SOAH DOCKET NO. 701-22-2439.IDEA
TEA DOCKET NO. 219-SE-0422

Student, B/N/F Parent,	**§**	**BEFORE A SPECIAL EDUCATION**
Petitioner	**§**	
	§	
v.	**§**	
	§	**HEARING OFFICER FOR**
	§	
CLEAR CREEK 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) brings this action against the Clear Creek 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 case was filed on April 14, 2022, with Notice issued by the Texas Education Agency (TEA) the same day.

The main issues in this case are whether the District provided Student with a Free Appropriate Public Education (FAPE) and whether the District's proposed placement was in Student's least restrictive environment. The Hearing Officer finds the District did not provide a FAPE during the relevant period and its proposed placement is not in Student's least restrictive environment.

II. PROCEDURAL HISTORY

A. Legal Representation

Petitioner was represented throughout this litigation by their legal counsel, Lucy Wood of the University of Texas Law School. Respondent was represented throughout this litigation by its legal counsel, Amy Tucker of Rogers, Morris, and Grover, LLP.

III. DUE PROCESS HEARING

The due process hearing was conducted August 23-25, 2022, via the Zoom platform. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Lucy Wood. Ms. Wood was assisted at the hearing by University of Texas School of Law students Mary Jones, Brad Steel, and Nicole Schilling. In addition, Parent attended the due process hearing.

Respondent continued to be represented by its legal counsel, Amy Tucker, who was assisted by her co-counsel, Kyle Stone. In addition, Dr. Michele Staley, the Executive 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 is due on October 13, 2022.

IV. ISSUES

Petitioner raised the following issues for decision in this case:

1. Whether the District provided Student a Free Appropriate Public Education (FAPE), both academically and behaviorally.

2. Whether the District failed to evaluate Student in all areas of suspected disability.

3. Whether the District failed to appropriately implement Student's Individualized Education Plan (IEP) and Behavior Intervention Plan (BIP).

4. Whether the District has failed to provide Student a program in *** least restrictive environment.

5. Whether the District procedurally violated the IDEA by failing to hold a Manifestation Determination Review (MDR) regarding Student's conduct.

6. Whether the District predetermined Student's program, including change of placement, behavior supports, and rejecting parent-requested supports.

A. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations stated in Petitioner's Complaint. The School District contends it provided Student with a 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:

1. Order the District to place Student in an appropriate educational setting that is not ***.

2. Order the District to provide Independent Education Evaluations (IEEs) in the areas of neuropsychological, occupational therapy (OT), assistive technology (AT), and a functional behavior assessment (FBA) by a *** (******).

3. Order the District to develop an appropriate program for Student based on the IEE findings, including social skills, behavior, and academics.

4. Order the District to provide Student direct Applied Behavior Analysis (ABA) therapy from a ******, OT and sensory processing support, psychological counseling in both talk and play-based models, social skills instruction, academic and behavior support in the general education setting.

5. Order the District to create and implement an appropriate BIP for Student.

6. Order the District to monitor progress on new IEP goals.

7. Order the District to provide parent training by a ****** and opportunities for parent to observe Student at school.

8. Order the District to contract with the ****** to train staff working with Student.

9. Order the District to develop a parent communication schedule.

10. Order the District to provide compensatory services to Student, including parent training, in-home training, OT, counseling, *** support or ABA therapy, AT, social skills, academic instruction, and extracurricular opportunities.

11. Order the District to provide any other relief the Hearing Officer deems appropriate.

VI. FINDINGS OF FACT

Student's background

1. Student is *** years old and attends *** grade at *** in the District. She qualifies for special education as a student with an Intellectual Disability and Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD).[1]

2. From the time Student was in *** until *** was in *** grade in the 2020-21 school year, Student attended school in *** Independent School District (***ISD). *** was first determined eligible for special education and related services during the 2014-15 school year when she was in ***. At the time, she was found eligible as a student with an emotional disturbance and OHI for ADHD.[2]

3. In 2015, ***ISD began serving Student in the *** program. The *** program provides educational support services within the mainstream setting to students with *** through coaches and teachers who check on the students and help them *** or otherwise thrive in their general education settings, because students benefit both behaviorally and academically when they can have experiences with their peers without disabilities in a general education setting. Student remained in the *** program throughout *** time in ***ISD and it led to improvements in ***. Prior to entry into the *** program in 2015, *** was ***. In the 2020-21 school year, Student had just one incident of *** and maintained appropriate behaviors more than 98% of the time. *** also played with and had friendships with peers in general education classes.[3]

4. In 2018, when Student was in *** grade, ***ISD conducted a three-year reevaluation. The reevaluation noted Student struggled with maintaining attention in *** classes and comprehending grade-level material. The evaluation found Student continued to be eligible for special education as a student with an emotional disturbance and OHI for

[1] Joint Exhibit 1, at pages 1-2 (JE_, at _).

[2] JE 10; P3, at 11-12; TR 384-85.

[3] *Id.*; TR 134.

ADHD. It also added the eligibility of Specific Learning Disability (SLD) for listening comprehension and oral expression.[4]

5. In August 2020, while Student was still attending ***ISD, a private evaluator recommended that *** school consider evaluating her for eligibility under the category of Autism. The evaluator found Student had a clinical diagnosis of Autism and ***ISD should determine whether *** also qualified for special education under that category of eligibility.[5]

6. In March 2021, ***ISD conducted Student's three-year reevaluation. The March 2021 FIE is the most recent evaluation of Student conducted by a school district. The three-year reevaluation found Student continued to be eligible for special education under the disability category of OHI for ADHD. It discontinued eligibility under the category of emotional disturbance, asserting that the behaviors were the result of an intellectual disability. The three-year reevaluation specifically evaluated for the eligibility category of Autism. It found Student did not qualify for special education under that category of disability. However, noting that Student struggles across all academic areas as well as with *** skills, the evaluation found that, rather than SLD, Student should be eligible for special education as a student with an intellectual disability. Student has a ***. That *** falls in the *** percentile, meaning *** of her same-age peers.[6]

7. The March 2021 FIE made several recommendations. Among them, the FIE recommended no longer having a BIP, because Student's *** by March 2021 were "so well under control." ***ISD did not follow that recommendation and maintained Student's BIP. Other suggestions included *** as much as teachers may *** with a student without ***, giving specific instructions with a *** checklist Student could check off, developing a cue to signal to Student to listen (***), and allowing frequent breaks. The FIE did not recommend use of the *** system or a particular teacher to student ratio.[7]

Transitioning from ***ISD to the District

8. Throughout Student's time in ***ISD, *** struggled with several ***. *** teachers found *** skills below those of *** same-age peers. Student became frustrated often, particularly with transitions or difficult tasks, and would ***. *** was occasionally *** and would avoid tasks or become visibly frustrated. In rare instances, *** would engage in *** when frustrated. In the 2020-21 school year, ***, *** only had one incident of ***. Nevertheless, despite the low frequency of ***, *** issues did impact *** learning and her peers' ability to access the curriculum. During the 2020-21 school year, ***ISD placed Student in the general education setting for science, music, and physical education. As a

[4] *Id.*

[5] JE 11.

[6] Petitioner's Exhibit 3 (P3).

[7] P3, at 12; J7, at 12.

result of *** difficulties and *** below-grade-level academics, ***ISD placed Student in a *** classroom for Reading, English Language Arts, Mathematics, and Social Studies. The classroom was geared toward students with ***.[8]

9. During the 2020-21 school year in ***ISD, Student received 30 minutes of weekly ***. She received an additional 20 minutes of bi-weekly ***. She also received 15 minutes per week of *** services so the *** could work with school staff to address Student's needs. Student also received *** hours of direct services from a *** over the course of the 2020-21 school year, with the amount per week to be determined based on the appropriateness. The goal of the *** services was to work on *** strategies. ***s are uniquely qualified to implement research-based *** as opposed to just "willy nilly trying something" new. ***ISD provided extended school year services (ESY) in the summer of 2020 and the summer of 2021 so Student could maintain *** progress. During the summer of 2021, in addition to several weeks of ESY, **ISD placed Student in its summer *** camp to further work on *** skills.[9]

10. Student moved with *** family from ***ISD into the District prior to the 2021-22 school year. When *** arrived, the District placed Student in its *** classroom for students with *** at *** home school, ***. Student struggled *** as soon as *** arrived in the District, exhibiting *** *** had rarely displayed in ***ISD several times in the *** between the start of school and *** initial ARD Committee meeting. The District found *** to be too high functioning academically for its *** program.

11. On August 31, 2021, the District held an ARD Committee meeting. During the meeting, the ARD Committee agreed Student would change schools to *** so *** could be in the *** classroom. The *** classroom did not exist on *** home campus. *** also showed*** in the *** classroom, something ***ISD only saw once in the previous school year when the FIE recommended discontinuing Student's BIP since *** were so "under control."[10]

12. The District also discontinued several of Student's services during the ARD Committee meeting. The District chose not to recommend any ESY or *** services. The District determined those services were unnecessary to obtain a FAPE *** weeks into the school year and without an intervening evaluation. The District only has one *** in the entire school district and she is responsible for covering 48 campuses, though at times there have been as many as two ***s *** to cover the 48 campuses. Student's teachers in the District stayed in touch with that one *** and discussed Student, but the *** did not directly work with Student at any point. That contrasts with the 120 hours of direct *** services Student received in ***ISD. The only access Student had in the District to *** services and counseling was during or immediately after an ***. The *** was responsible for ***. Otherwise, the *** is responsible for "every student" on campus and did not provide direct services to Student. That is in contrast to the weekly, biweekly, and indirect

[8] J10, at 12-13; P3, at 41; J7, at 1, 11, 28-29; TR 123.

[9] J7, at 40-41; J9, at 2; TR 74.

[10] TR 42-43; J6, at 2-3, 33, 46.

services she received in ***ISD. Parent signed the IEP in agreement with the decisions made.[11]

13. Following the August ARD Committee meeting, Student was to attend class at *** in the *** room for ***. *** was to attend class in a general education setting for *** with 180 minutes per week of in-class support through the District's *** program, which functioned similarly to ***ISD's *** program and supports students in general education, resource classes, or inclusion classes. However, during an ARD Committee meeting on February 25, 2022, the District removed *** from the general education *** class and placed her back in the *** classroom for *** for the remainder of the year. *** also had a special education *** class. Thus, after February 25, 2022, the only class for which Student left the *** classroom was the special education *** class. *** had no opportunity for class around peers without disabilities.[12]

14. Student spent exactly one day in the *** classroom after it was recommended *** transfer to ***. The next day, in early-September 2021, Student transferred unilaterally to *** a private residential school outside of ***, Texas. After approximately two months at ***, Student transferred back to the District and began attending classes in the *** classroom late in the fall of 2021.[13]

15. The *** classroom had a total of *** students and two full-time teachers. The two teachers are attentive to student needs and care about their students. Nevertheless, despite the *** teacher to student ratio, the District had difficulty working with Student. The District often called Parent to either *** Student or ***. The District frequently ***. Student exhibited frequent *** toward others.[14]

The recommendation to place Student in ABS East

16. Student's teachers attempted a number of interventions to control Student's *** appropriately. Because they were trying so many different strategies so quickly, the District never adjusted *** to reflect new *** interventions. The District also did not attempt to do a new *** even though best practices dictated a new one should have been conducted since *** was in a new environment after thriving in ***ISD. The two teachers, who genuinely want Student to be successful, would frequently meet with each other, look through all of the data, and strategize about different ways to manage Student's ***. They tried several strategies throughout the 2021-22 school year, including taking away Student's access to objects *** could ***, reassessing the *** plan often, taking a preference inventory frequently so they could provide rewards that would truly incentivize Student while giving *** power and control over what *** space would be

[11] J6; TR 89, 410-11, 414-15, 542, 570, 600.

[12] J3, at 2; J5, at 21; TR 200.

[13] TR 44-47.

[14] TR 256, 339, 385-86, 391-92.

like, pre-teaching lessons, and many other strategies. Still, these strategies had limited effect. The duration they allowed new interventions to be effective before changing to other interventions is not clear from the record. The District never re-implemented Student's *** and *** support that had worked well in ***ISD and lead Student to only have one incident of *** during the 2020-21 school year. Instead, Student would perform well with few incidents for a couple of weeks at a time, but then would regress and exhibit ***. During the 2021-22 school year, the District *** five times for a total of 9.5 school days. Despite the District's interventions and ***, Student was *** approximately 9.6 times per week by the time the District could hold an ARD Committee meeting in February 2022. The District often called Parent to ***. Doing that and/or *** Student reinforced the ***, because *** allowed Student to escape doing challenging work.[15]

17. On February 2, 2022, the District held an annual ARD Committee meeting. During the meeting, the District recommended placing Student in ***. *** is a *** School outside the District. The school is a special campus for students who are receiving special education services in their home school districts and are experiencing *** issues. No general education students attend *** and students do not have access to any peers without disabilities while placed there. *** uses a universal behavioral model known as the *** model, a *** program that includes a *** to incentivize students and a model on *** skills. That is used for every Student regardless of what is in their IEPs. *** classrooms have two teachers and six-eight students at any given time. There is no *** employed with *** and no students there have access to *** services. *** *** its students more frequently than a school like *** does. Students earn their way from *** back to their home schools *** set by *** to show a student has made sufficient progress to return to the student's home campus. There is not a set time period during which students attend ***. Instead, they return to their home campuses once the *** are satisfied.[16]

18. The District informed Parent, prior to the February 2022 ARD Committee meeting, that the District may recommend Student go to *** for approximately *** to get ***. Prior to the February 2022 ARD Committee meeting, Parent went to *** with Student for a tour arranged by the District to become familiar with the program. During the February 2022 ARD Committee meeting, Parent disagreed with the ARD Committee recommendation of placement at ***. Parent also asked the District to implement the *** services Student had received in ***ISD. The District told her it could not offer direct *** services. The District sought input from Parent about interventions it could try in Student's current setting. Parent suggested ***. Student's teachers tried those interventions among many others but they were not always successful.[17]

19. The ARD Committee meeting also showed how much regression Student had experienced since beginning in the District. In March 2021 while a student in ***ISD, Student was

[15] TR 50-51, 115, 167-68, 196-98, 207, 363-64, 582.

[16] TR 492, 497-98, 507, 520.

[17] TR 53-58, 549-51.

performing ***-grade level work across most areas. She is now struggling with ***-grade level work. *** is functioning on a ***-grade level generally across all subjects. The District had to discontinue several of Student's IEP goals from ***ISD at the February 2022 ARD Committee meeting because Student was not capable of performing them, instead scaling them back to more realistic goals given Student's regression. *** no longer has a goal to ***. That goal has been replaced with a simpler goal of ***. *** goal of *** has been replaced with a simpler *** comprehension goal given ***current levels. Every academic goal Student had from *** ISD IEP was similarly scaled back in February 2022.[18]

20. The ARD Committee reconvened for an ARD Committee meeting late in February as a result of Parent's disagreement with the proposed placement. The ARD Committee reconvened again in March 2022 for the express purpose of discussing ***. Placement in *** remained the District's recommendation due to Student's *** issues. The District had experienced success with other students with *** issues who had gone to *** and then returned to the District performing better. Parent continued to disagree with that proposed placement. The ARD Committee met one more time on April 11, 2022, to consider ***. It continued to be the District's recommendation and Parent continued to disagree. Petitioner filed this request for a due process hearing three days after that meeting and immediately invoked the stay put provision of the IDEA. Student remains in the *** classroom at *** even though the District does not feel it is *** ideal placement.[19]

VII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (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). A school 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

[18] J4, at 3; J7, at 3; TR 105-06, 164-166.

[19] J1, J2.

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).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.[20] *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 in her least restrictive environment and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

C. FAPE

A hearing officer applies a four-factor test to determine whether a school district's program provided a FAPE to a student with a disability. the 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 Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).[21] 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.*

[20] 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).

[21] 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).

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

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.,* 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the school 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).

The District's obligation when developing Student's IEP and BIP is to consider *** strengths, *** parent's concerns for enhancing *** education, results of the most recent evaluation data, and *** academic, developmental, and functional needs. 34 C.F.R. 300.324(a)(1)(i). For Student, whose *** impedes *** learning ***, the District must also consider positive *** interventions and supports and other *** strategies when developing *** 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).

In this case, the District did not base the IEP on assessment. As soon as Student transferred into the District, the District immediately terminated ESY services, *** services, and *** services. The District did not base this on its observation and assessment of Student, but rather on its available resources. The District only has one *** serving more than 40 campuses and does not have a *** who can provide the *** hours necessary to provide Student a FAPE. The District terminated *** services and ESY services without taking time to determine the appropriateness of those services. This left Student's teachers to "willy nilly try something" as they implemented interventions hoping something would work.

Respondent argues that Parent agreed to termination of those services and therefore the District did not violate the IDEA by removing them. The District, however, has the responsibility for providing Student a FAPE. 34 C.F.R. § 300.101(a). The IDEA vests school districts and officials with special responsibility for decisions of critical importance to students with disabilities due to their expertise and appropriate judgment. *Endrew F. ex rel Joseph F.*, 137 S.Ct. at 1001. Student had been receiving those services from a school district who was familiar with ***, having served *** for *** school years. While Student had *** issues with those services in place, *** had only one instance of *** during the previous school year and was able to thrive in ***ISD. ***ISD's FIE even recommended removing Student's *** because *** were so "under control." The District removed those services after two weeks, weeks in which Student was exhibiting *** and other ***, without basing that determination on new assessments or extensive observation. Whether Parent agreed to those changes in an ARD Committee meeting is not relevant to the question of the appropriateness of terminating those services.

When the District continued having significantly more difficulty with Student's *** than ***ISD had ever experienced, the District did not add back the services it removed or make changes in Student's BIP. In other words, it did not adjust *** IEP based on their assessment of Student's performance. It also did not conduct additional assessments to determine if anything had changed with Student. It did not conduct a *** assessment in an effort to gain additional insights into Student's ***. Best practices would have dictated conducting a new FBA since Student transferred into a new environment and was clearly exhibiting ***.

Respondent correctly points out the District was not obligated under the IDEA to conduct an FBA. However, Respondent also contends it "exhausted everything in its toolbox" in an effort to serve Student.[22] While Student's teachers did their best to identify strategies and incentives that could work, they were at a loss without additional support. A new FBA is one example of a tool that may have brought additional support and would have been consistent with best practices. However, more importantly than the potential efficacy of conducting an FBA, the District could have implemented the *** and *** services that resulted in Student only having one *** in the 2020-21 school year in ***ISD.

The District had an obligation to implement *** supports that could help Student. *R.P.*, 703 F.3d at 813. Instead, the District left Student's teachers to seek whatever solutions they could by "willy nilly" trial and error. While they consulted with the District's ***, Student was one student among the many students on 48 campuses of which the *** was in charge. She could not provide the direct *** services with which Student had thrived in ***ISD. With Student's teachers by their own testimony trying so many different strategies and interventions over the course of the 2021-22 school year, it is not clear from the record whether they tried any strategies long enough to determine their true efficacy. What the record does reveal is that, despite the documented success over the course of the 2020-21 school year of *** and *** services and despite Student's teachers noting a continued decline in Student's ***, the District never attempted those *** supports.

2. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with peers without disabilities 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

[22] Respondent's Closing Argument, page 19.

cannot be achieved satisfactorily. This provision is known as the "least restrictive environment requirement." 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require a school district's continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005.

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*. This determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- the educational benefit a student is receiving while placed in the general education setting; and

- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

Daniel R.R., 874 F. 2d at 1048.

The District's proposed placement in *** is not the placement in Student's least restrictive environment. The placement in *** contains no peers without disabilities and no access to extracurricular activities. Student will not have any time during the day in which *** has any access to a peer without a disability. In *** current placement in the *** classroom, Student at least has access to peers without disabilities on *** campus, even if *** does not have classes with them at the moment. In ***ISD, Student had several classes with peers without disabilities, including ***. The District never attempted the supplementary aides and services, such as *** support and *** services, that allowed Student to be successful in those classes and in ***ISD program more generally. *See Daniel R.R.*, 874 F.2d at 1048.

Respondent argues that Seabrook Intermediate has "exhausted everything in its toolbox" and Student needs to change placement.[23] There is no doubt Student's teachers made an effort to serve Student and think of new strategies that might be helpful for ***. However, it is not clear what tools *** has in its "toolbox" that cannot be provided at ***. *** uses the *** system universally for all students regardless of what their IEPs state or what their FIEs recommend. There is no assessment of Student that shows Student would benefit from the *** system. However, to the extent *** would, the District could implement the *** system with *** at ***. *** provides classrooms of two teachers with *** students. Student is currently in a classroom of two teachers with ***students. The teachers at *** do not have special licenses or training that the teachers of *** do not possess or could not obtain. They are also not in a unique position to implement a *** point system at ***. Student is in a classroom with a lower teacher to student ratio than *** has. If the *** point system represents the key tool to improve Student's ***, ***

[23] Respondent's Closing Argument, page 19.

teachers could implement it. In short, the District possesses any tools *** possesses and can keep Student in the District in a less restrictive environment.

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 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). 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.*

The District provided services in a coordinated manner. The District held several ARD Committee meetings during the 2021-22 school year and Parent participated in each one. The District listened to Parent and considered her opinion appropriately. Parent agreed with most District decisions with the notable exception of placement in ***. The District arranged for Parent to have a tour of *** prior to the decision to recommend the placement for Student. The District then held multiple ARD Committee meetings with Parent regarding the placement. The District also incorporated some of the *** interventions suggested by Parent.

Petitioner also asserts the District pre-determined Student's placement without parental input. "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*. The evidence shows the District determined Student could best be served at ***. The evidence also shows the District gave Parent opportunities to voice objections and offer suggestions. The District held several meetings about the suggested placement at *** and kept an open mind to Parent's suggestions. Ultimately, however, the District felt the placement was in Student's best interest.

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, 812-13 (5th Cir. 2012). As Respondent itself concedes, the District's efforts to provide Student academic and non-academic benefit were "mixed at best."[24] Student went from having one incident of *** during the 2020-21 school year to having an average of more than *** per day in the District. The District had to scale back *** academic IEP goals due to *** no longer being able to perform at the level *** performed in ***ISD. *** is now performing on a ***-grade level generally across subjects, as opposed to performing on a ***-grade level in nearly everything during the 2020-21 school year. Further, in terms of non-academic benefit, Student did not have access to peers without disabilities, instead spending the full school day in a self-contained class of *** students. *** did not participate in extracurricular activities. *** did not have opportunities to make friends with peers without disabilities. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit).

[24] Respondent's Closing Argument, at

Respondent argues the lack of progress is due to Student's behavioral issues and that, if Student had been in ***, *** would have made progress. It is not possible to form an opinion about a hypothetical. Certainly, Student would not receive non-academic benefit at *** since the school has no extracurricular activities and no students without disabilities to befriend. Further, as discussed above, the unique aspects of the *** program could have been implemented at *** at any time during the 2021-22 school year and their potential benefit could have been determined.

5. Conclusion

To sum up, the District did not develop Student's IEP based on observation and assessment. Instead, it immediately removed several of *** most important services—namely *** services, direct *** support, and ESY. It then recommended placement in a restrictive, out-of-District placement that did not constitute Student's least restrictive environment instead of attempting to re-implement any of those services. It also did not allow *** access to peers without disabilities even in the *** placement the District did not recommend. Its recommended placement, ***, would not have had a single student without disabilities on the entire campus. The District did collaborate with key stakeholders in providing Student's education, but the IEP did not confer academic or non-academic benefit. The District thus did not provide Student a FAPE.

D. Evaluations

Petitioner alleges that the District did not provide appropriate evaluations of Student and should have conducted additional evaluations. The District did not owe any evaluations of Student. A school district may conduct an evaluation not more than once per year without parental consent

and must conduct an evaluation of a student no less than every three years. 34 C.F.R. § 300.303(b)(i-ii). A school district must also conduct a new evaluation if it seeks to change a student's eligibility for special education and related services. 34 C.F.R. § 300.305(e).

***ISD conducted an appropriate FIE in March 2021 and a new one is not due at this time. It would have required special parental consent to conduct a new evaluation prior to March 2022. *Id.* The District had no reason to suspect the March 2021 FIE was no longer useful. The March 2021 FIE was conducted *after* Student was diagnosed medically with Autism. ***ISD specifically evaluated Student for Autism and found she did not qualify for special education and related services under that label. The District had no obligation to provide any further evaluations. While the District could have conducted an FBA as a "tool in its toolbox," it was under no obligation to do so. Therefore, Petitioner did not meet their burden of proof on the evaluation issue.

E. Manifestation Determination Review

The IDEA requires an ARD Committee meeting must convene within 10 school days of any decision to change the placement of a child with a disability due to a violation of a student code of conduct. The ARD Committee must review all relevant information in the student's file, including the child's IEP, teacher observations, and any relevant information provided by the parent. The ARD Committee must then determine whether the conduct at issue was caused by or had a direct and substantial relationship to the child's disability. The ARD Committee must also determine if the conduct at issue was a direct result of the school district's failure to implement the child's IEP. 34 C.F.R. § 300.530(e)(1); Tex. Educ. Code § 37.004(b).

Student was *** for a total of 9.5 school days. A school district only has an obligation to provide an MDR if a student has been suspended for 10 or more school days. 34 C.F.R. § 300.530(b). Therefore, the District did not violate the IDEA by failing to conduct an MDR.

VIII. Remedy

By terminating Student's access to *** support and *** services, the District failed to provide Student a FAPE. Further, the District's proposed placement at *** is not a placement in *** least restrictive environment. Because the District honored Student's stay-put placement, it owes no compensation for proposing placement in ***.

Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student. *G. ex. Rel RG v. Fort Bragg Dependent Schools*, 343 F. 3d 295, 309 (4th Cir. 2003). Compensatory education imposes liability on the school district to pay for services it was required to provide all along and failed to do so. *See, D.A.* 716 F. Supp 2d at 612 (upholding a hearing officer's decision that student failed to prove amount of compensatory reimbursement student was entitled to for school district's failure to evaluate in a timely manner).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ*., 471 U.S. 359, 374 (1996).

The District removed Student's *** and *** services immediately, before it even knew Student and before providing any additional assessments of Student to justify the choice. The District must make Student whole. Before addressing compensatory services, the Hearing Officer must first address moving forward. For the 2022-23 school year, the District will need to provide 120 hours of support from

a ***, 30 minutes per week of *** with *** to work on specific *** skills to be agreed upon by the parties, 20 minutes of bi-weekly *** for more general intervention, and 15 minutes of weekly indirect *** services. The District must also provide ESY services in the summer of 2023.

The *** support can come from a *** currently employed by the District or an outside provider. The District must also follow the ***'s recommendations about any additional assessments the District should conduct, including, but not limited to, a new FBA, an occupational therapy evaluation with an emphasis on ***, an assistive technology evaluation, or any other evaluations the *** recommends to allow Student to receive a FAPE.

The District should continue serving Student in the *** classroom with the goal of increasing *** access to general education and/or resources classes. Within 20 school days of this decision, the District must hold an ARD Committee meeting at a mutually agreeable time with Parent. The ARD Committee shall immediately implement the ordered *** and *** services. The ARD Committee shall then make plans to meet every six weeks during the 2022-23 school year with the goal of moving Student into a combination of general education and resources classes as quickly as possible once *** instances of *** have subsided. Student shall be supported by the *** program as *** progresses from the *** classroom into general education and resources classes.

Finally, to compensate Student, the District must provide one-on-one tutoring so Student can recoup the *** and *** skills *** lost due to *** difficulties during the

2021-2022 school year.[25] The District should provide one hour of one-on-one tutoring services per week in *** and one hour of one-on-one tutoring services per week in *** after school during the 2022-23 school year in an effort to allow Student to recoup the necessary skills.

IX. CONCLUSIONS OF LAW

1. Student was not provided a FAPE during the relevant time period and *** IEP was not reasonably calculated to address *** needs in light of *** unique circumstances. *Rowley*, 458 U.S. 176; *Endrew F. ex rel Joseph F.*, 137 S. Ct. 988.

2. The District's proposed placement at *** is not in Student's least restrictive environment. 34 C.F.R. § 300.114(a)(2)(i)(ii); *Daniel R.R.* 874 F. 2d at 1048.

3. The District did not have an obligation to hold an MDR. 34 C.F.R. § 300.530(e)(1); Tex. Educ. Code § 37.004(b).

4. The District did not have an obligation to provide any additional evaluations. 34 C.F.R. § 300.303(b)(i-ii).

X. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law, the District shall hold an ARD Committee meeting within 20 days of this decision at a mutually agreeable time. The parties may mutually agree to hold the ARD Committee meeting more than 20 days following the issuance of this decision if they are not available to meet sooner.

2. During the ARD Committee meeting, the District shall update the IEP to reflect 120 hours of direct *** support, 30 minutes per week of direct *** with an *** to work on specific *** skills to be agreed upon by the parties during the ARD Committee meeting, 20 minutes of bi-weekly *** with an *** for more general intervention, and 15 minutes of weekly indirect *** services. The *** support can come from a *** currently employed by the District or an outside provider. The District must also follow the ***'s recommendations about any additional assessments the District should conduct, including, but not limited to, a new FBA, an occupational therapy evaluation with an

[25] TR 105-06.

emphasis on ***, an assistive technology evaluation, or any other evaluations the *** recommends to allow Student to receive a FAPE from the District.

3. The District shall offer ESY services in the summer of 2023.

4. The District should continue serving Student in the *** classroom with the goal of increasing *** access to general education and resources classes. Within 20 days of this decision, the District must hold an ARD Committee meeting at a mutually agreeable time with Parent. The ARD Committee shall implement the ordered ****** and *** services within five school days of that meeting. The ARD Committee shall then make plans to meet every six weeks during the 2022-23 school year with the goal of moving Student into a combination of general education and resources classes as quickly as possible once *** instances of *** have decreased. Student shall be supported by the *** program as *** progresses from the *** classroom into general education and resources classes.

5. The District shall provide one hour per week of tutoring services focusing on *** and one hour per week of tutoring services focusing on *** in weeks in which the District has at least four school days beginning no later than 20 days after the issuance of this decision. The tutor could be a District employee or an outside provider as long as the person is competent to provide tutoring services to Student. Parent can request less tutoring if Student is having trouble focusing for that much time after school on a weekly basis.

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

SIGNED October 13, 2022.

ALJ Signature:

_____

Ian Spechler,

Presiding Administrative Law Judge

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).