the unique needs of the handicapped child by means of an individualized education plan [("IEP")]." Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127, 128 (5th Cir. 1993). The IEP is prepared at a meeting of the IEP team, which consists of (1) the student's parents, (2) at least one regular education teacher of the child, (3) at least one special education teacher of the child, (4) a representative of the public agency with appropriate authority, (5) "[a]n individual who can interpret the instructional implications of evaluation results . . . ", (6)

"[a]t the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child . . . ", and (7) where appropriate, the child himself. 34 C.F.R. § 300.321(a). In Texas, the IEP team is known as the Admissions, Review, and Dismissal Committee ("ARDC"). R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 805 n.1 (5th Cir. 2012).

The FAPE, however, "need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." R.P. ex rel. R.P., 703 F.3d at 809 (citation and internal quotation marks omitted). Stated another way, the IDEA guarantees only a "basic floor of opportunity . . . " for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit . . . ." Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 201 (1982). Still, "the educational benefit to which the IDEA refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial

educational advancement." R.P. ex rel. R.P., 703 F.3d at 809 (citation and internal quotation marks omitted).

The IDEA requires any state or local educational agency receiving funds under the IDEA to "establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies." 20 U.S.C. § 1415(a). Such procedural safeguards include allowing parents to play a significant role in the development of an IEP. See Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007).

Such an agency is also required to provide parents with an opportunity to present complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child . . . ." 20 U.S.C. § 1415(b)(6). If such complaints cannot be resolved at the preliminary stage, the parents may proceed to an impartial due process hearing which is generally limited substantively to whether the child received a FAPE. 20 U.S.C. §§ 1415(f)(1)(A) & 1415(f)(3)(E)(i). After parents have exhausted those administrative procedures, if they are still dissatisfied with the result, they may bring a civil action in a federal

district court, without regard to the amount in controversy. 20 U.S.C. § 1415(i)(2)(A).

Additional procedural safeguards are required when a school district seeks to place a student with a disability in a Disciplinary Alternative Education Program ("DAEP"). When such placement is to be for a period exceeding ten school days, the ARDC must make a manifestation determination, 20 U.S.C. § 1415(k)(1)(C), which requires a finding as to whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability . . ." and whether "the conduct in question was the direct result of the local educational agency's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E). However, no such manifestation determination is required when a student is sent to a DAEP for (1) less than ten school days, or (2) less than forty-five school days for engaging in conduct constituting special circumstances. 20 U.S.C. § 1415(k)(1)(B) & (G). The same appeals process described above may also be followed to appeal the manifestation determination.

II.

Plaintiff's Complaint

Plaintiff initiated this action by filing a complaint on August 11, 2014, in cause number 4:14-CV-646-A, which contained

various causes of action. On December 24, 2014, the court severed the instant appeal into the above-captioned action. Plaintiff's original complaint in this severed appeal action filed January 5, 2015, asks the court to find that the SEHO erred in his findings, decisions, and rulings, and that plaintiff is entitled to damages for injuries allegedly sustained by him and his parents, punitive damages, and attorney's fees.

III.

Standard of Review

When a federal district court reviews a decision rendered by a SEHO's in a due process hearing under the IDEA, the court must accord "due weight" to the SEHO's findings, but must ultimately reach an independent decision based on the preponderance of the evidence. Rowley, 458 U.S. at 206; Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F., 118 F.3d 245, 252 (5th Cir. 1997). Accordingly, this court's review of the SEHO's decision is "virtually de novo." Michael F., 118 F.3d at 252. The burden of proof is on the party challenging the IEP, in this case, plaintiff, to show why the IEP and resulting placement were inappropriate under the IDEA. See Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347 (5th Cir. 2000). The court's task "is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local

school officials have complied with the [IDEA]." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

IV.

Summary Background and Relevant Facts

The following is a summary of pertinent facts established by the administrative record:

On November 2, 2012, plaintiff and his parents entered into a mediation agreement with the District while he was a student at Central Junior High School, a school within the District. AR at 760-764.[1] As part of the agreement, the District agreed to conduct a Full and Individual Evaluation ("FIE")[2] to determine whether plaintiff was eligible for special education services under the IDEA. Id. at 760, ¶ 3. Plaintiff was also allowed to transfer to another school within the District, Bedford Junior High ("BJH"). Id., ¶ 1. In anticipation of that transfer, several meetings among staff, plaintiff's parents, teachers, the vice principal, and the principal of BJH were conducted to review

[1]The "AR at ____" references are to the administrative record that appears on the docket of this action as items 6 through 15.

[2]The IDEA requires that an agency governed by the IDEA "shall conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with disability under [the IDEA]." 20 U.S.C. § 1414(a)(1)(A). In Texas, such full and individual initial evaluation is known as a FIE.

plaintiff's Section 504 Accommodation Plan.[3] Id. at 766-767, 1314, 1746-1747. Plaintiff's first day at BJH was November 8, 2012. Id. at 1590-1591.

The FIE was completed on or about December 19, 2012, id. at 772-790, 792-795, 797-799, 803-826, and the ARDC met on January 15, 2013, to review it, id. at 828, 847. However, the meeting was recessed and rescheduled for January 31, 2013. Id. at 847. On January 23, 2013, plaintiff's parents and the District entered into another settlement agreement to resolve the parents' complaints about alleged violations of the IDEA procedures and the mediation agreement. Id. at 880-881. During the ARDC meeting on January 31, 2013, the ARDC approved the IEP goals and objectives, and reviewed and accepted a behavior intervention plan ("BIP").[4] Id. at 848-850. The ARDC also approved instructional accommodations in the form of alternative

[3]Section 504 of the Rehabilitation Act "broadly prohibit[s] discrimination against disabled persons in federally assisted programs or activities." Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 990 (5th Cir. 2014) (alteration in the original) (citation and internal quotation marks omitted). The District determined that plaintiff was entitled to accommodation under Section 504 on or about September 18, 2012, prior to his enrollment at BJH. AR at 750-752. His Section 504 Accommodation Plan approved the following accommodations: (1) preferential seating, (2) redirection, (3) small group testing for certain types of tests, (4) provision of teacher's notes when requested by the student, (5) an extra set of textbooks to keep at home, and (6) access to content mastery. Id.

[4]When the ARDC determines that a student's behavior impedes his learning or that of others, a BIP is adopted as part of the IEP. The BIP includes a list of targeted behaviors and a list of procedures, strategies, and consequences to encourage a student to engage in such behaviors. Plaintiff's BIP targeted the following behaviors: (1) comply with adult directives, (2) bring needed materials for class participation, and (3) initiate academic tasks independently. AR at 854-860.

assignments that required less writing and an alternative way of dealing with plaintiff's tardiness. Id. at 849-850. In addition, the ARDC also approved occupational therapy services, social skills training, assistive technology services, and inclusion support. Id. at 850. Special education counseling services were not recommended because it was determined that plaintiff should receive such services through his private therapist. Id. The parents waived the waiting period, so the IEP was implemented beginning February 1, 2013. Id. at 850, 876. Vice Principal Damon Emery ("Emery") conducted training on implementing these accommodations with plaintiff's teachers on February 1, 4, and 7, 2013. Id. at 1641-1645.

Plaintiff received a number of disciplinary referrals while at BJH. By the time the BIP was implemented, he had already received a number of lunch detentions, in-school suspensions, at least one Saturday school detention, and had been placed in a DAEP for a few days.[5] Id. at 1195-1218. On February 21, 2013, Emery was investigating an allegation that plaintiff had yelled

[5]While plaintiff seeks to minimize his disciplinary referrals, he does not take issue with any of the evidence received at the due process hearing that disclosed that plaintiff had serious disciplinary problems while at BJH and that personnel of the District patiently tried to cope with them in an appropriate manner. Because there apparently is no dispute relative to those matters, the court is not discussing them in detail, but simply is referring to the pages of the District's responsive brief where they are discussed. See Resp. Br., Doc. 54 at 6-8, 11.

across the classroom a derogatory remark about the size of another student's penis when he was told that plaintiff had taken a photo of another student, R.L., sitting on a toilet. Id. at 1229, 1651-1652. Emery questioned plaintiff about the incident, and plaintiff admitted to taking three photos, and showed them to Emery. Id. at 995-996, 1558. Plaintiff stated that R.L. wanted him to take the photos and, in fact, posed for the photos. Id. at 1463-1465. As part of the investigation, Emery questioned plaintiff, R.L., and three other students who were in the bathroom at the time of the incident. Id. at 982-990.

Following the investigation, Emery concluded that plaintiff's actions were conduct consistent with the felony of improper photography, see Tex. Penal Code § 21.15, and therefore plaintiff "on or within 300 feet of school property . . . " "engage[d] in conduct punishable as a felony," Tex. Educ. Code § 37.006(a)(2). AR at 992. The Texas Education Code mandated a DAEP placement for such conduct. Tex. Educ. Code § 37.006(a)(2)(A). Furthermore, the student code of conduct required such DAEP placement be for sixty days. AR at 970. Plaintiff's parents were called on February 21, 2013, and informed of the situation. Id. at 907, 941 When they arrived, they emptied plaintiff's locker and took him home. Id. at 942.

That afternoon the principal and Emery held a DAEP placement conference. Id. The parents declined to participate. Id. at 942, 992. Plaintiff has not attended a school within the District since February 21, 2013. Id. at 1898-1899, 1905, 1927.

On March 4, 2013, the ARDC met to conduct a manifestation determination review ("MDR"). Id. at 907. Under 20 U.S.C.A. § 1415(k)(1)(E), when a school seeks to change the placement of a student covered by the IDEA for more than ten school days,

> the local educational agency, the parent and relevant members of the IEP Team . . . shall review all relevant information in the student's' file, including the child's IEP, any teacher observations, and other relevant information provided by the parents to determine -
> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

20 U.S.C.A. § 1415(k)(1)(E). The ARDC decision was negative as to both questions. AR at 908. Plaintiff's advocate, Debra Liva,[6] objected to this finding because the ARDC had not yet

[6] The IDEA also allows a parent, at his or her discretion, to include within the ARDC "other individuals who have knowledge or special expertise regarding the child . . . ." 20 U.S.C. 1414(d)(1)(B)(vi). Such provision is presumably the basis for Ms. Liva's presence at the ARDC meetings. She was considered "In Attendance Only" rather than a "Required Member" and as such did not officially indicate her agreement or disagreement with any action taken by the ARDC on the ARDC signature page. Her objection is instead noted in the meeting minutes.

received the Independent Educational Evaluation ("IEE")[7] conducted by Dr. Shannon Taylor[8] to supplement the FIE. Id. Plaintiff was officially withdrawn from the District on March 4, 2013, id. at 927, and on March 5, 2013, the Principal of BJH signed the Disciplinary Alternative Education Placement Order. Id. at 975.

Prior to requesting a Due Process Hearing pursuant to the IDEA, plaintiff appealed the Disciplinary Alternative Education Placement Order through the general education procedure.[9] Id. at 979. On March 20, 2013, a district-level due process hearing was held by the District Level Due Process Hearing Committee.[10] Id. at 529. The following day, Emery conducted a follow-up investigation, and interviewed approximately five more students

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[7]The IDEA implementing regulations grant a parent "the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency . . . ." 34 C.F.R. § 300.502(b)(1). An IEE is defined by such regulations as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question . . . ." 34 C.F.R. § 300.502(a)(3)(i).

[8]Dr. Taylor is a Licensed Psychologist with the North Texas Neuropsychology and Behavioral Medicine Services. AR at 1055. Plaintiff was referred to her by his educational advocate Debra Liva. AR at 908.

[9]While the precise District policy is not included in the record, it appears from the evidence that, where a student is dissatisfied with a decision of a principal or other administrator, that student may appeal such decision to the District's Superintendent. AR at 976.

[10]The letter notifying plaintiff's parents of the decision of the District Level Due Process Committee was signed by Cicely Tuttle, Committee Chairperson, Tammy Daggs, Committee Member, and Dr. Toby Givens, Committee Member. AR at 530. Presumably such persons were the entirety of the committee provided by the Superintendent to hear such appeals.

based upon information provided during the district-level due process hearing. Id. at 998-999. His recommendation regarding plaintiff remained unchanged as a result of this further investigation, id. at 999, and the due process committee denied plaintiff's appeal and upheld his DAEP assignment on March 21, 2013. Id. at 529-530.

On April 11, 2013, the ARDC reconvened but plaintiff's parents were not in attendance. Id. at 1018. The ARDC denied plaintiff's previously made request for homebound placement. Id. at 1019. When the ARDC reconvened on May 20, 2013, to consider the results of the IEE which had been completed on April 9, 2013, it incorporated some of the suggestions of Dr. Taylor into plaintiff's IEP. Id. at 1055, 1092-1094. Though plaintiff's parents were in attendance at the May 20, 2013 meeting, they did not indicate whether they accepted or rejected the changes. Id. at 1092, 1095. The ARDC reconvened again on May 29, 2013, to allow the plaintiff's parents another opportunity to agree or disagree with the ARDC's May 20, 2013 decision, but the parents were not in attendance. Id. at 1136.

On January 13, 2014, plaintiff requested a due process hearing pursuant to the IDEA. Id. at 51. The hearing was held March 19-20, 2014. Id. at 1407-2014. The SEHO, Hunter

Burkhalter, presided over the hearing. Id. He issued his decision on May 13, 2014, from which the instant appeal was taken. Id. at 45.

V.

The Parties' Contentions

In this appeal, plaintiff challenged the following findings of the SEHO: (1) R.L. had a reasonable expectation of privacy and thus plaintiff engaged in conduct punishable as a felony; (2) the District did not violate the IDEA by failing to adjust plaintiff's IEP and placement after it was informed that the Tarrant County Juvenile Justice Authority ("TCJJA") declined to prosecute plaintiff; (3) plaintiff was provided a FAPE; (4) plaintiff received academic and non-academic benefits, despite the fact that he had a number of failing grades and only met with the Behavior Interventionist four times; (5) the academic environment was not hostile; (6) he did not have jurisdiction to entertain plaintiff's motion for expedited rehearing.[11] Plaintiff also initially challenged the SEHO's determination upholding the ARDC's manifestation determination. However, he

[11]Plaintiff contended that the SEHO erred when he made findings of fact which are actually conclusions of law. Rather than ruling on such contention, the court simply gives the SEHO's findings and conclusions the effect they deserve in making a ruling in this appeal.

stated in his reply brief that he is no longer contesting that determination.[12]

In response, the District maintained that (1) plaintiff demonstrated positive academic and non-academic benefits from the IEP and the District was not required to ensure that plaintiff's disabilities were remediated overnight, (2) the SEHO did not have jurisdiction to review the District's finding that plaintiff engaged in conduct punishable as a felony, though his finding was correct, (3) even if the District did receive notice that the TCJJA had decided not to prosecute plaintiff for a felony, such notification did not obligate the ARDC to reevaluate plaintiff's DAEP placement, (4) plaintiff was educated in the least restrictive environment, and (5) there is no evidence that the District was a hostile environment.

[12]Presumably plaintiff also is no longer contesting the SEHO's determination that the District did not violate the IDEA by "fail[ing] to adjust [plaintiff's] IEP and by extension the DAEP placement, based upon the [IEE] . . . ." Statement of Contentions at 5, ¶ 21. Plaintiff did not brief that contention, and as stated above, the District did make additions to his IEP based on the IEE. Therefore plaintiff's contention seems to be that the ARDC should have considered the IEE in making its manifestation determination, which plaintiff is no longer contesting.

VI.

Analysis[13]

A. The SEHO's Finding that Plaintiff's Engaged in Conduct Punishable as a Felony

Plaintiff contended that the SEHO erred in upholding the District's finding that plaintiff engaged in conduct punishable as a felony. The SEHO found "that the District correctly concluded that [plaintiff]: (a) photographed R.[L.] in a bathroom and transmitted those photographs, (b) without R.[L.]'s consent, and (c) with the intent to invade R.[L.]'s privacy." AR at 34. Plaintiff's contention is that, owing to the fact that R.L. used the toilet area without a door and allegedly posed for the photographs, the evidence does not support the SEHO's finding. The District responded that the SEHO's determination was correct, but argued that the IDEA does not give either the SEHO or this court jurisdiction to review the District's determination that plaintiff's conduct constituted a felony.

A person has committed the crime of improper photography if such person, "photographs . . . a visual image of another at a location that is a bathroom . . . : (A) without the other person's consent; and (B) with intent to: (i) invade the privacy

[13] All facts recited under this heading are facts the court has found by a preponderance of the evidence.

of the other person . . . ." Tex. Penal Code. § 21.15(b). Plaintiff admitted to taking three photographs of R.L. on the toilet. AR at 995-996, 1558. Based on his investigation, Emery found that plaintiff did not have R.L.'s consent to take the photographs and that plaintiff intended to invade R.L.'s privacy. Id. at 995. The principal upheld Emery's decision. Id. at 994. Plaintiff appealed, id. at 979, and the District Level Due Process Hearing Committee denied that appeal. Id. at 529-530. As a result, the student code of conduct mandated a sixty-day DAEP placement. Id. at 970.

Under the IDEA, a parent of a child with a disability may request a due process hearing. 20 U.S.C. § 1415(f)(1)(A). Such hearing is solely to resolve complaints about (a) "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child . . .", or (b) the manifestation determination. 20 U.S.C. §§ 1415(f) & (b) & (k). The SEHO's finding that plaintiff engaged in conduct punishable as a felony is not relevant to the issues he was to decide.

The IDEA provides that when the ARDC makes a negative manifestation determination, "the relevant disciplinary procedures applicable to children without disabilities [are]

applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities . . . ." 20 U.S.C.A. §§ 1415(k)(1)(B) & (C).[14] This inquiry is whether the disciplinary procedures were applied to plaintiff by the District in the same way that such procedures would have been applied to any other student within the District, not whether R.L. consented to the photograph being taken or whether plaintiff intended to invade R.L.'s privacy. Plaintiff has not proved that the procedures of the District were applied to him differently than they would have been applied had they found that another student engaged in conduct similar to plaintiff's.

Because the factual findings of the SEHO regarding R.L.'s consent and plaintiff's intent to invade R.L.'s privacy are not relevant to the inquiry under the IDEA, the court need not address the jurisdictional question presented by the District.

B. The District was Not Required to Adjust Plaintiff's DAEP Placement upon Notice from the TCJJA

Plaintiff contended that the TCJJA declined to prosecute him for the felony of improper photography because of insufficient evidence and so notified the District, and that, based upon that

[14]The IDEA also allows a child with a disability to be removed to a DAEP based upon "special circumstances" which are not relevant in this instance.

new information, the District should have adjusted his placement. Assuming, arguendo, that the TCJJA decided not to prosecute plaintiff for the felony of improper photography because of insufficient evidence and that the TCJJA notified the District of that decision, the District would still have no obligation to review plaintiff's DAEP placement under the IDEA.[15] In the case of plaintiff, the ARDC met to (1) discuss and implement his IEP, including his BIP, to ensure he was receiving a FAPE, AR at 847-850, 1018-1020, 1092-1094, 1136-1137, and (2) conduct a manifestation determination, id. at 906-909, the results of which plaintiff does not challenge. The only relevance such alleged TCJJA notice would have is to the question of whether plaintiff engaged in conduct punishable as a felony. The ARDC did not make that determination, and plaintiff has presented the court with no legal argument as to how the decision of a criminal justice authority affects any decision actually made by the ARDC. For that reason, plaintiff has failed to establish that the ARDC violated the IDEA by failing to take action based on the notice allegedly sent to them from the TCJJA.

[15]So far as the court can determine, the administrative record does not contain evidence that the District received notice from the TCJJA that it had decided not to prosecute plaintiff.

C. The SEHO's Declination to Grant a Rehearing Was Not Improper

The month after the SEHO issued his decision and order from which the instant appeal was taken, plaintiff, through his attorney, submitted to the SEHO a document titled "Motion For Expedited Rehearing" by which he sought a reopening of his due process hearing, apparently for the purpose of entering into the hearing record prints of the photographs that plaintiff took of R.L. while the latter was seated on the toilet. AR at 303-308. After the District filed a response to that motion, id. at 315-322, the SEHO issued a letter on June 4, 2014, that expressed his conclusion that he lacked jurisdiction to rule on the motion, and his decision that he did not plan to do so, id. at 324.

Plaintiff caused this court to become involved in his attempt to obtain a rehearing by filing a motion on October 21, 2014, in this action when it was pending as Case No. 4:14-CV-646-A, asking that this court order a remand so that the "Hearing Officer [could] admit the evidence previously denied . . . ." Case No. 4:14-CV-646-A, Doc. 19 at 2. By that motion, plaintiff sought a ruling that the proceeding be remanded to the SEHO not only for the purpose of having the SEHO reopen the hearing to take into account prints of the photographs, but also for the purpose of permitting plaintiff, through his attorney, to put

into the record of the due process hearing school records pertaining to non-party students. Id., Doc. 20 at 6-7, ¶¶ 27-29. After having considered the motion to remand and the District's response, this court issued an order on November 6, 2014, in Case No. 4:14-CV-646-A, denying the motion. Id., Doc. 29.

This court continues to be of the view that a remand was not appropriate, and would not have been required even if the only ground for the requested remand were, as stated in the June 2014 motion directed to the SEHO, to cause witness descriptions of what the photographs depicted to be clarified by an inclusion in the record of the due process hearing of prints of the photographs. There is no indication in the record that the officials of the District would have made any decisions different from those they made if they had perceived the photographs differently from what they said at the hearing, nor is there any suggestion in the record that the SEHO would have made any findings or rulings different from those contained in his May 2014 Decision and Order if he had seen prints of the photographs before he made his findings and rulings. Therefore, the issue of whether the SEHO had jurisdiction to reopen the hearing to receive prints of the photographs in evidence is moot because the record indicates that if the hearing had been

reopened, and the photographs received into the hearing record, the outcome would have been the same.

D. Plaintiff Received a FAPE

In order to provide a student a FAPE, the ARDC prepares and implements an IEP, which must be "likely to produce progress, not regression or trivial educational advancement." Michael F., 118 F.3d at 248. The United States Court of Appeals for the Fifth Circuit has approved four factors to "serve as indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA." Id. at 253. Those factors are: "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) positive academic and non-academic benefits are demonstrated." Id. (citation and internal quotation marks omitted). These factors are indicators that a FAPE was or was not provided, not independent causes of action.

Plaintiff contended that he was denied a FAPE, because (1) he was not educated in the least restrictive environment, (2) no positive academic or non-academic benefits were demonstrated, and (3) his IEP was not developed in a collaborative manner by key

stakeholders nor was it provided commensurate with his unique individualized needs.[16] The court agrees with the SEHO that the third contention seems to encompass the first and third Michael F. factors that: the program must be individualized on the basis of the student's assessment and performance, and the services must be provided in a coordinated and collaborative manner by the key stakeholders. Thus, the court will discuss plaintiff's contentions with that framework in mind.

1. Least Restrictive Environment

Plaintiff contended that he was not educated in the least restrictive environment because he was placed in a DAEP instead of in-school suspension or detention. The IDEA required the District to "assure that such education is offered, to the greatest extent possible, in the educational 'mainstream' that is, side by side with non-disabled children, in the least restrictive environment consistent with the disabled student's needs." Michael F., 118 F.3d at 247. Plaintiff provided no authority to support his proposition that this provision of the

[16]In the background section of his statement of contentions, as near as the court can tell, plaintiff asserted that the District violated the IDEA by having "pre-conceived notions of what C.C.'[s] IEP and placement should be prior to the Committee [meeting] where such items were to be addressed in an interactive and collaborative process between the parties." Statement of Contentions at 2. Since the issue is not listed within the contentions section of such document, nor is it brief, the court will assume plaintiff is not asserting such statement as a separate contention.

IDEA contemplates a less stringent disciplinary placement than would be otherwise warranted. In fact, as the SEHO correctly noted, once a negative manifestation determination was made, the District was authorized to apply its disciplinary procedures "in the same manner and for the same duration in which the procedures would be applied to children without disabilities . . . ." 20 U.S.C. § 1415(k)(1)(C); AR at 38. Plaintiff is not challenging the manifestation determination, and, as discussed above, offered no evidence that the District did not properly follow its disciplinary procedures.

2. Academic and Non-Academic Benefits

Plaintiff next contended he did not receive an academic or non-academic benefit. Presumably included in this contention is plaintiff's argument that the SEHO erred in making findings of fact that (1) he received an academic benefit despite having a number of failing grades, and (2) he derived a benefit from his four meetings with the Behavior Interventionist.

The Fifth Circuit "ha[s] not held that district courts must apply the four factors in any particular way. [Its] cases state only that these factors are indicators of an IEP's appropriateness intended to guide a district court in the fact-intensive inquiry of evaluating whether an IEP provided an

educational benefit." Richardson Indep. Sch. Dist. v. Michael Z, 580 F.3d 286, 294 (5th Cir. 2009) (internal quotations and citations omitted). Plaintiff's IEP was implemented February 1, 2013, and the last day he attended BJH was February 21, 2013. AR at 850, 876, 1898-1899, 1905, 1927. Thus, the IEP was only in place three weeks. There was not even a completed grading period following the implementation of the IEP prior to the parents removing the plaintiff from school. Id. at 1243. In making the finding of fact that plaintiff demonstrated an academic benefit, the SEHO noted that the data showed plaintiff's incidence of turning in work on time went from 23% to 46% between the week ending February 8, 2013, and the week ending February 15, 2013. Id. at 42, 1247-1248. The SEHO also made a factual finding that plaintiff demonstrated non-academic benefit from his four meetings with the Behavior Interventionist. Id. at 42, 2008-2009.

Considering the limited time frame and the fact that the party challenging the IEP bears the burden of proving that the IEP is deficient, the court concludes that plaintiff has failed to prove that positive academic and non-academic benefits were not demonstrated.

3. The Program was Individualized

Plaintiff contended that his IEP was not individualized because the ARDC did not consider the notice allegedly sent to the District by the TCJJA.[17] In support of this contention, plaintiff argued that (1) because plaintiff's behavior impeded his learning, the ARDC had a duty to consider the information from the TCJJA, and (2) the wording within the Texas Education Code and the Texas Code of Criminal Procedure evinced a desire of the legislature that schools take into account a juvenile justice authority's decision not to prosecute.

In developing the IEP, the ARDC "must consider– (i) [t]he strengths of the child; (ii) [t]he concerns of the parents for enhancing the education of their child; (iii) [t]he results of the initial or most recent evaluation of the child; and (iv) [t]he academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a)(1). The ARDC must also, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . . ." 34 C.F.R. § 300.324(a)(2)(i). The only

[17]As noted earlier, supra at 19 n.15, the court has not found anything in the administrative record suggesting that such notice was sent by the TCJJA to the District.

information regarding plaintiff which the TCJJA could have presented to the ARDC is that they decided not to prosecute the case. Even assuming, arguendo, that the TCJJA concluded that it could not prove beyond a reasonable doubt that plaintiff engaged in conduct punishable as a felony, that information is not relevant to the inquiry of the ARDC. That information has no bearing on any of the above-listed factors. Such information might be relevant to the factual finding of the school as part of the general education disciplinary procedures but that was not the ARDC's inquiry.

Plaintiff attempted to bolster this contention through his argument that provisions of the Texas Education Code and the Texas Code of Criminal Procedure evinced a desire by the Texas state legislature that the District consider such a TCJJA notice. However, such argument is unavailing. The Texas Education Code authorizes, but does not mandate, that the Superintendent or his designee consider such a notice from the TCJJA in determining whether there is a reasonable belief that the student engaged in conduct defined as a felony offense. See Tex. Educ. Code. § 37.006(e). As previously discussed, the question of whether a student engaged in conduct defined as a felony offense is irrelevant to the ARDC's inquiry under the IDEA. Therefore,

those provisions of Texas law have no bearing on the ARDC's analysis. Thus the ARDC did not err in not considering such a notice if it received one.

4. The Services were Provided in a Coordinated and Collaborative Manner by the Key Stakeholders

Plaintiff incorrectly contended that the TCJJA was a key stakeholder that needed to be included in the IEP development process. The IDEA required that the IEP team include the parents, at least one of the student's regular education teachers, at least one of the student's special education teachers, a representative of the school District who is qualified to provide specially designed instructions and is sufficiently knowledgeable about the general education curriculum and availability of resources, and an individual who can interpret the instructional implications of evaluation results. 20 U.S.C. § 1414(d)(1)(B). In addition, at the parents' or agency's discretion, the team may include other individuals who have knowledge or special expertise regarding the student. Id. As stated above, the only question the TCJJA could possibly aid in answering is whether it could prove beyond a reasonable doubt that plaintiff engaged in conduct punishable as a felony. Therefore, the TCJJA did not have knowledge relevant to the ARDC. Furthermore, plaintiff did not contend that he or his parents

requested the TCJJA be added to the ARDC at any point prior to this appeal.

Plaintiff's sole contention regarding this factor is that the TCJJA was not included as a stakeholder. He and his parents made no argument that the meetings of the ARDC were not collaborative or that they were unheard. The court therefore does not find that the IEP services were not provided in a coordinated and collaborative manner by the key stakeholders.

E. The Academic Environment was not Hostile

Plaintiff's final contention seems to be that hostility of the District deprived him of a FAPE. Within this segment of his brief, plaintiff contended that the SEHO erred in (1) excluding the disciplinary records of other children, and (2) determining that the environment was not hostile. The court has previously held that the disciplinary records of other children are not relevant to this appeal.

Plaintiff's hostile academic environment claim seems to be that the District punished him more harshly than other students in an effort to remove him from the regular education setting, causing him to be denied a FAPE.[18] As near as the court can

[18]Insofar as plaintiff is relying upon the section of the IDEA which requires a school to administer its disciplinary procedures in the same manner and for the same duration regardless of whether a student has (continued...)

tell, there is no precedent directly on point. But, even assuming, arguendo, that this is an appropriate inquiry under the IDEA, plaintiff has presented no evidence in support of this contention. In his brief, plaintiff stated that (1) he overheard two teachers saying they could write him up for destruction of school property for scratching a pencil on the wall, (2) one teacher followed him around, arranged for them to collide twice, and then filed assault charges against him, (3) the school attempted to have parents of two students file sexual assault charges against plaintiff, and (4) the District mischaracterized his actions of taking a picture of another student on the toilet as a felony.[19] First, plaintiff's testimony at the hearing was that he was told by staff that he was destroying school property by tapping a pen on the wall, not that he overheard teachers conspiring to have him kicked out of school for such action. AR at 1466, 1468. Second, assuming, arguendo, that plaintiff's characterizations are accurate, there is no evidence that the District instructed plaintiff's teacher to run into him or to

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(...continued)
a disability, the court has already addressed this contention.

[19]Plaintiff attempted to admit as evidence, both at the due process hearing level and as additional evidence pertinent to this appeal, disciplinary records of other students. While such records appeared to deal with serious conduct, there was no allegation made by plaintiff that a student who appeared to have engaged in conduct punishable as a felony on school property was treated differently than he was.

file assault charges or even was aware that she did either. AR at 634-635, 1208, 1226-1228. Third, as near as the court can tell, plaintiff has offered no evidence that Emery attempted to convince anyone to file sexual assault charges against plaintiff.[20] And fourth, plaintiff has presented no evidence that the District's conclusion that he engaged in conduct punishable as a felony was made in bad faith.

Plaintiff, who bears the burden of proving that he was deprived of a FAPE, has not persuaded the court that the District created a hostile environment that deprived him of an educational opportunity or interfered with his educational opportunities.

F. Plaintiff is Not Entitled to Reimbursement for Home School Costs

Under the IDEA, a district court has discretion to "grant such relief as [it] determines is appropriate." Michael Z, 580 F.3d at 292 (alteration in the original) (citation and internal quotation omitted). "When parents unilaterally remove their child from a public school, reimbursement for the expenses of

[20]Plaintiff in his brief cites to written notes of the principal wherein the principal wrote that plaintiff asked a young girl if she was making porn, and that the girl's mom, who was an employee of the District, wanted to speak with her daughter before "making a decision on which way she would like for [the school] to go with a consequence." AR at 1311. There is no mention of any school official suggesting the mother file a criminal complaint. Furthermore, inasmuch as plaintiff argued the District approached the parents of the student who plaintiff allegedly sexually harassed on February 19, 2013, plaintiff pointed to no evidence that the District discussed that matter with the other student's parents or encouraged them to file a criminal complaint. See Id. at 1229.

private schooling may be an appropriate form of relief in some situations." Id. at 292-293. In order to be entitled to reimbursement, plaintiff must prove that "(1) an IEP calling for placement in public school was inappropriate under IDEA, and (2) the private placement was proper under the Act." Id. at 293.

As the court has already determined that plaintiff has not met his burden of proving that the District did not offer him an individualized and appropriate IEP or did not make a FAPE available, plaintiff cannot satisfy the first prong of this analysis. Nor has plaintiff persuaded the court that private placement of plaintiff was proper under the IDEA. Thus, the court concludes that neither plaintiff nor his parents are entitled to reimbursement for home school costs, nor are they entitled to any other reimbursement or to damages they are seeking for alleged injuries.

G. Attorney's Fees

The IDEA provided that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B). "Under the IDEA, a prevailing party is one that attains a remedy that both (1) alters the legal relationship between the school district and the handicapped

child and (2) fosters the purposes of the IDEA." El Paso Indep. Sch. Dist. v. Richard R., 591 F.3d 417, 421-422 (5th Cir. 2009). A party need not obtain a favorable outcome on every issue to become a prevailing party, but he or she must prevail on some "significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Alief Indep. Sch. Dist. v. C.C. ex rel. Kenneth C., 713 F.3d 268, 270 (5th Cir. 2013). As plaintiff has not prevailed on any of his claims, he is not a prevailing party and neither he nor his parents are entitled to attorney's fees.

H. Conclusion

In reaching the decisions and making the findings expressed in this memorandum opinion and order, the court applied the standard of review prescribed by the Fifth Circuit for use in a case such as this. See Michael F., 118 F.3d at 252; see also Bobby R., 200 F.3d at 347. The court has concluded that plaintiff has failed to carry his burden of showing that the IEP and resulting placements were inappropriate under the IDEA. See Bobby R., 200 F.3d at 347. More generally, plaintiff has failed to persuade the court that the factual bases of any of his contentions have evidentiary support or that the District committed any legal error that adversely affected plaintiff.

Consequently, all plaintiff's complaints as to the findings, decisions, and rulings of the SEHO and the conduct of the District in relation to plaintiff are without merit, and all relief sought by plaintiff or his parents in this action should be denied.

VII.

Order

Therefore,

The court ORDERS that all relief sought by plaintiff in his complaint be, and is hereby, denied, and that the findings, decisions, and rulings of the SEHO be, and are hereby, affirmed.

SIGNED May 21, 2015.

JOHN McBRYDE
United States District Judge