CONFIDENTIAL
Pursuant to FERPA – 20 U.S.C. § 1232g;
34 C.F.R. Part 99

SOAH DOCKET NO. 701-22-0252.IDEA
TEA DOCKET NO. 027-SE-0921

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend *** (Parent or, Collectively, Petitioner) brought this action against the Tomball Independent School District (Respondent or 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 the District denied Student a free, appropriate, public education (FAPE) during the relevant time period. The Hearing Officer concludes the District developed a program for Student that was reasonably calculated to provide Student educational benefit based upon Student's unique needs and provided Student a FAPE.

II. PROCEDURAL HISTORY

A. Legal Representation

Petitioner was represented throughout this litigation by their legal counsel, Dominique Augustus with Cirkiel & Associates. Respondent was represented throughout this litigation by its legal counsel, Janet Horton with the Thompson & Horton law firm.

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on May 25 and 26, 2022. The hearing was recorded and transcribed by a certified court reporter. Petitioner was represented at the due process hearing by their legal counsel, Dominique Augustus and Henry G. Bostwick. In addition, ***, Student's mother, attended the due process hearing.

Respondent was represented by its legal counsel, Janet Horton and Paige Martin. In addition, ***, the Director of Special Services 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 August 17, 2022.[1]

IV. ISSUES

A. Petitioner's Issues

Petitioner raised the following IDEA issues from the 2020-21 and 2021-22 school years for decision in this case:

FAPE

- Whether Respondent denied Student a FAPE during the relevant time period.
- Whether Respondent denied Student a FAPE by failing to consider social work, counseling, and in-home family support services for Student.

[1] Petitioner's original closing brief exceeded the page limit set forth in Order No. 10. Petitioner subsequently corrected this error and filed a closing brief within the page limit. Petitioner's counsel is admonished to read carefully all the language in all of the orders issued by tribunals in all of their cases to prevent this type of error in the future.

- Whether Respondent denied Student a FAPE by failing to provide appropriate transition services.

B. **Respondent's Legal Position**

Respondent generally denies the factual allegations stated in Petitioner's Complaint. The District contends it provided Student with FAPE during the relevant time period, can continue to do so, and Petitioner is not entitled to any of the requested relief.

V. REQUESTED RELIEF

Petitioner requested the following items of relief:

- Compensatory education services for Student.
- Prospective private placement at District expense.
- Reimbursement for counseling and therapy services provided to Student.
- Any other relief deemed appropriate by the hearing officer.

VI. FINDINGS OF FACT

Student's Educational Background

1. Student is a ***-year-old *** student who resides within the jurisdictional boundaries of the District. Student is eligible for special education services under the categories of emotional disturbance and speech impairment.[2]

2. On April ***, 2018, the District completed a reevaluation of Student. The District evaluators determined Student's articulation skills were not within normal limits and

[2] Joint Exhibit (JE) 2.

concluded Student met eligibility criteria for a speech impairment. The evaluators recommended Student receive speech therapy services.[3]

3. The District evaluators noted Student's significant issues with behavior at school and concluded Student's behavior impaired Student's school performance. The District evaluators concluded Student did not have the characteristics of autism, but did have characteristics consistent with attention deficit hyperactivity disorder (ADHD) and *** (***). Student was also assessed to be in the severe clinical range for ***. The District evaluators concluded Student met the criteria for an emotional disturbance based on a general pervasive mood of ***.[4]

4. As part of the reevaluation, the District conducted a functional behavior assessment (FBA) and determined Student engaged in the behaviors of noncompliance and disrespectful behavior to escape non-preferred activities and gain adult attention.[5]

5. The District evaluators recommended Student be allowed to use alternative response methods, such as verbal response, short answer, or multiple choice, shortened daily assignments, specialized support in reading and math to teach Student the skills to initiate and complete Student's work, hard copies of lecture notes, preferential seating, private discussion to reinforce good choices, speech therapy, an updated behavior intervention plan, skills training through psychological services, and frequent positive reinforcement for initiating and completing work.[6]

6. Student resided and attended school at the *** (***), a residential treatment program for *** in ***, for the entirety of the 2018-19 and 2019-20 school years. Student was unilaterally placed at *** by Parent.[7]

7. Dr. ***, an independent school psychologist, completed a specialty psychological evaluation of Student while Student was at ***, issuing a report on September ***, 2019. Dr. *** observed that Student is able to manage Student's emotional, behavioral, and cognitive functioning on par with Student's same age peers when in a structured setting with few distractions, adult support, peer role models, adequate time limits, and academic accommodations. In less structured settings, Student is, however, more impaired in Student's executive functioning than Student's same-age peers. Dr. *** assessed Student to have social communication and social skill deficits associated with Student's social immaturity and difficulties recognizing other's perspective. Dr. ***

[3] JE 35 at 34.

[4] JE 35 at 10-11 and 35.

[5] JE 35 at 22.

[6] JE 35 at 36-37.

[7] JE 10 at 2; Transcript (TR) at 56.

recommended intensive social skills services to help Student develop more age-appropriate social skills communication in unstructured settings. Dr. *** concluded Student had an autism spectrum disorder (ASD) based on Student's deficits in social and reciprocal communication, Student's restrictive, repetitive, behavioral atypicality, rigid thinking, and restrictive range of interests.[8]

8. Dr. *** documented Student's history and present problems with ***. She concluded Student meets the criteria for a ***, and a ***.[9]

9. Dr. *** opined that Student's *** abilities, combined with behavioral symptoms such as Student's ***, have a devastating effect on Student's ability to progress academically and Student's ability to develop age-appropriate independent living skills. Dr. *** recommended Student be provided immersive, intensive interventions and explicit training to develop more age-appropriate social skills, communication skills, independent living skills, emotional coping skills, and executive functioning skills.[10]

Student's Return to The District

10. On February ***, 2020, *** staff shared Individualized Education Program (IEP) recommendations for Student's transition to Student's home school district. *** staff reported Student had made significant progress in Student's ability to communicate Student's thoughts and feelings to others, had improved Student's ability to use reflective listening skills, and made efforts to engage in pro-social relationship interactions. Student was reported to struggle at times to complete schoolwork but will complete Student's assigned work with some or limited prompting. *** staff reported Student's present levels to be in the *** to *** grade level in ***, *** to *** grade level for ***, *** grade level for ***, and *** grade level for ***.[11]

11. *** staff recommended a social emotional goal for using self-management strategies to address Student's feelings of *** and self-doubt in an academic setting, a social emotional goal to teach Student skills for managing emotional regulation, frustration tolerance, and understanding Student's autism, and a social emotional goal for improving Student's social skills through participating in an extracurricular activity. They recommended an academic goal related to using self-regulation strategies for completing non-preferred activities and a *** goal related to identifying the requirements for ***.[12]

[8] JE 10 at 30 and 32-34.

[9] JE 10 at 40.

[10] JE 10 at 39 & 40.

[11] JE 8 at 1-2.

[12] JE 8 at 3-4.

12. *** staff recommended accommodations for Student, including preferential seating near the front of the class, short breaks during class, a weekly organization management session with a special educator, extended testing time, separate testing location, a small, structured classroom setting, and weekly tutoring.[13]

13. On February ***, 2020, the District convened an Admission, Review, and Dismissal (ARD) committee meeting to plan for Student's return to the District from ***. Four members of the *** staff participated in the ARD committee meeting by telephone. Parent and her special education advocate participated in the meeting. The ARD committee reconvened on March ***, 2020, to complete the meeting with four members of the *** staff, Parent, and her advocate again participating.[14]

14. Prior to the ARD meeting, *** staff and District staff met by conference call to discuss Student's transition to the District, present levels, and special education needs.[15]

15. At the February ***, 2020 ARD committee meeting, Parent provided a copy of Dr. ***'s evaluation to the District for the first time. The ARD committee reviewed the evaluation and the District recommended a new evaluation for Student to begin when Student returned to the District. The District proposed evaluating Student in the areas of speech and communication, health and motor, emotional and behavioral, autism, functional behavioral, psychological, cognitive, and achievement. The District provided Parent with a notice of the evaluation and forms to consent to the evaluation at the ARD committee meeting. The District again provided the evaluation notice and consent to Parent on four occasions in September and October 2020. Parent never provided consent for the evaluation.[16]

16. The District recommended Student resume speech therapy services of *** per grading period upon Student's return.[17]

17. Based upon baseline data and recommendations from ***, the ARD committee drafted counseling IEP goals for Student using self-management strategies when Student is frustrated and Student identifying Student's frustration triggers. The ARD committee drafted IEP goals for Student improving Student's social skills and social interactions, a

[13] JE 8 at 6.

[14] JE 1.

[15] TR at 206-207 and 378.

[16] JE 1 at 3-4, 11-12, 20-21, and 29; JE 16; JE 17; JE 19; JE 20; TR at 89 and 116-118.

[17] JE 1 at 3-4, 11-12, 20-21, and 29.

goal for Student timely turning in Student's school work, and a goal for Student requesting help when Student encounters a concept Student does not understand.[18]

18. The ARD committee developed a *** plan for Student with an overall goal for Student to ***. The ARD committee determined Student would ***. Prior to the ARD meeting, Student met with District staff to discuss Student's *** plans and the District's *** proposals. The *** plan was based upon Student's interests, goals, and needs which were identified by *** and District staff. Student's Parent chose to have Student not attend the ARD meeting to discuss Student's *** plan.[19]

19. The ARD committee determined Student needed the in-class accommodations of frequent checks for understanding, gaining Student's attention before delivering instruction, providing hard copies of notes before instruction, providing a binder to organize daily work, and extra time for completing assignments and tests. Student had the behavioral accommodations of leaving class early, daily check in and out with behavioral support staff, reminders to stay on task, positive reinforcement, preferential seating, and a token chart. The ARD committee determined Student also needed *** and *** minutes per week of counseling to assist with self-management skills.[20]

20. The District recommended Student be placed in general education classes and participate in the *** (***) program. Parent was concerned about Student's placement in large general education classes and District staff singling Student out as part of the *** program. The District adjusted Student's means of communication with *** in-class support to *** to address Parent's concern about Student being singled out.[21]

21. The *** program teaches students prosocial replacement behaviors for inappropriate behaviors identified in a behavior intervention plan (BIP) and provides in-class monitoring and interventions to support students. *** staff provide coaching to students when they are struggling with behavior in class and do not impose discipline for inappropriate behavior. The coaching is initially done in the hallway outside the classroom and moves to the *** classroom if the student requires extended coaching. *** teaches students to self-manage their own behaviors and emotions and is not a reward or punishment program.[22]

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[18] JE 1 at 3-4, 11-12, and 20.

[19] JE 1 at 4-5 and 21; TR at 482-483.

[20] JE 1 at 6, 13, and 21.

[21] JE 1 at 22-23.

[22] TR at 476-480.

22. The ARD committee drafted a BIP targeting Student's behaviors of noncompliance, task refusal, and being off task. Under the BIP, Student was to utilize self-regulation and the *** token system as replacement behaviors. District staff members were to avoid power struggles, negative voice tone, and multiple directives at the same time. Appropriate interventions for District staff included, clear, concise, specific language, giving one directive at a time, allowing processing time, gaining Student's attention before giving a directive, and positive praise for appropriate choices. Consequences for inappropriate behavior included, reteach appropriate behaviors, and promptly redirect inappropriate behaviors.[23]

23. At the conclusion of the ARD committee meeting, Student's Parent requested five days to consider the IEP and services. On March ***, 2020, the District sent Parent prior written notice indicating the IEP and services offered and the intention to implement the proposed plan. Student's Parent ultimately did not agree with the proposed IEP and services.[24]

24. As a result of the COVID-19 global pandemic, Student did not return to the District as planned in March of 2020. Instead, Student stayed at *** for the remainder of the 2019-20 school year and began attending school in the District again at the beginning of the 2020-21 school year.[25]

2020-21 School Year

25. On September ***, 2020, Parent and her advocate requested an ARD committee meeting to review new recommendations from Dr. *** and *** staff. Dr. *** made written recommendations for Student's educational program after ***, including small group and one-on-one tutoring instruction that combines specially designed instruction for social skills, coping skills, stress management, expressive language, pragmatic and social language, and executive skill development in concert with core academic instruction. Dr. *** recommended an intensive, small group intervention setting for core academics with opportunities for mainstreaming for *** classes. Dr. *** opined that Student was at great risk of losing the progress Student made at *** if Student was placed in a *** ***. *** staff recommended small classes and one-on-one instruction for Student.[26]

26. On September ***, 2020, the District convened Student's ARD committee to consider Parent's request to implement all of Dr. *** and ***'s recommendations. The District

[23] JE 1 at 31-33.

[24] JE 1 at 27, 30, and 31.

[25] TR at 56.

[26] JE 6 at 1-2; JE 13.

reviewed the recommendations and determined one-on-one instruction was not necessary for Student, but that the request for smaller classes could be accommodated. The District proposed changing Student's schedule to *** in a general education setting with a 1 to 5 ratio, *** in a special education setting with a 1 to 3 ratio, *** in a general education setting with a 1 to 7 ratio, *** in the special education setting with a 2 to 2 ratio, *** in a general education setting with a 1 to 9 ratio, and *** in a general education setting with a 1 to 9 ratio. Student's Parent requested placement at *** to meet ***'s recommendation for smaller class sizes and one-on-one instruction. The District reviewed information related to the services provided at *** and declined Parent's placement request, indicating Student was doing well currently in Student's District placement, that the District could meet Student's need for smaller class sizes and that *** is not the least restrictive environment (LRE) for Student. The District requested parental consent for the proposed evaluation. The meeting ended in disagreement, the Parent declined a reconvened ARD meeting, and the District implemented the changes to Student's program.[27]

27. While attending classes in-person during the 2020-21 school year, Student was successful in general education classes, performed well academically, completed Student's assigned work, participated in class, and exhibited few, if any, inappropriate behaviors.[28]

28. On October ***, 2020, the District, at Parent's request related to family concerns over COVID-19, amended Student's IEP to change Student's instruction from in-person to virtual. The District developed a set of virtual classes for Student with a different set of instructors, which included a mix of synchronous and asynchronous instruction.[29]

29. After Student transitioned to virtual instruction, Student did not attend class regularly and regularly failed to complete Student's assigned work. District staff reached out to Student and Parent to attempt to have Student attend Student's virtual classes and complete Student's assignments. District staff provided tutoring and individual instruction to help Student complete Student's work and meet the requirements to complete the courses.[30]

30. Student achieved passing grades for all Student's classes for the fall of 2020-21.[31]

31. In the fall of the 2020-21 school year, the District delivered counseling services to Student. While Student attended in-person, the District LSSP delivered the sessions directly one-

[27] JE 2 at 1-2 and 7; JE 3; TR at 225-226.

[28] TR at 493-494, 591-592, and 611.

[29] JE 4; TR at 357-363.

[30] Respondent's Exhibit (RE) 16; TR at 594-595 and 613.

[31] JE 30.

on-one and while Student was virtual, the LSSP delivered the sessions directly one-on-one through videoconferencing with Student failing to attend some of the scheduled virtual sessions. During the counseling sessions, Student articulated Student's frustration triggers and identified self-management techniques. Student mastered Student's counseling goals.[32]

32. In December of 2020, Parent withdrew Student from the District. Student began attending *** on January ***, 2021.[33]

33. *** is a private school that delivers direct instruction one-on-one to students with assistance with assignments delivered in a twenty to one ratio. Counseling and psychological services are not available at ***.[34]

34. Following Student's withdrawal and Parent's request for Student's placement at ***, the District contacted Parent on multiple occasions to attempt to schedule an ARD committee meeting to discuss Student's placement at ***. Parent declined the District's requests to schedule an ARD committee meeting.[35]

VII. DISCUSSION

Petitioner alleges the District denied Student a FAPE during the 2020-21 and 2021-22 school years. As an initial matter, the hearing officer confirms that this decision is limited to claims accruing during the relevant time period (September 2020 to present). Petitioner filed their due process hearing request on September 24, 2021, and raised neither exception to the statute of limitations. Because Petitioner neither pled nor proved an exception to the one-year statute of limitations applies, any claims arising prior to September 24, 2020, are time-barred and will not be considered or analyzed. 19 Tex. Admin. Code § 89.1151(c); *Hooker v. Dallas Indep. Sch. Dist.*, 2010 WL 4025776, *11 (N.D. Tex. 2010); *T.C. v. Lewisville Indep. Sch. Dist.*, 2016 WL 705930, *9 (E.D. Tex. 2016).

[32] TR at 390-400.

[33] TR at 73-74.

[34] TR at 273-274 and 285-286.

[35] JE 23; JE 26; JE 27; JE 28; JE 33; TR 228-231.

While evidence related to the 2018-19 and 2019-20 school years was admitted and reviewed in this case, no legal issues from that time frame are under consideration in this decision. In addition, while Petitioner indicated the relevant time frame included the 2021-22 school year, Petitioner failed to present any evidence related to the 2021-22 school year. Thus, the analysis and decision in this case will only concern the 2020-21 school year.

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.[36] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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. *Id.*

B. 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.*

[36] There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.,* 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

v. Rowley, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). Petitioner alleges the District failed to provide Student a FAPE during the 2020-21 school year.

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

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

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).[37]

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 Ind. Sch. Dist. v. Michael Z.,* 580 F. 3d 286, 294 (5th Cir. 2009).

1. Individualized on the Basis of Assessment and Performance

The basic inquiry in this case is whether the IEP developed by the district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel Joseph F. v. Douglas Cnty. Sch. Dist. RE-1,* 137 S. Ct. 988, 999 (2017). Petitioner contends Student's IEP and program did not meet Student's individual needs and did not address Student's individual circumstances. In particular, Petitioner points to Dr. ***'s autism diagnosis,

[37] Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

the recommendations for one-on-one instruction, and the lack of social work and in-home services.

A. Development of Student's IEP

The District's obligation when developing Student's IEP and BIP was to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(1)(i). In preparing to develop Student's IEP upon Student's return from ***, the District met with *** staff and reviewed the IEP recommendations made by ***. District staff also reviewed the 2018 District reevaluation and met in a staffing meeting to prepare an IEP. Parent participated in three ARD committee meetings during the relevant time period and expressed her concerns about Student's IEP. To address Parent's concern, the District adjusted the *** signal to ***, included direct counseling in the IEP, moved Student to smaller classes, and explained how the *** program was consistent with ***'s recommendations.

B. Consideration of *** Evaluation

At the February 2020 ARD committee meeting, the District staff reviewed Dr. ***'s evaluation and concluded an early, updated FIE, including an autism evaluation should be done. The District prepared an evaluation plan and attempted on multiple occasions to obtain parental consent for the evaluation. However, Parent refused to consent.

Petitioner contends the District should have proceeded with the District reevaluation based upon Parent's tentative assent to the reevaluation during an ARD committee meeting, conducted the evaluation without parental consent, or simply accepted Dr. ***'s autism identification. However, Petitioner's positions on the evaluation and identification are inconsistent with the IDEA.

First, the District must receive informed parental consent before proceeding with an evaluation. 20 U.S.C. §1414(c)(3); 34 C.F.R. §300.300(c)(1)(i). As such, Parent's tentative verbal assent to the evaluation was not sufficient consent for the District to proceed with the evaluation. Petitioner alternatively argues the District, pursuant to 34 C.F.R. § 300.300(c)(2), should have proceeded with the evaluation based upon Parent's refusal to consent. To be clear, this regulation permits a school district to conduct an evaluation when a parent refuses a school district's multiple efforts to obtain consent, but does not require a school district to do so. In this case, where Parent was actively being represented by a special education advocate from a law firm, the District was justified in not trampling over Parent's rights and conducting an evaluation of Student without consent.

Additionally, a parent may not assert a student is entitled to special education services while simultaneously refusing to allow a school district to evaluate the student to determine what those services may be. *Andress S. v. Cleveland Indep. Sch. Dist*., 64 F. 3d 176, 178 (5th Cir. 1995), cert. denied, 519 U.S. 812 (1996). A parent who desires for her child to receive special education services must allow a school district to reevaluate her child using school district personnel. *Id.* at 179. Thus, here, Parent cannot insist on Student being identified as a child with autism without first allowing the District to perform its own evaluation.

While the District did not unconditionally accept Dr. ***'s autism identification, it nonetheless did develop a program consistent with her evaluation. In her September 2019 evaluation, Dr. *** indicated Student was able to manage Student's behavior and cognitive functioning on par with Student's same-aged peers in a structured setting with few distractions, adult support, and academic accommodations. Dr. *** also recommended Student attend general education ***. The District's IEP and program for Student placed Student in general education classes with the structured support of the *** program and accommodations of frequent checks for understanding, gaining Student's attention before delivering instruction,

providing hard copies of notes before instruction, providing a binder to organize daily work, extra time for completing assignments and tests, daily check in and out with behavioral support staff, reminders to stay on task, positive reinforcement, and preferential seating. As recommended, the District also placed Student in the ***. Moreover, *** assessed Student to be at or near grade level in all academic areas, and, therefore, the District appropriately placed Student in general education academic classes.

C. IEP For The 2020-21 School Year

Petitioner argues the District had no actual IEP in place for Student at the beginning of the 2020-21 school year, because Parent never agreed to an IEP. However, the evidence showed the District met its obligation to have an IEP in place for Student at the outset of the 2020-21 school year. 34 C.F.R. § 300.323(a). The District held ARD committee meetings in February and March of 2020, which proposed an IEP and program for Student. Following the ARD committee meetings, the District, in accordance with 34 C.F.R. § 300.503, provided prior written notice related to the proposed IEP. Once five days had passed following the notice, the District's proposed IEP was in effect. 34 C.F.R. § 300.503; 19 Tex. Admin. Code. § 89.1050(h). If Parent wanted to stop implementation of the IEP, she needed to file a due process hearing request before the District began implementing the IEP at the start of the 2020-21 school year. 34 C.F.R. § 300.507.

D. Addressing Student's Behavior

For Student, whose behavior impedes Student's learning and that of others, the District was required to consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.,* 703 F.3d 801, 813 (5th Cir.2012). Petitioner alleges the District denied Student a FAPE by failing to provide the behavioral supports of social work, counseling, and in-

home family support services. However, Petitioner presented no evidence to support the need for social work and in-home family services. As for counseling services, the evidence clearly shows the District addressed this need. Student's IEP contained weekly counseling sessions addressing behavioral self-management and frustration trigger identification consistent with the recommendations of ***. The District also addressed Student's behavior with the *** program, which is designed to teach students behavioral self-management techniques and prosocial behaviors and supports students in academic classes. Finally, District staff were directed to utilize clear, concise, specific language, giving one directive at a time, allowing processing time, gaining Student's attention before giving a directive, and positive praise for appropriate choices, and to avoid negative interactions. In sum, The District's program was individualized on the basis of the District's evaluation, Dr. ***'s evaluation, and ***'s recommendations. The District considered Parent's input and developed an IEP reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Endrew F.,* 137 S. Ct. at 999.

2. Least Restrictive Environment

The IDEA requires that a student with a disability be educated in Student's LRE 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. 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 determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id*.

Here, when Student was transitioning back to the District, *** reported Student had made significant progress in exhibiting pro-social behavior, that Student completes Student's schoolwork with minimal prompting, and is at or near grade level in all academic areas. Based upon this information, the District developed an IEP and program placing Student primarily in mainstream, grade level courses. Consistent with the recommendations of ***, the District provided Student with the accommodations of frequent checks for understanding, gaining Student's attention before delivering instruction, providing hard copies of notes before instruction, providing a binder to organize daily work, extra time for completing assignments and tests, daily check in and out with behavioral support staff, reminders to stay on task, positive reinforcement, and preferential seating. Under this placement, Student was successful while attending school in-person during the 2020-21 school year. Student completed Student's assignments, achieved good grades, participated in class, and exhibited few, if any, inappropriate behaviors.

Placing Student at *** is not Student's LRE. The evidence showed Student can be educated on a regular campus in the District. With accommodations and supports, Student was able to be satisfactorily educated in the District. 34 C.F.R. § 300.114(a)(2)(i)(ii); *Daniel R.R.,* 874 F. 2d at 1048. Placing Student at *** and removing Student from a general education campus with peers without disabilities and opportunities for social interactions would be inconsistent with the LRE requirements. *Id*.

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.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The evidence showed the District collaborated with the key stakeholders, including Parent and the *** staff. Prior to the February 2020 ARD committee meeting, District staff met with *** staff and reviewed the written recommendations from ***. The District included significant portions of the *** recommendations in Student's IEP. In addition, four members of the *** staff attended and participated in the February and March 2020 ARD committee meetings. The District adjusted Student's class sizes at Parent's request and made Student's *** indicator *** to accommodate Parent's request. 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).

Petitioner contends the District failed to meet Parent's request for one-on-one instruction for Student. However, 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). The District held an ARD committee meeting to consider Parent's request for one-on-one instruction. Based upon legitimate LRE considerations and Student's success at the outset of the 2020-21 school year, the District declined to place Student at *** or change the District program to one-on-one instruction. The District, in September of 2020, did move Student to smaller classes. Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

Petitioner argues in their Closing Brief that the District predetermined to deny placement at ***. First, as Respondent correctly objects, predetermination was not an issue from Petitioner's original Complaint or an issue framed at the initial prehearing conference. *See* Order No. 2. Petitioner may not add new hearing issues during the due process hearing. 20 U.S.C. § 1415(f)(3)(B);

34 C.F.R. § 300.511(d). Respondent has the right to know the issues presented and prepare its case accordingly. As such, Petitioner's predetermination argument is not properly before this hearing officer.

However, even if Petitioner had properly raised this issue, the evidence in the record does not support this claim. "Predetermination occurs when the school district makes educational decisions too early in the planning process, in a way that deprives parents of a meaningful opportunity to fully participate as equal members of the IEP team." *E. R. by E. R. v. Spring Branch Indep. Sch. Dist*., 909 F.3d 754, 769 (5th Cir. 2018) (quoting *R.L. ex rel. O.L. v. Miami-Dade Cty. Sch. Bd*., 757 F.3d 1173, 1188 (11th Cir. 2014)). "To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *Id*. Here, in response to Parent's request for smaller classes, the District convened the ARD committee and moved Student to several smaller classes. The District also offered on multiple occasions to convene the ARD committee to discuss ***, once Parent unilaterally placed Student. The evidence demonstrates the District considered Parent's request for *** and smaller classes and did not predetermine to deny placement at ***.

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. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012).

The evidence showed that Student benefitted from the District's program. While in-person, Student performed well academically, participated in class, and rarely experienced behavioral difficulties. Even after Parent chose to move Student to virtual instruction, Student learned the academic material and passed Student's classes because District staff made efforts

to provide Student instruction and ensure Student completed course requirements. Student also made progress emotionally, learning self-management skills, mastering Student's counseling goals, and rarely displaying inappropriate behavior.

E. Transition Services

Petitioner alleges the District failed to provide Student appropriate transition services. The IDEA defines transition services as a coordinated set of activities for the student that is designed to be within a results-oriented process and focused on improving the academic and functional achievement of the student to facilitate the student's ***. ***. The IDEA requires a set of transition services be included in the first IEP in effect when a student turns age 16 (or younger by decision of the ARD Committee), unless state law provides otherwise. In Texas, the age is 14. The IEP must include appropriate measurable *** goals based upon age-appropriate transition assessments related to ***. The IEP must also include the transition services, including courses of study, the student needs to reach those goals. 34 C.F.R. § 300.320(b); Tex. Educ. Code §§ 29.011; 29.0111; 19 Tex. Admin. Code § 89.1055(h).

Here, the District developed a transition plan for Student based upon Student's input and the recommendations of *** staff. Student's transition plan included an appropriate goal of Student ***, an area of strength and interest. The plan also included Student ***. To support Student being able to ***, the ARD committee determined Student would ***. The District also added a *** to Student's schedule to assist with Student's ***. The weight of the credible evidence shows the District provided an appropriate transition plan for Student.

F. FAPE Conclusion

The District developed a program for Student that was reasonably calculated to provide Student educational benefit based upon Student's unique needs. *Endrew F.*, 137 S. Ct. at 999.

Student's IEP and program were developed using District evaluations, input from *** staff, information from Dr. ***'s evaluation, input from Student's Parent, and placed Student in Student's least restrictive environment. Student's parent, as well as key stakeholders from within and outside of the District, provided input to develop Student's program and Student made progress academically and behaviorally. A review of the overall educational program shows Student was provided a FAPE and made progress with the program as it was developed. *Michael F.*, 118 F.3d at 253; *Klein Indep. Sch. Dist. v. Hovem*, 690 F. 3d 390 at 391 (5th Cir. 2012).

G. Private Placement

Petitioner must meet a two-part test in order to secure reimbursement from the District for Student's placement at ***.[38] First, Petitioner must prove the District's proposed program was not appropriate under the IDEA. Second, Petitioner must prove placement at *** is appropriate. *Burlington Sch. Committee v. Dept. of Educ.,* 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter,* 510 U.S. 7 (1993). Petitioner failed to meet their burden of proving the District's program was not appropriate under the IDEA. Therefore, Petitioner is not entitled to private placement at District expense.

VIII. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer*, 546 U.S. at 62.

2. Student was provided FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188, 203-04; *Endrew F.*, 137 S. Ct. at 999.

[38] In their closing brief, Petitioner cites to Petitioner's Exhibit No. 1 when discussing reimbursement for ***. However, Petitioner failed to properly offer this exhibit into the record. At the close of evidence, the hearing officer clarified that this exhibit had not been admitted. TR at 656.

3. *Petitioner failed to meet their burden of proving that Respondent denied Student a FAPE during the relevant time period. Schaffer, 546 U.S. at 62; Rowley, 458 U.S. at 188, 203-04; Endrew F., 137 S. Ct. at 999.*

4. Petitioner is not entitled to private placement at District expense. *Burlington Sch. Comm.,* 471 U.S. at 370; *Florence Cty. v. Carter,* 510 U.S. 7 (1993).

IX. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED.**

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

SIGNED August 17, 2022.

Steve Elliot
Special Education Hearing Officer
For the State of Texas

X. 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. 34 C.F.R. § 300.514(a-b); 19 Tex. Admin. Code § 89.1185(n).