

SOAH DOCKET NO. 701-23-05450.IDEA
TEA DOCKET NO. 092-SE-1122

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend *** (Parent and , collectively, Petitioner), brought this action against the North East Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations. The main issue in this case is whether Respondent denied Student a free, appropriate public education (FAPE) by failing to provide extended school year services (ESY) and by failing to develop an appropriate Individualized Education Program (IEP).

The Hearing Officer concludes Respondent denied Student a FAPE by failing to individualize Student’s IEP to address Student’s need for ESY and assistive technology (AT).

II. PROCEDURAL HISTORY

A. Legal Representation

Petitioner was originally represented in this litigation by Kassandra Levay, authorized non-attorney representative. Subsequently, Student was represented by legal counsel Karen Seal of the Law Office of Karen Dalglish Seal. Ms. Seal then withdrew as attorney and Sonja Kerr of the Law Firm of Connell Michael Kerr, LLP made an appearance for Petitioner, representing Petitioner for the remainder of the case. Respondent was represented throughout this litigation by its legal counsel, Christopher Schulz with Schulman, Lopez, Hoffer & Adelstein, LLP.

III. DUE PROCESS HEARING

The due process hearing was conducted April 5-6, 2023. The hearing was conducted via Zoom videoconferencing and recorded and transcribed by a certified court reporter. Petitioner was represented by Sonja Kerr, who was assisted by co-counsel, Yvonnilda Muñiz. Parent also attended the due process hearing.

Respondent was represented at the hearing by Christopher Schulz and Alysa Sanderson. In addition, ***, Program Coordinator for Critical Cases for the District, attended the hearing as the party representative. Both parties filed written closing briefs in a timely manner. The Decision in this case is due on May 22, 2023.

IV. ISSUES

Petitioner raised the following IDEA issues for decision in this case:

1. FAPE: Whether Respondent denied Student a FAPE by failing to provide an appropriate ESY program; and
2. FAPE: Whether Respondent denied Student a FAPE by failing to develop an appropriate IEP.

V. REQUESTED RELIEF

Petitioner requested the following items of relief:

1. An order requiring Respondent to provide the ESY services requested by Parent;
2. An order requiring the use of the *** device for Student at school; and
3. An order requiring Respondent to develop an IEP goal for Student for ***.

VI. FINDINGS OF FACT

ABOUT STUDENT

1. Student is a *** year old, *** grade student in the District. Student is eligible for special education services as a student with autism, an intellectual disability, and a speech impairment.¹
2. Consistent with Student's autism identification, Student has communication and socialization deficits, engages in repetitive behaviors, and displays unusual sensory responses.²
3. Student has impaired intellectual functioning and significant deficits in multiple adaptive behavior domains. Student has academic skills at the *** level.³

¹ Respondent's Exhibit (RE) 33 at 1-2.

² RE 33 at 23.

³ RE 33 at 35 and 40.

4. Student can independently ***. Student requires constant supervision at all times throughout the school day due to safety concerns related to elopement and sensory seeking behaviors.⁴
5. At school, Student follows ***. Student requires no visual prompts for directions Student hears daily but requires new directions to be broken down into shorter steps to gain understanding. Student gains adult attention by ***, or by using Student's communication device.⁵
6. Student has a speech impairment in the areas of receptive, expressive, and pragmatic language, as well as in the area of articulation. These impairments impact Student's ability to follow verbal instructions, learn academic concepts, participate in classroom discussions, and communicate with others. Student communicates through ***.⁶
7. Student's ***. Student can navigate through multiple levels of the *** application to locate familiar ***. Student carries the *** and uses the *** throughout the day across settings to make requests for items, engage in activities, and to request assistance.⁷
8. Student uses the *** to request preferred activities and items at home. During the regular school year, Student brings Student's *** home in the evenings, on weekends, and during breaks. However, in the summer, the District only allows Student to bring the *** home while District-operated ESY services are in session. When ESY is not in session, Student is without Student's *** and significantly limited in Student's ability to communicate.⁸
9. Student has sensory processing needs in the areas of visual, tactile, and body awareness stimuli. Student engages in sensory seeking behavior frequently throughout the school day across settings, including ***,

⁴ Joint Exhibit (JE) 6 at 10; Transcript (TR) at 88.

⁵ RE 33 at 3.

⁶ RE 33 at 3 and 43-44, TR at 43.

⁷ RE 33 at 5 and 42.

⁸ RE 33 at 5; TR at 157-158, 207, and 259.

***. Student requires occupational therapy (OT) services to address Student's sensory seeking behaviors and self-regulation.⁹

2020-21 SCHOOL YEAR

10. During the first nine weeks of the 2020-21 school year, Student engaged in *** of school days. For the last nine weeks of the school year, Student engaged in *** of school days and went *** consecutive school days without any *** behavior. Student made significant improvement on *** during the 2020-21 school year.¹⁰
11. The last day of school in the District for the 2020-21 school year was May ***, 2021. Student received no services from the District from May ***, 2021 until the start of the District's ESY program on June ***, 2021.¹¹
12. Student attended ESY in the District from June ***, 2021 to July ***, 2021. The ESY program was supervised by District special education administrators, staffed by District education professionals, and ran Monday to Thursday for four hours per day. During the 2021 summer ESY program, Student *** of ESY days and went *** consecutive days without ***.¹²
13. The first day of school in the District for the 2021-22 school year was August ***, 2021. Student received no services from the District from July ***, 2021 until the start of school on August ***, 2021.¹³

2021-22 SCHOOL YEAR

14. During the first nine weeks of the 2021-22 school year, Student *** of school days. During the entire 2021-22 school year, Student engaged in *** of school days with five school days being the longest stretch of school days without ***. Student regressed significantly in *** following the break in services during the summer of 2021 and did not recoup the loss.¹⁴

⁹ RE 33 at 58; RE 34 at 3.

¹⁰ JE 6 at 34 and 40; TR at 93.

¹¹ JE 14.

¹² JE 3 at 32-33; JE 6 at 40; JE 14 at 7.

¹³ JE 1; JE 14.

¹⁴ RE 33 at 11; TR at 94-95 and 113.

15. Prior to spring break in March of 2022, Student independently ***. After returning to school following spring break, Student ***.¹⁵
16. On April ***, 2022, the District conducted Student’s annual Admission, Review, and Dismissal (ARD) committee meeting. The District reconvened the ARD committee on May ***, 2022, and May ***, 2022, to attempt to resolve a disagreement over Student’s ESY services.¹⁶
17. The ARD committee developed an IEP for Student with a reading goal for ***, a *** goal related to ***, a math goal related to ***, a *** goal related to the ***, a *** goal related to ***, a speech goal related to ***, an adaptive behavior goal related to ***, an *** goal related to ***, and a speech goal related to ***.¹⁷
18. The ARD committee continued Student’s placement in the special education *** classroom for ***. The *** is a self-contained special education classroom with a small staff to student ratio. The ARD committee placed Student in general education for ***. Student is also included with general education students for ***. The ARD committee provided Student nine, thirty minute speech therapy sessions each nine weeks; four, fifteen minute OT sessions each nine weeks to work on fine motor skills and visual perceptual development; and one hundred minutes per week of *** services.¹⁸
19. The ARD committee determined Student required ESY services, because an interruption in services will cause Student to regress in behavior and skills related to independence, including ***. The committee identified that Student had significantly regressed in the behavior of *** over the summer break between the end of the 2020-21 school

¹⁵ RE 33 at 29.

¹⁶ JE 6 at 40-43.

¹⁷ JE 6 at 15-23.

¹⁸ JE 6 at 4 and 34-36; RE 33 at 9; TR at 77-78.

year and the start of the 2021-22 school year. The committee also identified Student had regressed in *** over spring break in 2022.¹⁹

20. During the ARD committee meeting, Parent requested full day ESY services for the entire summer to address Student's regression following school breaks and Student's increase in unsafe behaviors, such as ***, following school breaks.²⁰
21. The District offered half day ESY services for Student for six weeks of the summer break, from June ***, 2022, to June ***, 2022, and then again from July ***, 2022, to July ***, 2022. The District's ESY program runs 8:00 AM to 12:00 PM, four days per week during these time periods. The program is supervised by a special education administrator and staffed by District education professionals. The District indicated full day, full summer ESY services were not necessary for Student, because half day ESY services are sufficient to maintain Student's behavior and skills.²¹
22. The last day of school for the District for the 2021-22 school year was May ***, 2022. Student received no services from the District from the end of school until the start of the District's ESY program on June ***, 2022.²²
23. Student attended the District's ESY program in the summer of 2022. During the ESY program Student engaged in *** of ESY program days and experienced no ***.²³
24. Student received no services from the District from the end of ESY on July ***, 2022 to the first day of school for the 2022-23 school year on August ***, 2022.²⁴

2022-23 SCHOOL YEAR

25. For the 2022-23 school year, Student had a new primary teacher in the *** classroom, after having the same primary teacher for the four prior school years. The new teacher recorded behavior data differently than the prior teacher. The District data collection

¹⁹ JE 6 at 34.

²⁰ JE 6 at 39-41.

²¹ JE 6 at 41, 45, and 54.

²² JE 1; RE 35.

²³ RE 35 at 7 and 11.

²⁴ JE 2; RE 35.

records for Student for August of the 2022-23 school year are incomplete and the data for the remainder of the school year cannot be directly compared to prior years data.²⁵

26. During summer ESY of 2022, Student had no ***. When Student returned to school for the 2022-23 school year, Student had *** in *** school days. Student did not recoup Student's independence in *** during the first nine weeks of the school year.²⁶
27. During the first two weeks of the 2022-23 school year, The District's limited data indicated Student *** at least *** times at school.²⁷
28. The District completed a reevaluation and a functional behavior assessment (FBA) for Student on October ***, 2022. The District conducted the FBA to analyze Student's behavior of ***, defined as ***. Student's teacher indicated Student is most likely to engage in *** during a transition time, such as transitioning from ***.²⁸
29. As part of the FBA, the District determined Student *** from the educational environment while waiting during transitions to engage in the sensory activity of ***. Student enjoys *** and seeks opportunity to do so even when engaged in other enjoyable activities.²⁹
30. When Student ***, Student is unconcerned with Student's safety and is likely to ***. Student has ***. Student does not take Student's *** when Student ***, making it very difficult for Student to communicate.³⁰
31. Based upon the results of the FBA, the District developed a behavior intervention plan (BIP) to address Student's ***. The goal of the BIP is to eliminate *** during transition times through the use of a visual schedule and sensory reinforcements.³¹

²⁵ RE 5 at 3; JE 15; TR at 361, 396, 420-421 and 460-461.

²⁶ RE 35 at 7; TR at 40-41 and 204.

²⁷ JE 9 at 40.

²⁸ RE 33; RE 34 at 1-2 and 5.

²⁹ RE 33 at 28; RE 34 at 5.

³⁰ TR at 47-48, 96, and 138-139.

³¹ RE 34 at 10.

32. The District convened Student's ARD committee on October ***, 2022, and reconvened the ARD committee on November ***, 2022, to review the FIE and FBA. The committee adopted the BIP that was part of the October ***, 2022 FBA. The committee recommended a *** for Student to address ***.³²
33. On October ***, 2022, Student *** at school, ***. Student was ultimately ***.³³
34. The District is recommending ESY services for Student for the summer of 2023. The District does not recommend ESY services for Student for other school breaks, such as Thanksgiving, winter, and spring break. The District indicated additional ESY services were not necessary for Student, because data did not support significant regression over breaks that could not be recouped in a reasonable time, and that, specifically, *** was decreasing.³⁴
35. The last day of school in the District for the 2022-23 school year is May ***, 2023 and the first day of school for the 2023-24 school year is August ***, 2023.³⁵
36. Student rides special transportation to and from school. During fall of 2022, Student *** on several occasions. Student now ***. Student has not *** since Student began ***.³⁶
37. The District behavior specialist, Student's teacher, Student's private behavior specialist, and Parent met to exchange data and strategies for addressing Student's behavior. Student's teacher emailed IEP progress data to Parent at the end of each week.³⁷
38. During the ARD Committee meetings, Parent raised the issue of ***. *** used with individuals with *** behaviors. The *** is used for ***. The manufacturer of *** provides the ability to disable the *** features while children

³² JE 9 at 43 & 45.

³³ TR at 190-191.

³⁴ JE 9 at 34 and 43.

³⁵ JE 2.

³⁶ JE 6 at 33; TR at 219-220.

³⁷ TR at 363 and 411-412.

*** at school to address privacy issues in schools. The District requested Parent sign an agreement to disable the *** features while Student was at school, but Parent declined to do so. Parent requested *** be part of Student's IEP, but the District did not include it.³⁸

VII. DISCUSSION

In this case, Petitioner alleges Respondent denied Student a FAPE by developing a deficient IEP for Student. Specifically, Petitioner asserts Student's need for ESY, AT devices, and a *** goal are not appropriately addressed in the IEP. Petitioner confirmed the relevant time period for the issues at hearing ends with the November ***, 2022, ARD committee meeting, the last ARD committee meeting prior to Petitioner filing the complaint on November 15, 2022.³⁹

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes 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). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). The basic inquiry in this case is whether the

³⁸ Petitioner's Exhibit (PE) 3; TR at 213-214 and 217.

³⁹ TR at 20.

IEP proposed by the school district “was reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Schaffer*, 546 U.S. at 49; *Andrew F.* 137 S. Ct. at 999.

C. FAPE STANDARD

A hearing officer applies a four-factor test to determine whether a school district’s program offers FAPE to a student with a disability. Those factors are:

- Whether the program is individualized on the basis of the student’s assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Whether positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997); *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide

the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

1. Individualized on the Basis of Assessment and Performance

Petitioner argues the District failed to individualized Student's ESY program, failed to provide necessary AT, and failed to address safe ***, resulting in a deficient IEP. The District was required to consider Student's strengths, Parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs, when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(1). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i); *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir.2012).

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the District must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress, not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). Parent points to Students regression in *** in the absence of needed ESY services to show the District has failed to provide Student with meaningful educational benefit. *Id.*

a. ESY

The parties dispute whether the ESY services offered by the District are sufficient to meet Student's individual needs. State and federal regulations require the ARD Committee to determine a student's need for ESY services. 34 C.F.R. § 300.106; 19 Tex. Admin. Code § 89.1065. ESY is necessary when benefits accrued to the child during the regular school year will be

significantly jeopardized if the child is not provided an educational program during the summer months. *Alamo Heights Indep. Sch. Dist. v. State Bd. Of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986).

Under state regulations, ESY services must be provided when a student has “exhibited, or reasonably may be expected to exhibit, severe or substantial regression” in one or more critical areas addressed in Student’s IEP “that cannot be recouped within a reasonable period of time.” 19 Tex. Admin. Code § 89.1065(2). “Severe or substantial regression means that the student will be unable to maintain one or more acquired critical skills in the absence of ESY services.” *Id.* The reasonable period of time for recoupment must be determined on the basis of needs identified in each student’s IEP, but in any case, must not exceed eight weeks. 19 Tex. Admin. Code § 89.1065(3). In addition, if the loss of acquired critical skills would be particularly severe or substantial, or if such loss results, or reasonably may be expected to result, in immediate physical harm to the student or to others, ESY services may be justified without consideration of the period of time for recoupment of such skills. *Id.*

Both parties agree Student requires some ESY services. Thus, the question here is not whether ESY services are necessary, but rather the scope of the necessary ESY. Parent contends Student requires ESY during all extended school breaks and for full days every day during the summer break. In contrast, the District contends Student only requires ESY for six weeks during the summer in a four day per week, half day District program. The District asserts that Student does not require ESY services at all during other school breaks.

The evidence shows that following the break in services from July ***, 2022 to August ***, 2022, Student significantly regressed in ***. Even the short, one-week spring break in 2022 resulted in Student regressing from being substantially independent in ***. More significantly, the break in services in summer of 2022 resulted in Student having *** on *** days, a substantial regression

that continued, and was not recouped over the first nine weeks of the school year, a significant period of time.

The evidence also showed Student experienced substantial regression in *** following extended breaks. During the 2020-21 school year, Student made substantial progress with ***, eventually going *** consecutive days without *** and reducing the frequency of Student's *** from *** percent to *** percent of school days. While Student attended ESY for *** weeks during the summer of 2021, Student maintained Student's progress, going *** consecutive days without ***. However, when Student returned to school in fall of 2021 after a break in services from July ***, 2021 to August ***, 2021, Student experienced substantial regression, *** on *** percent of school days in the first nine weeks of school. Moreover, Student never recouped Student's progress, *** on more than *** percent of school days for the 2021-22 school year and only going *** consecutive days without ***.

Student again regressed when Student returned to school in fall of 2022 after the summer break, *** on at least *** of the first *** days of school. In addition, on October ***, 2022, Student ***. Student was ultimately ***. This incident demonstrates, for Student, *** is a critical skill that, if not addressed and maintained, will result in a substantial risk of immediate physical harm.

The evidence showed the District failed to consider Student's need for ESY services appropriately. 34 C.F.R. § 300.106; 19 Tex. Admin. Code § 89.1065. When developing Student's IEP and BIP, the District also failed to consider all potential behavioral strategies, including providing additional ESY services to maintain critical behavioral skills. 34 C.F.R. § 300.324(a)(2)(i); *R.P.*, 703 F.3d at 813. The District recognized *** were critical skills for Student by providing ESY to specifically address these two skills and by

conducting an FBA to exclusively address ***. Student experienced significant regression in these two critical skills without recouping Student's losses in a reasonable time. Moreover, the failure to provide more ESY services puts Student at risk of substantial harm. Student's IEP was not individualized on the basis of assessment and performance as to ESY services.

b. AT

The ARD committee is required to consider Student's need for AT. 34 C.F.R. § 300.324(a)(2)(v). During ARD committee meetings and in the complaint, Parent requested the District include *** as an AT device in Student's IEP. During the hearing, Parent also contended the District failed to develop an appropriate IEP by withholding Student's *** during school breaks. The District is required to provide AT to students who require AT as part of their special education services or as a necessary related service or supplemental aid. 34 CFR § 300.105(a). The District must also ensure a student can bring Student's AT home if it is necessary for the provision of a FAPE. 34 CFR § 300.105(b).

The *** was included in Student's IEP as AT and the District recognized the *** as essential for Student's communication. The District even recognized Student required the *** at home on nights, weekends, and breaks during the regular school year in order to communicate. However, inexplicably, the District deprived Student of Student's *** and one of Student's primary means of communication when school based ESY services concluded in the summer.

As for the *** AT device, the evidence showed the District considered Parent's request to include the *** in Student's IEP. However, Parent refused the request to disable the *** during school hours to address the District's privacy concerns. Parent's refusal prevented the District from further consideration of ***. At hearing, Petitioner

failed to present evidence demonstrating how the *** AT device was necessary as special education, a related service, or a supplemental aid. 34 CFR §300.105(a).

Although the District did not err in failing to include the *** device in Student’s IEP, the District needed to provide year-round access to the ***. The *** is clearly necessary as special education and a related service for Student and Student requires its use at home at all times to receive a FAPE. 34 CFR § 300.105. The District failed to individualize Student’s program when it did not provide year round access to the ***.

c. ***

Petitioner contends the District failed to include a goal in Student’s IEP related to ***. Petitioner presented little evidence on this issue at hearing. Student was reported to have *** in the fall of 2022. It is unclear how many times Student *** or what occurred during these ***. To address the ***, the District added a *** to Student’s IEP and *** services. After Student began ***, the *** stopped. Petitioner failed to meet their burden to prove a *** IEP goal was necessary.

2. Least Restrictive Environment (LRE)

The IDEA requires that a student with a disability be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R.

§ 300.114(a)(2)(i)(ii). To determine whether a school district is educating a student with a disability in the LRE, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State Bd. Of Educ., 874 F. 2d 1036, 1048 (5th Cir. 1989).

The District has placed Student in the *** classroom for Student's core classes to address the deficits related to Student's autism, intellectual disability, and speech impairment. With academic skills at the *** level, Student cannot be educated in mainstream classes for core academic subjects. The District is, however, mainstreaming Student for special area classes and including Student for ***. Here, the District is educating Student in Student's LRE.

3. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, Civil Action No. 4:16-CV-0058, 2017 WL 3017282, at *27 (S.D. Tex. June 15, 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). Here, Petitioner contends Student's IEP was not developed in a collaborative manner involving the key stakeholders, because the District failed to consider Parent's request for additional ESY services and her request to consider other resources. However, the IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto

power” over a school district’s decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003).

In this case, the fact the District declined Parent’s requests for additional ESY services and including the *** in the IEP does not lead to the conclusion the District failed to collaborate. The District met with Parent in multiple ARD committee meetings in 2021 and 2022, considering Parent’s input on Student’s program during each meeting. Moreover, District staff met with and collaborated with Student’s private providers and Student’s teacher sent Parent weekly reports. A school district must be deemed to have met the IDEA’s requirements regarding collaborating with a student’s parents absent a showing of bad faith exclusion of a student’s parents or refusal to listen to them. *Id.* Here, the evidence showed the District developed a program in collaboration with the key stakeholders and did not refuse to listen to Parent.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P.*, 703 F.3d at 813-14. Here, Student has not made appropriate progress on ***. Following school breaks, Student experiences significant regression in Student’s independence with ***, despite demonstrating the ability to be independent in *** when services are consistently in place. Similarly, when services are consistently maintained, Student demonstrates the ability to go extended periods of time without ***. However, when there are extended service breaks, Student experiences regression with ***, leading to highly dangerous situations. The evidence showed Student failed to make sufficient non-academic progress in the key independence areas of *** under the IEP proposed by the District. *Id.*

VIII. CONCLUSION ON THE FOUR FACTORS

In this case, The District failed to individualize Student's program in accordance with Student's need for ESY during school breaks and Student's need for access to Student's *** year round. As a result, Student did not receive non-academic benefit from Student's program and regressed in ***. When Student's program is considered as a whole, the District did not provide Student a FAPE. *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F.3d 390, 391 (5th Cir. 2012). A preponderance of the evidence showed that Student was denied a FAPE and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188, 203-04; *Andrew F.*, 137 S. Ct. at 999.

IX. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. The District failed to provide Student a FAPE during the relevant time period and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188, 203-04 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).
3. The District violated the IDEA by failing to provide necessary ESY services during extended school breaks. 34 C.F.R. § 300.324(a)(2)(i); 34 C.F.R. §§ 300.106; 19 Tex. Admin. Code § 89.1065.
4. The District violated the IDEA by failing to provide the *** to Student year round. 34 CFR §300.105.
5. Petitioner did not meet their burden of proof to show the District violated the IDEA by failing to include the *** or a *** goal in Student's IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

X. RELIEF AND ORDERS

The IDEA’s central mechanism for remedying perceived harms is for parents to seek changes to a student’s program. *Polera v. Bd. Of Educ. Of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2nd Cir. 2002). Hearing officers have “broad discretion” in fashioning relief under the IDEA. Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *School Comm. Of Town of Burlington, Mass. V. Dept. of Educ.*, 471 U.S. 359, 369 (1985).

Here, Parent requested full day ESY services for Student for every school break. As of November of 2022, the evidence supported Student’s need for ESY for more than six weeks of the extended summer breaks. After receiving six weeks of District ESY services in summer of 2022 with a break in service from July ***, 2022 to August ***, 2022, Student experienced significant regression in *** and Student did not recoup this critical skill in the first nine weeks of the school year. Student also struggled with *** following the summer breaks in 2021 and 2022 after receiving ESY services for only a portion of the summers. In fall of 2021, Student never recouped the progress Student lost over the summer and in 2022, Student ***, and was at risk of substantial harm from the ***.

The evidence does not support Student’s need for ESY services during other school breaks. Student did experience regression in *** following spring break in 2022. However, Student recouped this loss before the end of the school year. Moreover, during summer ESY in 2022, which included a one week break before the start of ESY services and another one week break in the middle of the program, Student had no ***. Petitioner presented no evidence of Student’s regression or loss of critical skills during other one week breaks. As such, this Hearing Officer declines to order ESY services for breaks in service during the regular school year.

The evidence also showed Student was able to maintain Student's skills while attending District ESY services, consisting of half day services from professional educators four days per week. Specifically, during District ESY in 2021, Student went *** consecutive days without ***, maintaining Student's skills in this area. Similarly, in summer of 2022 while attending District ESY, Student had no ***. This Hearing Officer concludes Student requires ESY services four days per week, a half day in length, in the summer of 2023 from June ***, 2023 to August ***, 2023. This change in Student's program is necessary for Student to receive FAPE. *Burlington*, 471 U.S. at 369.

In 2023, the District's summer break runs from May ***, 2023 to August ***, 2023. The District must provide Student with ESY services, four days per week for four hours per day, beginning on June ***, 2023 and ending on August ***, 2023. The District is not required to provide Student ESY services during the week of July ***, 2023. For time periods when the District ESY program is operating in the summer of 2023, Student will attend this program. For time periods between June ***, 2023 and August ***, 2023 when the District program is not operating, the District may deliver the four hours per day, four days a week of services directly through District personnel or may contract to deliver the services through outside personnel who are capable of implementing Student's IEP.

The District must also provide Student year round access to Student's *** without breaks in availability. The *** is essential for communication for Student in all environments and the District should not have withheld it from Student for any portion of the year.

The hearing officer therefore makes the following **ORDERS**:

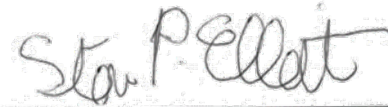
1. The District is **ORDERED** to provide Student ESY from June ***, 2023 to August ***, 2023, exclusive of the week of July ***, 2023;

2. As ESY services during the summer of 2023, the District is **ORDERED** to provide Student four hours of services, four days per week, through District personnel or may contract to deliver the services through outside personnel with the capability to implement Student's IEP; and
3. The District is **ORDERED** to provide Student year-round access to Student's VOD.

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requested relief is **GRANTED IN PART AND DENIED IN PART**.

All other relief not specifically stated herein is **DENIED**.

SIGNED May 22, 2023.



Steve Elliot
Special Education Hearing Officer
For the State of Texas

XI. 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(i)(2); 34 C.F.R. §§ 300.514(a), 300.516; 19 Tex. Admin. Code § 89.1185(n).