

STUDENT bnf	§	BEFORE A SPECIAL
PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
DALLAS ISD	§	
Respondent	§	
	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student *** and Student’s next friend and parent, *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent Dallas Independent School District (hereinafter referred to as Respondent, the District, or DISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations. This action was filed on October 21, 2014.

The issues raised by Petitioner in this proceeding are as follows:

- 1) Whether Petitioner is entitled to reimbursement for tuition and costs, including transportation costs, associated with attendance at *** for the 2013-2014 school year;
- 2) Whether Petitioner is entitled to reimbursement for costs associated with counseling received during the 2013-2014 school year;
- 3) Whether Petitioner is entitled to compensatory services for violations of IDEA sustained during the 2013-2014 school year in the form of reimbursement for counseling and transition services for Student until the age of ***; and
- 4) Whether Respondent violated the procedural protections of IDEA by its failure to review Student’s Independent Educational Evaluation upon its completion?¹

For relief, Petitioner requests the following:

Tuition and costs, including transportation, for attendance at *** for the 2013-2104 school year; reimbursement for counseling obtained during the 2013-2014 school year; and compensatory services in the form of reimbursement for counseling and transition services until Student reaches the age of ***.

PROCEDURAL HISTORY

¹ Issue number 4, a subsidiary issue to Petitioner’s primary issue concerning tuition reimbursement, is not addressed herein because it is not necessary to the resolution of the fundamental issue raised by Petitioner.

Petitioner filed the instant request for due process on October 21, 2014. Roy Atwood, Attorney at Law, represents Petitioner in this proceeding. Sarah Flournoy, Attorney at Law, represents Respondent.

The parties agreed to waive the Resolution Session required by IDEA in lieu of mediation. The parties met in mediation, but were not successful in resolving the issues in dispute.

A pre-hearing conference was held on November 5, 2014, at which time Petitioner identified additional issues that were not delineated in Petitioner's original request for due process and requested leave to amend the original request. I granted Petitioner leave to amend and Petitioner filed Petitioner's First Amended Request For Due Process on November 7, 2014.

A second pre-hearing conference was held on December 16, 2014. An order following pre-hearing conference issued on December 18, 2014, delineating the issues and relief sought by the Parties and granting Petitioner's request to extend the statutory decision due date to March 12, 2015.

On January 21, 2015, I entered an order denying Respondent's Motion to Dismiss for Lack of Jurisdiction, holding that Petitioner's claims for alleged violations of Respondent's duty toward Petitioner during the 2013-2014 school year, prior to Student's ***, were not moot.

The hearing took place on February 11-12, 2015 in Dallas, Texas at a mutually agreed upon location. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Filing Post-Hearing Briefs, setting the due date for briefs as March 19, 2015 and the decision due date as April 30, 2015.

On April 29, 2015, I entered an order granting Petitioner's Request To Extend The Decision Due Date For Cause, resetting the decision due date to May 6, 2015.

This decision is timely issued and forwarded to the parties on May 6, 2015.

FINDINGS OF FACT

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence.

1. Throughout the 2013-2014 school year, Student was a resident of DISD, a political subdivision of the State of Texas and a duly incorporated school district.
2. Student ***, a private school located in the geographical boundaries of DISD. (Joint Exhibit 20; hereinafter referred to as JX 20).
3. Student was first identified as eligible for special education and related services under the IDEA in *** 2012 by *** (hereinafter referred to as ***) At that time, *** designated Student as eligible based on the eligibility category of Specific Learning Disability, with severe discrepancies in the areas of Math Reasoning and Reading Comprehension. (JX 2).
4. For the 2013-2014 school year, Respondent DISD was Student's resident district under the IDEA. (Transcript of Due Process Hearing, p. 89; hereinafter cited as T.89).

Background Concerning Student Prior To IDEA Eligibility In * Grade**

5. Student first presented with academic difficulties that resulted in evaluation in ***. At that time, Student was diagnosed with ADHD and as being at risk for developing a language disorder and a dyslexic learning style. (JX 23).
6. Throughout Student's ***, Student attended private schools that served students with disabilities and received supports for academics, social interactions, and ADHD. Evaluation data indicates continued concerns related to ADHD, Reading, and oral and written expression. (JX 23).
7. At *** years of age, Student's ***. The family ultimately moved to Dallas, where Student began *** grade at a private school in Dallas not designed to serve students with disabilities. Student transferred to the *** in Dallas after *** grade, where Student remained for *** grades. *** is a private *** school that does not specifically serve students with disabilities. (T. 39, 49-50).
8. While at ***, Student exhibited substantial deficiencies in Student's academic profile, leading the *** headmaster to refer Student for assessment. As a result, *** formally evaluated Student in *** 2010, Student's *** grade year. (T. 45-49; PX 1). *** evaluation found that Student exhibited clear evidence of learning differences that required remediation and accommodations. Specifically, the evaluation found that Student had a Nonverbal Learning Disorder, Not Otherwise Specified and Dysgraphia. (PX 1).
9. Following *** evaluation, *** referred Student to ***, a private school serving students with disabilities, but Student declined to attend ***. Student completed Student's *** grade year at *** despite their indications that they could not properly educate Student, and Student did not do well academically. (T. 50).
10. Following Student's *** grade year, Student moved to *** so that ***. For the *** of Student's *** grade year (*** 2011), Student attended ***, a private *** school in *** that did not provide services to students with disabilities. Student was wholly unsuccessful at ***, both academically and socially. (T. 52-53).
11. As a result of Student's lack of success at ***, Parent enrolled Student in the *** public schools at *** (hereinafter ***) in *** 2012 for the *** of Student's *** grade year. Parent informed *** about the *** Evaluation and Student's educational history. *** developed a 504 Plan to provide accommodations in the classroom to support Student's learning. In *** 2012, *** completed a comprehensive psychoeducational evaluation for Student to determine if Student was eligible to receive services under IDEA under the categories of Learning Disability and/or Other Health Impaired for ADHD. (JX 1).

*****'s Finding of IDEA Eligibility and Initial IEP- *** Grade**

12. ***'s comprehensive evaluation of Student found a discrepancy between Student's ability and achievement in the area of Reading Comprehension, with deficits also noted in Math. The evaluation also found that Student had ongoing attention problems, but concluded that Student's motivation and hard work prevented those problems from impacting Student's educational performance. The evaluation recommended that Student be referred to an IEP team to determine eligibility and program placement options, as well as continued

implementation of Student's 504 plan and private counseling outside of school to manage anxiety and other emotional issues revealed by the assessment. (JX 1).

13. The *** IEP team met on ***, 2012 and concluded that Student was eligible for services under IDEA based on the category of Specific Learning Disability. Parent concurred, but also believed that Student's past designation of Dysgraphia should be included and requested independent testing for Dysgraphia, which was never completed. The IEP team developed an IEP for implementation with goals and objectives to address Reading, Math, and Vocational Education, and with instructional accommodations. The IEP designated General Education as the instructional setting. (JX 2).
14. The *** 2012 IEP was implemented for the remainder of Student's *** grade year (approximately one month) and Student completed *** grade with greater success. Parent requested, and *** agreed, that Student take *** classes in Student's *** grade year. (T. 58).

*****: Student's *****

15. *** grade (2012), Student ***. ***, Student experienced significant emotional deterioration: Student had episodes of ***. Student's *** sought medical attention for Student while in *** and obtained mood-stabilizing medication. (T. 61-65).
16. Student *** and continued to demonstrate dramatic symptoms of an emotional breakdown despite mood stabilization medication: ***. (T. 65-68; PX 3). Student was admitted to the *** (hereinafter referred to as ***) on ***, 2012. Student's admitting diagnosis was Psychosis Not Otherwise Specified, ***. (PX 2).
17. On ***, 2012, Student's attending psychiatrists at *** drafted a progress note concerning Student's condition and its implications for Student's upcoming *** grade year, the 2012-2013 school year. In relevant part, the report confirmed that Student met diagnostic criteria for *** in addition to Student's previously diagnosed learning disabilities and attention problems. Due to the level of Student's functional impairment, the doctors stated that Student required an increase in special education services in order to access the curriculum. Specifically, they recommended that Student's school program include a "small, self-contained, specialized setting throughout Student's school day where Student can work within an adjusted curriculum and received instructional supports and modifications in all subjects as well as therapeutic supports and close monitoring." In addition, they recommended counseling as a related service. Finally, the recommendation stated that Student may only be able to access Student's education in an instructional setting of a small self-contained campus (a non-public school setting) due to the severity of Student's psychotic disorder. (PX 3).
18. On ***, 2012, *** discharged Student to Student's home and a partial hospitalization program that included day treatment and educational services in a highly structured, supervised, therapeutic milieu. (PX 4). Student remained in the partial hospitalization program until Student's discharge on ***, 2012. (PX 6).
19. On ***, 2012, the *** psychiatrists treating Student issued an update and addendum to their recommendations for Student's educational programming made on ***, 2012. (PX 5). The addendum reported that Student continued to be fragile and disorganized, easily

overwhelmed by external stimuli, and impaired in Student's judgment. The recommendation indicated that Student's treatment team was seriously concerned about Student's ability to transition to and/or function in a general education environment given the pervasive nature of Student's psychiatric illness and Student's ongoing struggles even within the contained day treatment setting. Again, the recommendation was strongly made that upon discharge, Student transition directly to a "small, highly-structured, contained specialized school setting with a therapeutic component and instructional modifications.... Student... is far too fragile to be placed on a general education campus." (PX 5).

20. At the time of Student's discharge on ***, 2012, *** offered only continued services for Student in the general education setting at *** despite the *** recommendations. (T. 72-73, 76). Parent, knowing Student could not return to ***, ***, who could provide Student with the necessary supports to transition out of the hospital setting. (T. 77-78). Parent *** throughout the 2012-2013 school year.

Student's Discharge From * and ***- *** Grade**

21. In Dallas, Student enrolled in ***, a small, highly structured, specialized school that Parent believed could meet Student's needs as identified by Student's psychiatrist's recommendations. *** offers a learning environment for students with learning differences and challenges with very small classes, concrete-teaching methods, and extensive extra supports. (T. 91).
22. Student made a positive transition to *** and completed Student's *** grade year with A's and B's due to the very small class size, structure of the environment, and extensive supports that Student received. (T. 91-92; JX 19).
23. Student's ***, who was ***, recommended that Student develop a relationship with a Texas psychiatrist and be evaluated in Texas in case of a repeated psychotic break. (T. 81). As a result, *** in Dallas completed an evaluation of Student in *** 2013 to provide diagnostic clarification and treatment recommendations. (PX 7).
24. The *** evaluation found Student to be very emotionally and psychologically sensitive and vulnerable. *** recommended holding off on a firm diagnosis *** and diagnosed Student with Major Depressive Disorder in remission and Psychotic Disorder Not Otherwise Specified. *** noted a significant decline in overall intellectual functioning from Student's previous evaluation. *** recommendations included, in relevant part, continued follow-up with Student's psychiatrist for medication management, consistent structure with no significant life changes, and family and individual therapy. (PX 7).

*****'s Role In *** Grade Placement and *** IEP for *** Grade**

25. Due to ***'s failure to offer Student a placement other in a general education setting for Student's *** grade year, Parent initiated a due process action against ***. On ***, 2013, *** and Parent executed a settlement agreement and release in the then pending due process action, in which *** agreed to reimburse Parent for all educational costs associated with Student's placement at ***, plus counseling services. (PX 8).
26. *** also agreed to continue Student's private placement for the 2013-2014 school year at an appropriate non-public school certified by the ***, plus counseling for 60 minutes per week

and transportation. *** agreed to document the placement agreed to for 2013-2014 on Student's IEP. In the settlement agreement, the Parties agreed that if Student was not accepted into a non-public school for any reason, that Student's placement for 2013-2014 would be the placement and IEP set forth in Student's *** 2012 IEP. ((PX 8, p. 3).

27. On ***, 2013, toward the end of Student's *** grade year, Student's IEP team from *** convened an annual review to develop Student's IEP for *** grade, the 2013-2104 school year. Because Student had been attending *** during Student's *** grade year, *** had no achievement data on Student's IEP goals and objectives and no information concerning present levels of performance. (JX 3, pp. 2-7). The team continued Student's eligibility based on a specific learning disability and developed an IEP for Student's *** grade year that included 1570 minutes per week in a special education setting at a non-public school (***), plus transportation and 240 minutes per month of counseling as a related service. (JX 3, pp. 15, 17).
28. Though not mentioned in the settlement document or IEP, Parent understood that *** would substitute *** for *** should Student continue to attend school in Dallas during the 2013-2014 school year. (T. 80, 224).
29. Petitioner waived the statutory notice of the IEP team meeting and the presence of IEP team members who might otherwise be required to attend. (JX 3, p. 18).
30. ***, the non-public school identified in Student's IEP for Student's *** grade year, is a private school that offers a smaller learning environment for students with learning disabilities and behavioral issues. (T. 80).
31. *** and *** are both non-public schools that serve students with disabilities in a smaller learning environment with supports and services.

***** Grade: Initial Request For Services From DISD/Transfer Meeting**

32. At the outset and throughout Student's *** year, Student continued to be very disorganized, have difficulty following basic instruction, have difficulty managing simple tasks of daily living, and to require tremendous oversight and supervision. Student could not be left alone in Student's home and was unable to ***. (T. 100-103).
33. On ***, 2013, Student began Student's *** year at ***. Also in *** 2013, ***, ***, ***, Student because a resident of Dallas ISD ***.
34. On ***, 2013, Petitioner, through Petitioner's attorney, notified DISD by letter dated ***, 2013, of Student's residence in DISD and Student's desire to receive a free appropriate public education (hereinafter FAPE) from DISD comparable to the terms of Student's *** grade IEP from ***. In connection with the request for placement at ***, Petitioner provided DISD with the *** IEP from *** 2013 that placed Student in a nonpublic day school for Student's *** grade year, the *** evaluation from *** 2013, and background information concerning Student's psychosis and reasons for being placed in private school by ***. (JX 5; T. 109).

35. In the *** letter to DISD, Petitioner asked DISD to provide Petitioner with whatever forms were necessary to allow reimbursement for the expenses associated with Student's attendance at ***. (JX 5).
36. Petitioner did not enroll Student in DISD because Student's IEP provided for placement in a nonpublic day school and Parent believed it would be catastrophic for Student's health based on doctors' recommendations. (T. 240-244). The record is clear that Parent believed it critical for Student to remain at *** and intended to pursue funding for Student's tuition from DISD from the beginning. (RX 58; T. 384).
37. On ***, 2013, DISD responded, through its attorney, requesting additional information to assist the District in determining the appropriate placement and provision of services for Student. Specifically, DISD requested the complete Admission, Review, and Dismissal Committee (hereinafter ARDC and also referred to as IEP team ***) document from 2012, the most recent *** Full and Individual Evaluation (hereinafter FIE), and all educational records from ***. DISD informed Petitioner that once the records were reviewed, DISD would schedule an ARDC. (JX 6).
38. For a variety of reasons, Petitioner required that all communication between DISD and *** be coordinated through Petitioner's attorney. While DISD found this limitation frustrating and concerning, there is no indication that the timely exchange of reliable, credible information was impacted by this requirement. (T. 331-335).
39. Parent responded to DISD's request for documentation quickly, asking *** for records that same day. (T. 110-111). Even so, it took until ***, 2013, for Petitioner to provide the requested documents to DISD because *** had to complete forms reporting Student's Present Levels Of Academic Achievement And Functional Performance (PLAAFP) (JX 10). The forms were unfamiliar to *** staff. (T. 112, 330, 336-337; JX 7).
40. On ***, 2013, DISD requested consent from Petitioner to obtain records from ***; on ***, 2013, Petitioner provided consent the requested consent. (PX 13; T. 369).
41. On ***, 2013, DISD contacted Petitioner to schedule an ARDC meeting. DISD proposed three dates in ***; ultimately, the Parties agreed to conduct the ARDC meeting on ***, 2013. (RX 63; T. 115).
42. DISD requested that personnel from *** attend the meeting; however, a conflict developed because of ***'s policy of requiring payment for the time of staff to attend the meeting. As neither party was willing to pay *** staff, they did not attend the *** 2013 meeting. (T. 142; RX 66, 67).
43. Emails amongst DISD staff immediately preceding the ***, 2013 meeting indicate confusion as to whether the meeting was an ARDC meeting or a transfer meeting to document comparable services to be provided to Student. (RX 65, 68, 59; T. 360-370). The emails clearly indicate DISD's knowledge that Student was "placed at a private school as a means of completing the *** school district's obligation for the IEP services." (RX 68).
44. Petitioner arrived at the ***, 2013 meeting, understanding that the meeting was an ARDC meeting. Upon arrival, Petitioner was told the meeting was a "Student Transfer Meeting." (T. 134; JX 8). The stated purpose of the meeting, as per DISD, was "to document a student

transfer into the district and plan for comparable services... (JX 8, p. 1). The transfer document provides that “Student will receive special education services on a temporary basis...” (JX 8, p. 2). The document then notes that Student’s eligibility for services had been verified by both Parent statement and documentation from *** and ***. Finally, the documentation notes that the services provided by the former school were “unclear.” (JX 8, p.2).

45. The transfer committee found that Student had a disability (specific learning disability), an educational need for special education and related services, and met eligibility criteria to receive services under IDEA. The document indicates that the committee believed additional evaluation was needed and that temporary services would be provided. (JX 8, p. 3).
46. Confusingly, the Transfer Documentation is completed with boxes checked designating that Student is a “parentally placed child with a disability in private school” who “declines enrollment in the home LEA.” The box is not checked next to the statement, “Parent declines enrollment in Dallas ISD and FAPE.” DISD apparently understood that Parent sought a FAPE from Dallas ISD. (JX 8, p. 3).
47. Although the transfer documentation reflects that temporary special education will be provided, the committee did not develop goals and objectives and provided that Student would master all of the TEKS objectives at Student’s grade level in a “mainstream” setting. (JX 8, pp. 11, 13).
48. Minutes of the *** Transfer meeting indicate that the District would reevaluate the Student and develop a plan to provide FAPE. DISD rejected Student’s IEP from *** because: 1) there was no disability specified documented in the FIE; 2) the goal statements are not measurable; and 3) the appropriate ARD committee members did not sign in agreement to the ARD meeting. The committee recommended a re-evaluation to provide a complete and current picture of Student’s eligibility for services. (JX 8, p. 13; T. 138, 387-388)
49. As of the *** 2013 Transfer Meeting, DISD was aware of the *** Evaluation, Student’s hospitalization at ***, Student’s ***, and the recommended need for stability in Student’s placement. (T. 140-141; 388-394). Despite the findings on page 3 of the Transfer documentation, DISD did not offer Student placement at *** or an IEP for services at DISD pending the completion of their re-evaluation.
50. As of ***, 2013, DISD found that Student was not IDEA eligible because neither a determination of a disability or of educational need had been made. (T. 398-399; JX 8).

***** Grade: DISD’s Evaluation Of Student**

51. Following the Transfer meeting in *** 2013, DISD sought and obtained consent to evaluate Student in *** 2014. Due to the adversarial context surrounding the evaluation, several disputes erupted concerning the process of conducting the evaluation, including a due process proceeding initiated by DISD on ***, 2014 complaining of Petitioner’s attorney’s involvement in scheduling the evaluation sessions for Student. (PX 26; T. 149).
52. Petitioner’s actions during the evaluation process were reasonable and did not serve to delay or compromise the integrity of the evaluation process. (T. 322-326, 331, 333, 335).

Petitioner's actions were primarily motivated by protectiveness of Student so that Student would not suffer anxiety or additional psychological stress. (T. 147-150).

53. DISD's FIE of Student was completed by Dr. ***, a Licensed Specialist In School Psychology (LSSP) employed by DISD. In completing the FIE, Dr. *** reviewed Student's records from ***, ***, ***, and ***. Dr. *** did not observe the Student at *** or complete formal testing for adaptive behavior. (T. 432; JX 11, p. 26). Dr. *** did not discuss or document the environment at *** in her FIE, such as the small class size, structured learning environment, or extensive supports provided to students. (T. 454; JX 11).
54. Dr. *** concluded that Student demonstrated symptoms consistent with the IDEA eligibility criteria for an Emotional Disturbance based on inappropriate behaviors or feelings under normal circumstances, a general pervasive mood of unhappiness or depression, and a tendency to develop physical symptoms or fears associated with personal or school problems. (JX 11, P. 27; PX 32, p. 27; T. 454).
55. Dr. *** also concluded that Student did not meet the diagnostic criteria as a student with a learning disability, although she documented that Student demonstrated deficits in Reading Comprehension, Math Reasoning, and Written Expression along with a pattern of strengths and weaknesses in Student's cognitive profile, with deficits noted in Student's ability to reason, process visual information, use associational memory, and overall general knowledge. (T. 456; JX 11, p. 24). Dr. *** attributed Student's academic deficits to both Student's cognitive processing and emotional disturbance. (T. 456).
56. In Dr. ***'s initial FIE report provided to Parent on ***, 2014, Dr. *** found Student to be IDEA eligible based on Student's emotional disturbance. (PX 32, p. 36; T. 153).
57. Subsequently, on ***, 2014, DISD provided Parent with a revised copy of the FIE, with a cover email indicating a "clerical error" had been made in the original report. (PX 33). In the revised FIE, Dr. *** concluded that Student was not IDEA eligible because Student had no demonstrated educational need for special education services. Dr. ***'s conclusion was based on Student performing successfully in Student's "mainstream" environment at ***. (JX 11, p. 17; T. 154-157, 410-411, 438).
58. Dr. *** did not note in her FIE, the cautionary recommendation from *** that any significant life change could place Student at significant risk for ***. (JX 11). Dr. *** viewed the *** recommendation as significant and concurred that changing Student from *** to a DISD *** school would constitute a significant life event; however, she did not bring this to the attention of the ARDC when her FIE was reviewed or Student's IEP was developed. (T. 431-432).

ARDC Meetings To Consider FIE and Determination Of Eligibility

59. The initial ARDC meeting to review DISD's FIE and discuss the provision of a FAPE for Student convened on ***, 2014 at ***. (T. 161; JX 13).
60. The ARDC reviewed Dr. ***'s FIE, including information concerning Student's performance at ***. The ARDC members were not able to reach consensus, as DISD concluded that Student did not require special education services despite Student's designation as meeting criteria for an emotional disturbance based on their belief that Student

had been successful in a mainstream environment at *** and was on track ***. (JX 13, pp. 34-35; T. 175-177; 343).

61. At the conclusion of the ARDC meeting, Petitioner disagreed with the FIE results and the ARDC's conclusion and asked for an Independent Educational Evaluation (IEE) of Student. DISD denied the request for an IEE and scheduled a reconvene ARDC for ***, 2014. (JX 13, pp. 34-35; T. 175-177; 343).
62. In between the initial ARDC meeting and the reconvene meeting, Petitioner retained Dr. ***, a private LSSP, to provide a psychological consultation concerning Student. Specifically, Dr. *** was asked to review DISD's FIE and opine about its conclusion that Student did not meet IDEA eligibility criteria due to a lack of educational need. DISD received Dr. ***'s report on ***, 2014. (JX 16; T. 181-183).
63. To complete her consultation, Dr. *** observed Student at school for several hours in three different classes and reviewed Student's prior medical and educational records. (JX 16, p. 1; T. 287-288).
64. Dr. *** concluded that DISD's FIE failed to consider significant information about Student that resulted in the improper conclusion that Student did not special education services in order to receive a FAPE. Specifically, Dr. *** emphasized the FIE's failure to describe the environment at *** and understand the impact of that environment on Student's ability to be successful. Dr. *** pointed out that the description of *** as a "mainstream setting" was wholly inaccurate. (JX 16, p. 4; T. 293).
65. Dr. *** also noted that Dr. *** did not observe Student in a classroom setting or complete formal testing for adaptive functioning when completing Student's FIE, both of which led to the inaccurate conclusion that Student could function at a higher level without supports than Student is capable of. (JX 16; T. 289-291).
66. Dr. *** concluded that Student continued to experience a cognitive decline resulting from Student's psychotic break, with particular cognitive deficits in the areas of math and reading comprehension. Dr. *** believed that Student continued to need a very structured, predictable, quiet and safe environment and she concurred with the *** evaluation that Student remained vulnerable ***. Dr. *** ultimately concluded, "A change of schools for Student's *** year would almost certainly have been devastating." (JX 16, p. 4; T. 293-294).
67. Dr. *** further concluded that Student absolutely demonstrated a need for special education services and that *** was an appropriate placement for Student. (T. 299-300, 306).
68. In large part as a result of Dr. ***'s report, Dr. *** and other DISD members of the ARDC became aware that *** was not a "mainstream environment" and decided that Student did require special education services as a result of Student's emotional disturbance and its impact on Student's cognitive and academic abilities. At the ARDC meeting on ***, 2014, the ARDC determined that Student was IDEA eligible and developed an IEP for Student to be implement at ***. (JX 13, p. 35; T. 467-468).
69. As of ***, 2014, Student had completed Student's course work and exams at *** and was prepared ***. (T. 184-186).

DISD's Offer Of FAPE On *, 2014**

70. The ***, 2014 ARDC reviewed Student's PLAAFPs and developed goals and objectives related to the remaining activities of the school year even though the end date for the goals was set for *** 2015. Student's IEP contained two annual goals, one related to organizational skills and the other to self-regulating skills. (JX 13, pp. 14, 15).
71. Student's IEP contained academic accommodations and supports, as well as behavior support in the form of a cool down time/area and access to a designated trained adult to guide Student through calming procedures. (JX 13, p. 16).
72. The schedule of services was 150 minutes per week per core subject in a special education setting and 60 minutes per week of personal social development in a special education setting. The remainder of Student's time was in the general education environment with in-class support. As reflected on Student's proposed IEP, the total number of minutes Student was to be in special education was 660, while spending 1440 minutes in general education. (JX 13, p. 24).
73. Student's proposed IEP specified continuation of psychological services to be provided by a school counselor. (JX 13, p. 27).
74. DISD proposed to implement Student's proposed IEP at ***. When Parent disagreed with the proposed placement, DISD suggested that Parent observe the environment at ***. (JX 13, pp. 34, 37, 54; T. 190-192).
75. The ARDC ended in disagreement. Petitioner continued to seek DISD's funding of Student's placement at *** during Student's *** year, while DISD proposed the IEP described herein. (JX 13, p. 53-54).
76. Although Petitioner viewed DISD's attempt to design an IEP for Student after Student had completed *** as futile, Petitioner fully participated in the process of developing the proposed IEP, providing meaningful information about Student and contributing to the design of proposed goals and objectives.
77. Petitioner objected to DISD's proposed IEP for Student at the end of the ARDC meeting on several grounds: 1) the proposed IEP was offered after Student had completed ***; 2) the IEP included inadequate services and supports to address Student's emotional needs; and 3) the goals and objectives contained procedural irregularities and inaccuracies and failed to address Student's academic or emotional deficits. (JX 13, p. 54; T. 188-190).
78. DISD's proposed IEP offered on ***, 2014 was the first offer of FAPE made to Student by DISD.
79. Petitioner renewed Petitioner's request for an IEE at the conclusion of the ARDC meeting, which was granted. (JX 13, p. 55).

80. DISD completed the final ARDC document from the *** and *** 2014 ARDC meetings and provided it to Petitioner on ***, 2014. (PX 39; T. 162-163).

81. During *** grade, Student attempted to ***, but was not ***. Student decided to *** in Dallas to navigate ***. Student enrolled in summer school during summer 2014 and was successful in Student's classes with very extensive support from Parent. (T. 93-94).

82. During fall semester 2014, Student was not able to successfully complete the semester without the special education supports Student had received at ***. Student received ***, ***, and ***. (PX 47; T. 94-95).

83. Student's performance at *** does not reflect any failing on the part of ***; but rather, reflects the level of supports that Student requires in order to be successful. (T. 94-95; 299-300).

Appropriateness of DISD's Offer of FAPE to Student

84. The IEP (including placement at ***) offered to Student on ***, 2014 by DISD did not provide Student with a timely offer of FAPE.

85. The IEP was based almost completely on the FIE conducted by DISD without regard to Student's IEP from *** that provided for Student's education full-time in a special education setting or other evaluation data concerning Student's performance and needs.

86. The IEP failed to adequately address all areas of Student's documented academic and emotional needs.

87. The IEP was not reasonably calculated to produce meaningful educational benefit to Student, as the weight of the evidence demonstrates that Student required continuity of placement in a small, highly structured environment with small class sizes and significant emotional support in order to obtain a FAPE.

Appropriateness of * Placement**

88. *** is a small private school designed to serve students with disabilities. The school provides its students with trained staff, a high degree of structure and support, and very small classes. Student's *** class had approximately *** students. *** offers curriculum based on the Texas Essential Knowledge and Skills (TEKS), but also provided modified classes not offered in a public school setting, such as Student's modified *** Math class. (JX 13, pp. 35-37; PX 46; T. 91, 293, 339).

89. *** was an appropriate placement for Student in light of Student's fragile emotional condition and cognitive decline following Student's ***, which Student had not fully recovered from by the time of Student's ***. Each evaluation of Student performed in 2013-2014, other than DISD's FIE, concluded that a general education public school campus was not equipped for a student with a mental illness as severe as Student's. PX 7; JX 16; JX 23; PX 42; T. 91-92; 119-120; 122-123; 124-125; 294; 299-300).

90. With the supports and environment offered by ***, Student received a meaningful academic benefit and ***. (JX 19, 20)

Evidence Related To Petitioner's Requested Remedies

91. The tuition for *** for the 2013-2014 school year was ***; Petitioner paid *** the sum of *** as Petitioner received a *** financial aid credit from the school. (PX 52; T. 204).

92. Transportation costs associated with Student's attendance at *** for the 2013-2014 school year totaled ***. (PX 50; T. 207).

93. During the 2013-2014 school year, Petitioner obtained services from Dr. ***, M.D., a psychiatrist, primarily for medication management in the amount of ***. (PX 51; T. 207).

94. Pursuant to the provisions of the *** IEP and as compensatory services, Petitioner seeks counseling services for 240 minutes per month at the rate of \$300.00 per hour until the age of *** years, for a total of \$42,000.00. (T. 208-209).

DISCUSSION

Petitioner framed the central issue in this case as whether Petitioner is entitled to reimbursement for tuition and costs at *** for the 2013-2014 school year.

Petitioner asserts that Petitioner's entitlement to reimbursement for Petitioner's private placement stems from the transfer provision of IDEA that required DISD to provide comparable services to those set forth in Student's *** IEP until such time as DISD conducted a new evaluation and developed a new IEP. *34 C.F.R. § 300.323 (f); 19 T.A.C. § 89.1050(i)(2)*. Petitioner further argues that Petitioner is entitled to reimbursement for Petitioner's private placement because once DISD developed its own IEP, the District's offer of FAPE was both untimely and inappropriate.

DISD argues that the transfer provision of IDEA does not apply in this case because Student never enrolled in DISD. DISD views Student as a parentally placed private student who was referred to DISD and who is entitled to reimbursement for Petitioner's private placement only if DISD did not make FAPE available to Petitioner in a timely manner and *** placement is appropriate. *34 C.F.R. § 300.148; 19 T.A.C. 89.1090*.

For reasons set forth below, I find that Student is entitled to reimbursement for Student's private placement as set forth herein regardless of whether Student is characterized as a transfer student or a student who is privately placed under IDEA. Under both provisions, as well as under IDEA's Child Find provisions, DISD had a legal obligation to make a timely offer of FAPE available to Student for the 2013-2014 school year; the evidence demonstrates that DISD's offer of FAPE on ***, 2014 was both untimely and not in accord with the requirements of FAPE set forth in the IDEA.

Reimbursement For Private School Placement Under IDEA

Under IDEA, a parent is entitled to reimbursement for the unilateral placement of a child with a disability at a private school² if the public school did not make a free appropriate public education

² As noted above, Petitioner objects to categorizing Student's placement at *** as a unilateral private placement because of the existence of the *** IEP. Respondent maintains otherwise. Even if Petitioner

available to the student in a timely manner and the private school's program is appropriate. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S.359 (1985); 34 C.F.R. § 300.148(c). In addition, courts and hearing officers must consider equitable factors that may impact a parent's entitlement to some or all of the reimbursement sought.

The threshold question in a reimbursement action is whether the district made a timely offer of FAPE to the student. If the student's IEP is substantively and procedurally appropriate, reimbursement is not proper. If a timely offer of FAPE was not made to the Student, reimbursement is proper only if the student's private placement is appropriate. Equitable considerations in awarding tuition reimbursement include timely notice to the school of the student's private school enrollment, a parent's refusal to accept an offer of FAPE from a school district, and unreasonable actions by the parent in the course of the development of the IEP.

What Is A FAPE

The purpose of IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that provides special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400 (d). Under IDEA, DISD has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. 34 C.F.R. § 300.101 (a). As a resident of DISD during the 2013-2104 school year, Student was entitled to an offer of FAPE from DISD.

The definition of FAPE is special education, related services, and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. 20 U.S.C. § 1401(9); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

The vehicle for provision of a FAPE is a Student's IEP; an appropriate IEP details an educational plan that addresses all of a student's identified needs in accordance with the requirements of IDEA and is reasonably calculated to provide a meaningful education benefit. 34 C.F.R. § 300.320.

When IEPs Must Be In Effect: Students Identified As IDEA Eligible

IDEA defines a "child with a disability" as one who has been evaluated in accordance with the provisions of IDEA as having a disability, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a). A school district must provide FAPE to all IDEA eligible students residing within their boundaries.

An IEP must be in effect at the beginning of each school year for each child with a disability within the geographic jurisdiction of a school district. 34 C.F.R. § 300.323(a). With regard to a child with a disability who had an IEP from a public school district, but transfers into a new school district and enrolls in a new school within the school year, IDEA requires the new district, in consultation with the parents, to "provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency) until the new agency conducts an evaluation ... and

is correct and Respondent is responsible for reimbursement of *** tuition for having violated the transfer provision of IDEA, the *Burlington* analysis is still applicable to determining if the remedy of tuition reimbursement for the alleged violation of IDEA is appropriate.

develops, adopts, and implements a new IEP... *34 C.F.R. 300.323(f)*. For students with disabilities who have been placed by their parents directly in a private school and are referred to the local school district for services, IDEA directs the school district to “convene an ARDC meeting to determine whether the district can offer the student a FAPE. If the district determines that it can offer a FAPE to the student, the district is not responsible for providing educational services to the student...” *19 T.A.C. § 89.1096*.

Thus, IDEA makes clear that each child with a disability must be offered a FAPE from the local school district, either at the start of the year or upon transfer into the district or referral from a private school.

When IEPs Must Be In Effect: Students Not Identified As IDEA Eligible

IDEA provides that school districts have an affirmative responsibility to identify, locate and evaluate all children with disabilities residing within their jurisdiction who are in need of special education. This responsibility is known as “Child Find.” *34 C.F.R. §§ 300.111*.

Child Find requires a district to evaluate a child when it suspects or has reason to suspect that the child has a disability and needs special education services as a result. The Child Find obligation extends to all students within a school district, including students who are placed in private schools located in the school district’s boundaries. *34 C.F.R. § 300.131*. Child find for private school students must be conducted in a time comparable to that for students attending public schools in the district. *34 C.F.R. 300.131(e)*.

For students who are newly receiving services under IDEA and have not yet been designated as a “child with a disability” (*34 C.F.R. § 300.8*), districts must ensure that “a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and as soon as possible following development of the IEP, special education and related services are made available to the child.” *34 C.F.R. §300.323(c)*.

Thus, IDEA places an affirmative obligation on public school districts to evaluate all students within their jurisdiction who are suspected of having a disability and a need for services. Such students must be evaluated within 60 days of receiving consent for an evaluation; an ARDC meeting to develop an IEP must be convened within 30 days of the evaluation if eligibility is supported; and services must be provided as soon as possible after the IEP is developed.

Timely Offer of FAPE: The Transfer Provision

Petitioner argues that the transfer provision of IDEA required DISD to make an offer of comparable services under the *** IEP for the 2013-2014 school year pending re-evaluation and proposal of a new IEP. DISD rejects the applicability of that provision to Student on the grounds that Student did not transfer to DISD and enroll in a new school within the school year. I concur with Petitioner and find that the transfer provision of IDEA applies in this case.

The evidence shows that Student became an official resident of DISD in *** 2013 when Student’s parent moved to Dallas. At the time, Student had an IEP for the 2013-2014 school year from ***, which documented Student’s IDEA eligibility based on a specific learning disability and provided for Student to receive 1570 minutes per week in a special education setting at a non-public school, plus transportation and 240 minutes per month of counseling as a related service. Student enrolled at *** for Student’s *** grade year pursuant to this IEP and notified DISD in *** of Student’s request to receive a FAPE from DISD in the form of services comparable to those outlined in Student’s *** IEP. Although DISD repeatedly characterizes Student as a parentally placed private student rather than a transfer from

another jurisdiction, the evidence conclusively demonstrates that Student had an IEP from *** in effect for Student's *** grade year that called for Student to receive services in a non-public special education setting comparable to ***. This is the exact scenario described in the transfer provision of IDEA. Student simply cannot be characterized as a parentally placed private student given the evidence in this case; to do so completely ignores the existence of Student's IEP from ***.

The evidence further demonstrates that at the time Student contacted DISD in *** 2013 and requested a FAPE in the form of private school services, DISD itself recognized Student as a transfer student and raised no issues related to Student's enrollment. DISD convened a transfer meeting, described the meeting's purpose as documenting Student's transfer and planning for comparable services, indicated that Student would receive services on a temporary basis, confirmed eligibility, and noted that services described in Student's IEP were unclear. Seemingly because of the IEP's deficiencies and unclarity, DISD determined that Student was not IDEA eligible despite Student's existing FIE, IEP, and compelling evaluation data from *** and *** about Student's severe emotional issues. As a result, DISD declined to make any offer of FAPE to Student at all, and instead decided to evaluate Student for initial eligibility.

If a student is a transfer student with an IEP in place from another public school district, IDEA does not give the receiving district the option to decline FAPE because of errors made in the IEP by the previous district. Rather, the provision ensures continuous service for IDEA-eligible students and places the onus on the receiving district to offer a FAPE, in consultation with the parents, that is comparable to the one offered by the previous district. Comparable means equivalent, similar or approximate. The IEP in effect was very specific in its description of the amount of services for Student, though vague in other important respects. The challenges DISD faced in developing a comparable offer of FAPE do not excuse DISD from its legal obligation to Student, particularly where additional information was available to help identify and confirm Petitioner's needs.

DISD's failure to offer Student a FAPE of any kind despite the clear evidence that Student was an IDEA eligible student with a well-documented need for services is clearly not what is contemplated by the continuous service transfer provision of IDEA.

Duty To Offer FAPE Is Triggered By Residency Rather Than Enrollment

Despite its actions to the contrary at the *** Transfer meeting, DISD contends that the transfer provision does not apply to Student because Student did not enroll in a DISD school. DISD also argues that Student rejected the *** IEP by not attending the *** school designated in Student's IEP.

DISD's argument that the transfer provision does not apply because Student did not enroll in a DISD school is without merit. IDEA case law distinguishes between the obligation to make an offer of FAPE and the obligation to actually provide FAPE. A district's obligation to make an *offer* of FAPE to a student with a disability hinges on a student's residency in the district and not on enrollment. While a district is not required to actually provide FAPE to a student unless s/he enrolls, the obligation to offer FAPE in the form of an IEP is triggered by residency. *Woods and Woods v. Northport Public School Board*, 112 LRP 34879 (6th Cir. 2012); *DC v. Vinyard*, 971 F. Supp. 2d 103 (D.C.D.C. 2013); *Moorestown Township Board of Education v. S.D. and C.D.*, 811 F. Supp. 2d 1057 (D.C.N.J. 2011); *D.S. v. D.C.*, 699 F. Supp. 2d (D.C.D.C. 2010); *D.C. Public Schools*, 115 LRP 16706 (SEA DC 2015).

The facts of this case perfectly demonstrate the importance of this principle. As in the cases cited above³, requiring Petitioner to enroll Student in DISD in order to request an offer of FAPE from the District, with no information as to the type of program Student would be offered or if Student would be offered any services at all, would place Petitioner in an untenable position given the severity of Student's emotional condition and the clear medical advice against such a major life change. This is especially true here, given that DISD twice found Student to be ineligible for a FAPE at all (** Transfer meeting and ** ARDC meeting) and ultimately found Student IDEA-eligible on **, 2014, after Student had completed all coursework for Student's **. DISD's stated basis in ** 2013 for refusing to provide a FAPE comparable to the ** IEP was that Student was ineligible based on the information available to DISD; had Student enrolled in DISD instead of ** so that Student could receive an offer of FAPE from DISD, Student would have spent the entire 2012-2013 school year without services that the evidence overwhelmingly demonstrated Student needed. As the court explained in *Moorestown*, "Surely, Congress did not intend to turn special education into a game of poker, where a school district does not have to show its cards until after the parents have taken the gamble of enrolling their child, and the child bears the risk of losing an appropriate education." *Id at 1066*.

DISD's waiver or rejection of placement argument is unpersuasive. Clearly, Student did not reject the ** IEP by not attending the ** school designated in the IEP because Student no longer lived **; rather, Student sought comparable services from Student's now home district, DISD.

In sum, I find that the transfer provision of IDEA applies to this Student and obligated DISD to make an offer of FAPE to Student of comparable services to Student's existent IEP for the 2013-2014 school year pending its own evaluation and the development of a new IEP. DISD's offer of FAPE on **, 2014 does not constitute a timely offer of FAPE in accord with its legal obligations to Student under the transfer provision of IDEA.

Timely Offer of FAPE: The Private Placement Provision

Respondent argues that Student is properly characterized as a student with a disability who has been placed by his or her parents directly in a private school and referred to the local school district. *19 T.A.C. 89.1096*. For reasons discussed previously, I find that the evidence makes clear that this provision is inapposite to this fact pattern because student was placed in a private school pursuant to Student's IEP from ** and not by Student's parent.

However, even if DISD is correct and Student's placement at ** was pursuant to a parental placement, the evidence demonstrates that DISD also failed to timely comply with its obligations under this provision. The plain language of *19 T.A.C. 89.1096* makes clear that this provision governs the duty of a school district to provide FAPE to a student with a disability, an IDEA eligible student, who has been privately placed by his/her parent. The provision requires a district to convene an ARDC and make a determination as to whether it can provide FAPE *upon a student's referral* to a local district; not months

³ I concur with Respondent that the Supreme Court's decision in *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) that tuition reimbursement can be a proper remedy for students who have never received special education services from the public school district addresses the issue of tuition reimbursement for incorrect eligibility determinations, rather than the precise issue presented here of tuition reimbursement and enrollment status. However, numerous other court and hearing officer decisions have addressed this issue, concluding that an offer of FAPE is premised on the duty to provide FAPE to a resident child and not on enrollment.

later after a new evaluation for eligibility is completed. The need for immediate action by a local school district is made clear by the remainder of the provision: “if the district determines that it can offer a FAPE to the student, the district is not responsible for providing educational services... until such time as the parents choose to enroll the student in public school full time.” *Id.*

Under this provision, a district cannot unduly delay for the entire school year, as DISD did in this case, before informing a parent as to whether it can provide FAPE; and therefore, whether the child can access FAPE only by enrolling in the public school. Such an untimely determination has the effect of depriving a child with a disability of the option to access FAPE in violation of this provision.

Timely Offer of FAPE: The Child Find Provision

DISD determined that Student was not an IDEA-eligible student as of the *** 2013 Transfer Meeting and referred Student for initial evaluation to determine eligibility. DISD argues that it timely evaluated Student within 60 days of obtaining consent to evaluate and timely convened an IEP meeting within 30 days of the evaluation to develop an IEP.

Again, the evidence conclusively demonstrates that Student was IDEA-eligible for services at the start of the 2013-2014 school year and in *** 2013 by virtue of the determination made the IEP team in *** in *** 2012. DISD’s action in failing to recognize that, upon transfer, Student remained IDEA-eligible and was entitled to an offer of FAPE violated IDEA’s Child Find provisions. DISD failed to make any offer of FAPE at all. *Regional School Unit 51 v. Doe, 920 F. Supp. 168 (D.C. ME 2012); D.C. Public Schools, 115 LRP 16706 (SEA DC 2015).*

Thus, even if the transfer provision of IDEA does not apply to Student, obligating DISD to provide comparable services under Student’s *** IEP, the Child Find provision required DISD to make an offer of FAPE to Student based on Student’s existing eligibility. The record indicates that DISD had access to sufficient information through existing evaluations, Parent, and *** staff to develop an interim IEP for Student pending its evaluation. IDEA’s Child Find provisions obligated DISD to make an offer of FAPE to Student pending completion of its evaluation given Student’s status as IDEA-eligible.

Even assuming DISD could completely ignore ***’s finding of eligibility and its IEP and therefore had no obligation to offer FAPE at all before completing its own evaluation, the evidence shows that DISD’s actions delayed the offer of FAPE to the point where it was meaningless. As of ***, 2013, when DISD received notice of Student’s request for a FAPE, DISD had reason to suspect that Student was a child with a disability in need of special education by virtue of the *** IEP and the *** evaluation provided by Petitioner. DISD waited until ***, 2013, approximately two months, to request consent to evaluate. Petitioner provided such consent shortly after the school *** recess, in *** 2014. The ARDC meeting that convened to review DISD’s FIE in *** 2014 found Petitioner ineligible for services under IDEA because the FIE failed to accurately report and consider all relevant information, i.e. the extensive supports Student was receiving at ***. Finally, on ***, 2014, the ARDC found Petitioner eligible and developed an IEP.

Under Child Find, had Respondent acted more promptly to obtain consent to evaluate and then correctly identified Student as eligible upon conclusion of its evaluation, an offer of FAPE could have been made to Student no later than *** 2014. As such, even if Respondent had no duty to provide FAPE to Student before completing its own evaluation, I find that Respondent’s initial offer of FAPE on ***, 2014 was untimely and in violation of the Child Find provision of IDEA.

DISD's Duty To Provide FAPE To Student

The above analysis demonstrates that Student was entitled to an offer of FAPE from DISD, Student's resident district, under the transfer provision, the parentally placed private school provision, or the Child Find provision of IDEA.⁴ Each of these provisions gave rise to a duty to serve Student that DISD failed to timely honor. Under each scenario, DISD argues that the delay in determining if it could provide FAPE and in proposing an IEP was caused by the lack of information it had due to deficiencies in the *** FIE and IEP. Student's entitlement to receive FAPE from DISD cannot be abrogated by the failings of Student's former school district. DISD had access to more than adequate information to make some offer of services to Student, a *** with an IDEA-eligibility and a clear need for services. DISD failed to make any offer of FAPE at all. DISD cannot excuse its duty to offer services to Student at any point during the 2013-2014 school year by pointing to ***'s mistakes.

Whether The District's Proposed Offer of FAPE Was Appropriate

IDEA requires Respondent to provide Student with a free appropriate public education that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id. at 206-207*.

Procedural Sufficiency

It is well settled that procedural violations constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or caused a deprivation of educational benefit. *34 C.F.R. 300.513(a)*. In this case, the evidence demonstrates procedural irregularities that ultimately impeded Student's right to a free appropriate public education.

As discussed at length previously, the most significant procedural violation in this case is Respondent's failure to make a timely offer of FAPE to Student. DISD failed to acknowledge that Student already had an eligibility determination under IDEA as a student with a specific learning disability and make a timely offer of FAPE to Student. IDEA requires that IEPs be in effect for Students with disabilities, i.e. students who have been evaluated under IDEA and found eligible for services, at the beginning of each school year for every child within the geographic jurisdiction of the district or upon transfer from another district or referral from a private school. Although DISD asserts in its Brief In Support of Judgment that "While no IEP was developed by the ARD committee until *** 2014, Dallas ISD offered a FAPE to all students within its geographic boundaries, including this student, at the beginning of and throughout the Fall 2013 and Spring 2014 semesters," the assertion is not supported by the evidence or

⁴ For reasons fully discussed previously, I find the transfer provision to apply to Student's situation, requiring an offer of comparable services under the *** IEP. In the alternative, the Child Find provision obligated DISD to provide Student with an offer of FAPE upon learning of Student's IDEA-eligibility. Finally, the parentally placed private school provision, while not applicable to Student's situation, also mandated a determination of whether FAPE could be provided upon Student's referral to DISD in *** 2013.

grounded in the law. A FAPE cannot be offered to a student if no IEP is developed. More significantly, the evidence conclusively demonstrates that DISD found Student ineligible to receive a FAPE in *** 2013 and *** 2014. Clearly, no offer of FAPE was made if the District did not believe Student was eligible under IDEA. The evidence is undisputed that DISD did not find Student eligible to receive a FAPE or make an offer of FAPE by developing an IEP until that ***, 2014.

As the court found in *Regional School Unit 51 v. Doe, supra*, a failure to offer an IEP providing special education services to an IDEA-eligible student is a sufficiently serious procedural violation as to constitute, on its face, a substantive denial of a FAPE. The court pointed out that a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. *See also, Forest Grove, supra*.

In Student's case, the failure to timely offer any IEP at all until the school year was over clearly caused a deprivation of education benefit as it resulted in no offer of services for the entirety of the 2013-2014 school year.

Petitioner raised other grounds on which the IEP finally developed by DISD in *** 2014 was not procedurally sufficient. It is not necessary to decide if those procedural irregularities also impeded Student's right to FAPE given that the failure to timely offer an IEP to Student so fundamentally impeded Student's right to obtain a FAPE in the 2013-2014 school year.

Substantive Sufficiency

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's proposed program will provide the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve some benefit. Some benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided or offered, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on the student's assessment and performance; 2) is the program administered in the least restrictive environment; 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student. These factors need not be accorded any particular weight nor applied in any particular way. Instead, they are indicators of an appropriate program and intended to guide the fact-intensive inquiry required to evaluate the appropriateness of the school district's proposed program. *Richardson ISD v. Leah Z.*, 580 F. 3d 286 (5th Cir. 2009).

Applying these considerations to Student's proposed program in *** 2014, I find that the program was not appropriate or reasonably calculated to provide Student with meaningful educational benefit.

Individualized Program Based On Performance And Assessment

The evidence shows that the District failed to develop and propose an individualized educational program based on available performance and assessment data. First, the proposal to move Student from

*** to DISD, especially in *** 2014 with *** left of school, was not based on *any* available data and failed to take into account Student's well-documented needs. Evaluations from *** and ***, as well as Respondent's FIE, all described Student's substantial emotional challenges and needs, as well as their impact on Student's academic profile and needs. In addition, *** performance data demonstrated the level of support Student required to obtain educational benefit, even in the small, highly supportive and structured environment offered there. The *** evaluation, the only then-current evaluation to address the impact of a school change on Student, clearly documented that such a change would have had a very detrimental effect on Student's emotional condition. Dr. *** confirmed this finding in her *** 2014 psychological consult and DISD's evaluator, Dr. ***, concurred in her testimony at the hearing in this case that moving Student from *** to DISD would constitute a significant life event that would be very stressful for Student. DISD's own FIE failed to account for the substantial supports Student required in Student's education and failed to include formal adaptive behavior testing, resulting in an over-estimation of Student's functional capabilities. Thus, although DISD proposed to serve Student at DISD, the only available evaluation data indicated that Student could not access educational benefit at DISD or sustain the change of placement emotionally.

Second, Student's IEP goals and objectives related solely to organization and self-regulating skills (because there was only one week left of school) and failed to address Student's academic or cognitive deficits at all. Respondent's FIE demonstrated that Student had deficits in Reading Comprehension, Math Reasoning, and Written Expression, as well as in Student's ability to reason, process visual information, use associational memory, and retain overall general knowledge. Student's overall cognitive decline and need for greater services to support Student's learning was also documented by the *** evaluation, ***'s FIE, and Dr. ***'s psychological consult. *** provided actual performance data that was consistent with the findings of the evaluations. Despite the existence of all of this data, the proposed IEP failed to address any of Student's academic or cognitive needs.

Finally, the FIE on which Respondent's proposed IEP was based contained several important deficiencies, which directly impacted the IEP offered to Student. First, as discussed previously, the FIE failed to account for the environment and supports at *** and failed to accurately measure Student's adaptive skills. Second, the FIE was conducted without an observation of Student in the school setting. These important omissions, coupled with the FIE's failure to fully analyze or incorporate information from other available assessments, resulted in an incomplete picture of Student's abilities, leading to an incorrect determination of eligibility. Even though the ARDC changed its eligibility determination in *** 2014 after receiving Dr. ***'s consultation report and other information, the FIE and its recommendations for the development of Student's IEP did not change. They were based on the same limited picture that did not include an IEP at all.

In sum, I find that Respondent's proposed offer of FAPE to Student on ***, 2014 was not based on performance and assessment; but rather, on DISD's desire to offer a program within the public school setting despite the evidence that Student could not be successful there, especially with the limited goals and services delineated in Student's proposed IEP.

Least Restrictive Environment

The parties did not address concerns related to the least restrictive environment provision of IDEA. To the extent that Student's proposed IEP or Student's placement at *** removed Student from the general education environment, the evidence conclusively demonstrated that such removal was both appropriate and necessary for Student to obtain a FAPE.

Coordinated and Collaborative Manner By Key Stakeholders

The evidence shows that DISD coordinated and worked in collaboration with Petitioner, *** and Dr. *** to obtain information about Student. Although the coordination efforts were surely strained by the differences in perspectives and desired outcomes of the parties, I find that DISD made appropriate (except as to timeliness) efforts to obtain the necessary information from key stakeholders; the problem arose with DISD's failure to appropriately incorporate or utilize the information obtained.

Reasonably Calculated To Provide Meaningful Benefit

The evidence conclusively establishes that Student's proposed educational program was not reasonably calculated to provide *** with meaningful educational benefit. The IEP failed to address any of Student's academic needs and provided no academic goals and objectives at all. The schedule of services provided 150 minutes per week per core subject and 60 minutes per week of personal social development in a special education setting, with the remainder of Student's time in a general education environment with in-class support. Given that Student's prior IEP from *** provided for Student to be educated full-time in a special education setting and that Student continued to require substantial support to be academically successful even at ***, the IEP proposed by DISD, offering substantially fewer supports in a significantly larger, less structured environment, was not reasonably calculated to provide Student with a meaningful educational benefit. This does not even take into account the very probable scenario, based on the evidence adduced at hearing, that a move to DISD could have so significantly impacted Student's emotional stability that Student may have been unable to access Student's education at all.

In conclusion, I find that taking the *Cypress-Fairbanks* factors as a whole into account, Respondent's proposed program to educate Student at DISD did not provide Student with a free appropriate public education that was reasonably calculated to provide Student with meaningful educational benefit.

Whether *** Was Appropriate

The second prong of the reimbursement analysis asks whether the educational program provided by the private school was appropriate. *Burlington, 471 U.S. at 370*. The private school program need not necessarily meet every specific requirement of the IDEA, but it must be "otherwise proper." *Florence County School District Four v. Carter, 510 U.S. 7 (1993)*. The evidence showed that *** meets the requisite test. In fact, the only evidence introduced about *** demonstrated that the school provided Student with a small, highly supportive and structured educational environment with small class sizes and significant emotional support. Student was very successful at ***, both academically and in maintaining sufficient emotional stability to engage academically.

*** offered Student the type of environment recommended by each of the evaluations done of Student's needs following Student's *** 2012, as well the environment provided for in Student's IEP from *** developed in *** 2013. On this basis, as well as Student's success at the school, I find that *** was an appropriate private placement for Student.

Whether Equitable Considerations Foreclose Full or Partial Reimbursement

When a court or hearing officer determines, as I have here, that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors and equities, including the notice provided by the parents, the school's opportunities for providing a FAPE, and the

reasonableness of the actions taken by the parent to determine if reimbursement for some or all of the child's private education is warranted. *Forest Grove, supra*; 34 C.F.R. § 300.148(d).

In the instant case, Respondent argues that Petitioner is not entitled to tuition reimbursement even if Respondent failed to timely offer FAPE because: 1) Petitioner failed to provide Respondent with notice of Petitioner's intent to seek tuition reimbursement until after Student was already enrolled in the private placement in violation of the notice provisions of 34 C.F.R. § 300.148 and 2) Petitioner made clear Petitioner's intent to remain at *** and Petitioner's refusal to access services at DISD.

Considering the equities, I find no basis to reduce Petitioner's requested tuition reimbursement on the grounds cited by Respondent.

First, with regard to Petitioner's notice to Respondent: Petitioner enrolled in *** for the 2013-2014 school year pursuant to an IEP that was in place to govern Petitioner's education for that school year. When Parent made a firm move to Dallas in *** 2013, Petitioner notified DISD, through Petitioner's attorney, of Petitioner's desire to seek a FAPE from DISD, specifically in the form of a non-public day school placement as per the *** IEP. Whether DISD was required to provide comparable services to Student under that IEP or some other type of services has been fully discussed herein; the critical point here is that Student notified Respondent of Student's intent to seek reimbursement on ***, 2013, very shortly after confirming that DISD was Student's resident district responsible for the provision of FAPE.

DISD is correct that Parent knew by *** 2012 that Parent would likely relocate to DISD and should have contacted DISD *** to allow more time to develop an offer of FAPE before school started. However, the facts of this case do not support the conclusion that the additional time would have changed the outcome. The FAPE ultimately offered by DISD was not substantively appropriate to meet Student's needs. DISD introduced no evidence to support its contention that it could have offered Student a FAPE even if Student had provided notice before the school year began. (See prior discussion).

Second, concerning DISD's contention that Parent never intended to enroll Student at DISD and access services, thereby depriving DISD of the opportunity to provide a FAPE, I find that the circumstances of this case make clear that Parent fully intended to seek a FAPE from DISD; however, Parent believed that FAPE required Student to continue Student's attendance at ***, both because Student could not emotionally tolerate a change in environment and because Student required the structure and environment of *** in order to access Student's education. Although Petitioner and Respondent disagree about what FAPE must be provided by DISD, i.e. services at a DISD *** or services at ***, the facts make clear that Petitioner intended to seek a FAPE from DISD from the outset. *Blount County Board of Education v. Bowens*, 60 IDELR 211 (D.C.N.D. AL 2013), *aff'd* 63 IDELR 234 (11th Cir. 2014)(*No reduction in reimbursement for Student attending private school before LEA became responsible for FAPE who requested LEA to continue the private school placement*).

In addition, as discussed previously, case law under IDEA makes a critical distinction between an *offer* of FAPE and the *provision* of FAPE. In *D.C. v. Vinyard, supra*, the parents of a privately placed student approached their LEA in March and again in August requesting an offer of FAPE for the following school year. The district declined to develop an IEP because the student was not enrolled and the parents had previously declined services from the district and made clear their intent to stay in the private school. In finding that the District failed to comply with its obligations under IDEA, the court held that "... the relevant inquiry is whether the parents expressed their intent to maintain the child's private school enrollment *after* the school district offers a FAPE...Here, the parents requested an IEP,

the District refused, and the parents filed a due process complaint. The parents' subsequent conduct does not excuse the District's initial failure to comply with its obligation to offer a FAPE.” *D.C. at 114*. Similarly, in the instant case, the Parent’s stated intent that Student remain at *** did not relieve DISD of its obligation to make an *offer* of FAPE to Student. Had DISD made a timely offer of FAPE that Parent rejected, Parent’s actions might justify a reduction or denial of the requested tuition reimbursement; however, DISD made no offer of FAPE at all for Parent to consider or reject.

The equitable considerations asserted by DISD do not justify a reduction in the tuition reimbursement requested by Petitioner for the 2013-2014 school year. Petitioner approached DISD soon after the start of the 2013-2014 school year to notify the District of the intent to request a FAPE in the form of placement at ***. Petitioner cooperated with DISD’s desire to evaluate and gather additional information and even participated in the process of developing an IEP with only one week left of school. Ultimately, DISD failed to offer any FAPE at all to Student until the end of the school year despite Petitioner’s request; when DISD did make an offer of FAPE, it was not appropriate to meet Student’s academic or emotional needs. In short, DISD’s offer of FAPE was “too little and too late” and neither the timing of Petitioner’s notice to DISD nor Parent’s intent to continue Student at *** justify DISD’s failure to meet its obligations to Student during the 2013-2014 school year.

Petitioner’s Requested Remedies

Petitioner seeks reimbursement for tuition and transportation costs for attendance at *** for the 2013-2014 school year. The evidence established that Petitioner’s out of pocket tuition costs plus transportation at the pertinent IRS mileage reimbursement rate totaled \$25,426.93. For the reasons fully discussed herein, I find that Petitioner is entitled to full reimbursement for tuition plus transportation for the 2013-2014 school year.

Petitioner also seeks reimbursement for costs for counseling services obtained during the 2013-2014 school year. The evidence established that Petitioner obtained services from Dr. ***, a psychiatrist in the amount of \$825.00. I decline to award Petitioner reimbursement for the costs of Dr. *** because the evidence indicates that Dr. ***’s services were primarily for medication management, a medical service that was not required or necessary for educational purposes.

Finally, Petitioner requests compensatory services for violations of IDEA sustained during the 2013-2014 school year in the form of counseling and transition services from the beginning of the school year until the age of ***. Awards of compensatory education are designed to place a student in the same position they would have been in but for the denial of FAPE. *Draper v. Atlanta ISD, 519 F.3d 1275 (11th Cir. 2008)*. In Student’s case, the award of tuition reimbursement with transportation provides Student with the FAPE Student was entitled to receive during the 2013-2014 school year. Student obtained the requisite educational benefit at *** without counseling or transition services. I concur with Respondent that an award of compensatory damages, and particularly until the age of ***, in addition to tuition reimbursement would constitute a duplicate remedy that goes beyond what Student would have received, but for the denial of FAPE. Accordingly, I decline to award Petitioner the requested compensatory damages of counseling and transition services until the age of ***.

CONCLUSIONS OF LAW

1. Respondent Dallas ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state

regulations. Dallas ISD was Student's resident district under IDEA for the 2013-2014 school year. DISD had the legal obligation to make FAPE available to Student. *34 C.F.R. § 300.101*.

2. Respondent failed to timely offer an educational program to Student that was reasonably calculated to provide Student with a free appropriate public education for the 2013-2014 school year. *34 C.F.R. 300.323; 34 C.F.R. § 300.111; 34 C.F.R. § 300.19 T.A.C. § 89.1096*.
3. Petitioner is entitled to reimbursement for the out of pocket cost to Student's family for the tuition at the private school, plus transportation, for the 2013-2014 school year because Respondent failed to make a timely offer of FAPE to Student and the private school placement was appropriate. *34 C.F.R. § 300.148*.
4. Petitioner's tuition reimbursement for the 2013-2104 school year is not be reduced or denied based equitable considerations. *34 C.F.R. § 300.148*.

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is **GRANTED IN PART** as follows:

1. Respondent shall reimburse Petitioner for the out of pocket costs for the tuition at *** for the 2013-2014 school year, plus transportation, in the total amount of \$25,426.93.
2. The total amount of \$25,426.93 shall be paid to Petitioner within thirty (30) business days of the date of this decision.

It is further **ORDERED** that all other items of relief not specifically awarded herein are **HEREBY DENIED**.

SIGNED and **ENTERED** this 6th day of May 2015.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Attorney at Law

Special Education Hearing Officer for the State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *20 U.S.C. §1415; 34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n)*.

TEA DOCKET NO. 052-SE-1014

STUDENT bnf	§	BEFORE A SPECIAL
PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
DALLAS ISD	§	
Respondent	§	
	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent failed to devise and offer an appropriate and timely IEP to Student for the 2013-2014 school year?

Held: For the Student. Petitioner met Petitioner’s burden of establishing that Respondent failed to devise and offer an appropriate and timely IEP for Student for the 2013-2014 school.

Cite: 34 C.F.R. 300.323

Issue: Whether Petitioner is entitled to reimbursement for tuition and transportation for the private placement obtained for Student for the 2013-2014 school year?

Held: For the Student. Petitioner met Petitioner’s burden of establishing that Respondent failed to make a timely offer of FAPE to Petitioner for the 2013-2014 school year and that Student’s private placement was appropriate. Student further demonstrated that the equities did not require a partial reduction in the amount of Student’s tuition reimbursement.

Cite: 34 C.F.R. § 300.148