SOAH DOCKET NO. 701-21-3369.IDEA
TEA DOCKET NO. 258-SE-0821

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

DECISION OF THE HEARING OFFICER

*** (Student), by next friend *** (Parent, and collectively Petitioner) brings this action against the Lewisville Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issues in this case are whether the District failed to provide Student with a free, appropriate public education (FAPE) during the 2020-2021 and 2021-2022 school years, whether the District timely evaluated Student and accurately identified Student, and whether the District procedurally violated the IDEA.

The Hearing Officer concludes that the District procedurally violated the IDEA by not responding as required to a Parent request for an ARD Committee meeting, and procedurally complied with the IDEA as to all other allegations. The Hearing Officer further concludes that all of the individualized education programs (IEPs) developed during the relevant time period were adequately designed to provide Student an educational benefit. However, there was a denial of FAPE for a period of the 2020-2021 school year as a result of the procedural violation. Finally, the Hearing Officer concludes that the District timely evaluated Student and accurately identified Student.

I. DUE PROCESS HEARING

The due process hearing was conducted on June 1 and 2, 2022 through the Zoom videoconferencing platform. Student was represented throughout this litigation by Student's legal counsel, Jordan McKnight. In addition, ***,[1] Student's mother, attended the due process hearing. The District was represented throughout this litigation by its legal counsel Nona Matthews with Walsh Gallegos Treviño Kyle & Robinson, P.C. Ms. Matthews was assisted at the hearing by her co-counsel, Lindy French of the same law firm. In addition, Dr. ***, the Chief Executive Director of Special Education for the District, attended the hearing as a party representative. Petitioner requested that the hearing be open to the public and observers were present.

The parties offered separately disclosed exhibits. Petitioner offered testimony of Parent, private psychologist Dr. ***, and two District psychologists. Respondent offered testimony of two of Student's teachers, a District behavior interventionist, a District psychologist, and a District special education director. The hearing was recorded and transcribed by a certified court reporter. Both parties filed timely written closing briefs. The Decision in this case is due on August 1, 2022.

[1] Petitioner's due process hearing request and Petitioner's January 10, 2022 Amended Complaint identified Parent's first name as ***, as reflected in the case caption. However, the exhibits and Parent herself identify her as ***. Counsel for Petitioner acknowledged the error during the September 15, 2021 prehearing telephone conference, however it was repeated in the subsequently filed Amended Complaint.

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

II. ISSUES

A. Petitioner's Issues

Petitioner confirmed the following IDEA issues for decision in this case pertaining to the 2020-2021 and 2021-2022 school years:[2]

- Whether Respondent failed to conduct a timely reevaluation of Student.
- Whether Respondent failed to evaluate Student's need for Occupational Therapy (OT) services.
- Whether Respondent failed to timely complete a Functional Behavior Assessment (FBA).
- Whether Respondent failed to identify Student as a student with an autism spectrum disorder.
- Whether Respondent denied Student a FAPE by failing to develop an appropriate IEP.
- Whether Respondent denied Student a FAPE by failing to implement Student's IEP.
- Whether Respondent denied Student a FAPE by failing to place Student in Student's least restrictive environment (LRE).
- Whether Respondent failed to collaborate with Student's Parent in the development of Student's special education program.
- Whether Respondent failed to conduct necessary Admission Review and Dismissal (ARD) Committee meetings.
- Whether Respondent failed to timely review an Independent Education Evaluation (IEE) of Student.
- Whether Respondent denied Student a FAPE by failing to provide necessary related services.

[2] Prehearing Telephone Transcript at 13 (Feb. 4, 2022). Hearing Officer Steve Elliot presided over all prehearing proceedings in this matter. The case was reassigned to the undersigned Hearing Officer on May 25, 2022.

B. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

- A determination Respondent denied Student a FAPE.
- Privately provided compensatory education services, including tutoring, speech therapy, OT, and recreation therapy.
- Placement of Student at District expense at ***.
- An independent FBA.
- Reimbursement of Student's Parent for education expenses.
- Any other relief deemed appropriate by the hearing officer.

C. Respondent's Legal Position

Respondent generally and specifically denied Petitioner's factual allegations and legal claims. Respondent also asserted a counterclaim to prove the appropriateness of its FBA and seek an order denying Petitioner an FBA IEE. Respondent moved to dismiss claims arising under statutes other than the IDEA, which was granted in Order No. 6.

III. FINDINGS OF FACT

Background

1. Student is *** years old and in the *** grade. Student is eligible for special education based on an emotional disturbance (ED) and other health impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD). Student has not attended the District since September ***, 2021. Student lives with Student's mother. Student ***.[3]

2. Student experienced ***. Beginning at least as early as ***, Parent has sought medical help to address Student's behavior, which has included periodic ***. Student's behavior challenges have typically been much more intense at home than at school. Student saw private psychologist Dr. *** for private therapy, including family therapy, from April 2014

[3] Petitioner's Exhibit (PE) 1 at 2; Respondent's Exhibit (RE) 25 at 1; RE 29; Transcript Vol. I (Tr. I) at 65.

to March 2016. In a report dated August ***, 2014, Dr. *** diagnosed Student with *** and ADHD – combined presentation. In May 2015, Dr. *** added a mood disorder to Student's diagnoses. Student's treating providers have at times categorized Student's behavior as indicative of ***. Student has consistently *** regularly since 2014.[4]

3. Student began attending the District in April 2014 as a *** ***. Student was referred for response to intervention services shortly thereafter and was retained to attend *** again in the 2014-2015 school year. During this time frame, Parent obtained the Dr. *** evaluation diagnosing Student with *** and ADHD. In November 2014, Student began receiving accommodations through a Section 504 Plan.[5]

4. Student was first evaluated by the District for special education in the fall of 2015 when Student was in *** grade. An October ***, 2015 Full Individual Evaluation (FIE) report determined that Student met diagnostic criteria for an ED based on inappropriate types of behavior or feelings under normal circumstances and a general pervasive mood of unhappiness or depression. The FIE report also indicated that Student's ARD Committee may consider eligibility for OHI due to Student's ADHD. Lastly, the FIE report determined that Student met eligibility criteria for a specific learning disability (SLD) in the areas of basic reading skills and reading fluency.[6]

5. In the fall of 2018, when Student was in *** grade, a triennial reevaluation was completed. The October ***, 2018 FIE report concluded that Student exhibited an average cognitive profile across domains, no longer exhibited weakness in any cognitive area, and therefore no longer met eligibility criteria for an SLD. The FIE report noted that Student exhibits impulsive and inattentive behaviors and still met eligibility criteria under OHI based on Student's ADHD. The FIE report also described that Student still struggled with emotional and behavioral functioning, including mood regulation, and recommended continued eligibility under ED. The FIE report recommended that Student continue to receive school-based counseling services. An updated FBA completed concurrently identified Student's targeted behaviors as ***, and noncompliance, all functioning to seek attention.[7]

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[4] RE 1 at 4; RE 36 at 134, 207-325, 463, 466, 649, 895, 963-65, 986; Tr. I at 68-69, 74, 246; Transcript Vol. II (Tr. II) at 340-42, 344-46.

[5] RE 2 at 3.

[6] RE 2 at 1, 27-29.

[7] RE 8 at 16-17, 19, 21-22; RE 9.

6. During an October ***, 2018 annual ARD Committee meeting where the 2018 FIE was reviewed, Parent provided consent to conduct additional assessment in the areas of assistive technology and OT based on concerns about Student's typing and/or handwriting. An addendum to the FIE, dated May ***, 2019, recommended that Student did not need assistive technology or OT services in order to access the curriculum and make adequate progress.[8]

7. During the spring semester of *** grade, from February ***, 2019 to April ***, 2019, Student was ***.[9]

8. During the fall of Student's *** grade year, Parent provided consent for the District to conduct an updated FBA. The new FBA, dated September ***, 2019, identified problem behaviors of *** and noncompliance, with hypothesized functions of attention seeking and escape.[10]

9. At Student's *** grade annual ARD Committee meeting, held on September ***, 2019, the ARD Committee agreed that Student would continue to receive instruction in the general education setting with access to the *** classroom as needed for behavior support. Student's program also included direct and indirect social skills and direct group counseling services. The ARD Committee agreed to accommodations of: access to ***, access to fidget, BIP, call on frequently, check for understanding, extra time, follow outcry procedures, frequently misspelled word list, genuine positive praise, increased support during transitions, option to type assignments, preferential seating, private discussions about behavior, and secure attention before giving instruction. The ARD Committee agreed to annual goals for behavior, counseling, social skills, and study skills.[11]

10. Due to COVID-19, Student participated in virtual instruction from mid-March 2020 through the end of the spring 2020 semester.[12]

11. In the spring semester, another updated FBA was completed, dated April ***, 2020. This updated FBA continued to identify targeted behaviors of *** and noncompliance, as well

[8] RE 10 at 15-17, RE 11; RE 11.

[9] RE 36 at 109, 753-55.

[10] RE 12.

[11] RE 13 at 3, 12-15.

[12] Tr. I at 72.

as a return of ***. The FBA noted parent input that Student had struggled with at-home learning and was struggling behaviorally at home.[13]

12. Another annual ARD Committee meeting was held at the end of *** grade, dated April ***, 2020. The ARD Committee agreed to a schedule of services for Student's upcoming *** grade year that consisted of instruction in the general education setting with access to the *** classroom as needed for support, direct and indirect social skills instruction, and biweekly direct counseling services. The ARD Committee added accommodations of individual structured reminders on tests, ***, small group test administration, and ***. The ARD Committee agreed to annual goals for behavior (reduce maladaptive verbals, reduce noncompliance, and reduce physical aggression), counseling (emotional regulation), social skills (social problem solving, self-control, compliance), and study skills (attention to task). Student's BIP was encompassed in the behavior goals and included some updated strategies to address Student's targeted behaviors.[14]

2020-2021 School Year

13. The first day of school for the District during the 2020-2021 school year was August ***, 2020. Student began the school year participating in remote learning. On August ***, 2020, Parent emailed the *** assistant principal expressing concern that Student's *** class was too fast paced for Student to keep up. On August ***, 2020, Parent separately emailed both the *** teacher and the assistant principal asking for help moving Student out of the *** class. Parent requested an ARD Committee meeting. The assistant principal forwarded the email to Student's case manager, who got Student's schedule changed to a different, not *** class that same day. Student's case manager provided Student's IEP information to the new *** teacher and explained that Parent had agreed that staff would monitor Student for the first two weeks when Student returned to in-person instruction to determine if academic accommodations were needed.[15]

14. Parent had email correspondence with Student's *** and *** teachers in early September about Student feeling overwhelmed and missing assignments. Parent emailed Student's case manager on September ***, 2020, requesting an ARD Committee meeting. Parent and the case manager corresponded about adding in-class support to Student's IEP through an IEP amendment instead of holding an ARD Committee meeting. Student returned to in-person learning on September ***, 2020. On September ***, 2020, Parent

[13] RE 15.

[14] RE 16 at 5, 16-19; Tr. II at 106-08.

[15] PE 10 at 5, 9-10, 18, 29-30; RE 32.

confirmed that she wanted to have an ARD Committee meeting instead of making changes through an amendment.[16]

15. An ARD Committee meeting was held on September ***, 2020. The ARD Committee agreed to add in class support in *** in the general education setting, an annual goal in ***, and new accommodations. The new accommodations included a daily morning check-in in the *** classroom and a weekly *** check-in to discuss any missing assignments. At that time, Student's case manager did not have any concerns about Student's academic performance and Student needed minimal behavior interventions to manage Student's behavior.[17]

16. Parent had regular correspondence with Student's teachers and case manager through the fall 2020 semester about missing assignments and Student's behavior at home and at school. Student exhibited an escalation of behavior issues at school in November and December. On November ***, 2020, Parent sent an email to the case manager in response to a grade notification saying "I think we should ask for an ard meeting." In a December ***, 2020 email exchange between Parent and Student's *** teacher about a behavior incident, Parent stated "I guess it's time for an[] ard meeting to see if we can get more help in your class." The next day, Parent emailed the case manager, asking "to see when Student's next ard meeting would be scheduled." The case manager responded that Student's annual ARD Committee meeting would be held in the spring semester. In an email exchange between Parent and an assistant principal on December ***, 2020 about a discipline incident, Parent asked whether an ARD Committee meeting was appropriate to get more support for Student. The assistant principal suggested that a more restrictive placement and additional *** be considered.[18]

17. The more restrictive placement option contemplated on the *** campus was the ******. The purpose of a ****** placement is to teach students behavior coping skills that they can translate to the general education setting. The *** placement serves students with different disabling conditions including ED and autism. Students assigned to *** spend a portion of the day in the *** classroom and other portions of the day attending "out classes" in the general education setting. When a student is first assigned to ***, they typically spend all or most of their day in the *** classroom and gradually increase their attendance in out classes. At any given time during the spring 2021 semester, there would typically be *** students present in the *** classroom. There was one teacher and two

[16] PE 10 at 37-38, 40-44.

[17] RE 17 at 4-5, 18; Tr. I at 353.

[18] PE 10 at 84-85, 95-101, 105, 109; Tr. I at 354-55.

paraprofessionals assigned to the class, which included two adjoining rooms, one of which was used as a cool down space.[19]

18. When school resumed after winter break in January, Student's behavior continued to escalate. On January ***, 2021, the case manager had a conversation with Parent about additional supports that could be provided, including increased services and placement changes, and that Student's lower grades were attributable to Student's behavior and rushing assignments, not Student's academic skills. On January ***, 2021, a request was made by the *** campus for a District behavior interventionist to consult on strategies for Student's increased noncompliance and physical aggression. Parent was informed of this on the following day, and Parent responded requesting an ARD Committee meeting.[20]

19. The behavior interventionist consulted with Student's case manager on the implementation of a point sheet. The point sheet was not immediately effective at decreasing Student's targeted behaviors. A behavior intervention may initially increase a student's targeted behaviors as a result of being held more accountable, before the intervention effectively reduces the targeted behavior, called an "extinction burst."[21]

20. District staff also had two staffing meetings with Student's teachers during the spring 2021 semester to discuss Student's behavior and strategies to address it.[22]

21. On March ***, 2021, Parent emailed the case manager again asking for an ARD Committee meeting to address Student's struggles. The case manager responded the same day indicating that Student's annual ARD Committee meeting would be moved up to March ***, 2021. The day before the ARD Committee meeting, the case manager sent Parent draft IEP goals to consider and offered additional discussion about ***. Parent responded expressing interest in trying the new setting but hesitance to commit to that being the placement for the next school year as well.[23]

22. During the spring semester, another FBA was completed, identifying the same three targeted behaviors. The March ***, 2021 FBA noted that Student's behavior struggles were consistent over the years and that updated goals and strategies were needed. The

[19] Tr. II at 191-92, 196, 199, 204, 219.

[20] PE 11 at 13, 26, 33; Tr. I at 357.

[21] PE 33 at 39-40; Tr. I at 362-63, Tr. II at 98, 109-10, 136-37, 190, 272-73.

[22] Tr. I at 360-62.

[23] PE 11 at 64-65, 83.

frequency of non-compliance and maladaptive verbals (***) had increased when compared with the FBA done the previous school year, although the average duration had dropped. Physical aggression (***) had declined in both frequency and duration from the previous FBA.[24]

23. By March ***, 2021, Student had not mastered and/or exhibited regression on most of Student's annual goals. Student had mastered Student's goals for reducing maladaptive verbals and reducing noncompliance during the first grading period in the fall 2020 semester. However, Student had regressed on the goal criteria and was no longer mastering both goals by the second grading period in the fall 2020 semester, and then regressed more significantly in the first grading period of the spring 2021 semester. The same pattern occurred, with less significant regression, in Student's counseling and social skills goals. Student maintained mastery on the math goal that had been added in the fall semester.[25]

24. The annual ARD Committee meeting was held on March ***, 2021. Teacher reports indicated that Student was academically on grade level, although assessment scores sometimes didn't reflect Student's true abilities as a result of Student rushing to complete them. The present level of academic achievement and functional performance (PLAAFP) stated that Student had experienced an uptick in behavior issues and negative peer interactions in the second half of the fall semester that had continued into the spring semester. Student had accrued *** disciplinary infractions for that school year. The ARD Committee agreed to change Student's placement to ***, instead of continued support in general education through ***. The ARD Committee agreed that Student would receive core content classes in *** but would have *** class as an out class right away. Student's counseling services were also increased to weekly sessions from biweekly. Student's accommodations were updated to add ***. The IEP explained that Student needed more intensive social/emotional support than can be provided in a general education setting and that Student's presence in the general education setting was disruptive to the learning of other students. The ARD Committee agreed to new annual goals in ***. The annual goals in the core content areas were all based on mastery of grade level curriculum. The BIP included new strategies to address Student's targeted behaviors of ***. Parent agreed with the IEP.[26]

[24] RE 17; RE 20.

[25] RE 21; RE 35.

[26] RE 19 at 2, 4-5, 12, 17, 19-23; Tr. II at 114-16, 120.

25. As part of the March ***, 2021 annual ARD Committee meeting, the ARD Committee also conducted a review of existing evaluation data (REED) to determine what assessments were needed in the triennial evaluation due by October ***, 2021. The ARD Committee discussed whether it would be appropriate to just continue Student's current eligibilities without the need of additional assessment but agreed that updated testing would be useful. The REED recommended updated assessment in the areas of physical, sociological, emotional/behavioral, cognitive/intellectual, adaptive behavior, and academic achievement. Parent provided consent for the updated evaluation on the same date.[27]

26. Spring Break was the week following the ARD Committee meeting. Student did not begin in *** until March ***, 2021. Parent exchanged emails with the *** teacher and Student's school counselor shortly thereafter about Student having a rough transition to ***. Parent and the counselor exchanged emails again on April ***, 2021, discussing that Student had settled into the transition to ***. However, the next day Parent emailed the *** teacher asking if *** was too restrictive for Student. On April ***, 2021, Parent and the *** teacher exchanged emails about whether Student would be able to attend any additional classes in the general education setting, and the teacher stated that it was unlikely for the remainder of the school year.[28]

27. During the remainder of the spring 2021 semester, Student continued to engage in significant instances of maladaptive verbals and noncompliance, as well as an uptick in physical aggression. There was one instance of ***. The duration of Student's targeted behaviors also increased significantly. Some of the uptick in instances and duration may be attributed to the closer monitoring and data collection that occurs in the *** setting as compared to the general education classroom.[29]

28. Student's report card indicates passing grades in all classes in all grading periods during both semesters of *** grade.[30]

29. During the spring of 2021, Parent obtained a private evaluation of Student by a clinical psychologist, Dr. ***. The report is not dated. Dr. *** conducted cognitive and achievement testing and determined Student's intellectual functioning and academic skills to be in the average, age-appropriate range. Dr. *** collected adaptive behavior information from Student's mother and one of Student's teachers. However, the teacher's protocol was not fully completed and was not scored as part of the assessment.

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[27] RE 19 at 27, 30; Tr. I at 370.

[28] PE 11 at 124-28, 137; RE 32; Tr. II at 127.

[29] RE 24; Tr. II. at 155-56, 169-70, 189-90, 197.

[30] PE 31.

Dr. *** collected numerous rating scales on emotional and behavioral functioning from Student and Parent. Parent and one of Student's teachers also completed Autism Spectrum Rating Scales (ASRS). Parent's ASRS ratings were overall "elevated" and the teacher ratings were overall "slightly elevated." Dr. *** administered the Childhood Autism Rating Scale (CARS) and the report states that Student exhibited the minimal symptoms range of Autism Spectrum Disorder (ASD). Dr. ***'s report diagnoses Student with ASD and ***. The report also states that Student meets eligibility criteria for special education based on ASD. The report makes numerous recommendations for educational services and classroom accommodations, including recommending speech therapy and OT. [31]

30. Dr. *** is a licensed psychologist but does not hold a license as a licensed specialist in school psychology (LSSP). Dr. *** acknowledged there were errors in her report in the calculation of scores obtained on the Beery-Buktenica Developmental Test of Visual Motor Integration, but testified that the errors would not change her diagnosis. Dr. ***'s report lists the standard score on the CARS as an ***, indicating mild symptoms of ASD. However, the protocol reflects that the true standard score was less than ***, indicative of minimal to no symptoms of ASD. There were also errors in Dr. ***'s calculation of scores on the ASRS. Dr. ***'s clinical diagnosis of autism was not consistent with the clinical criteria standard in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Dr. ***'s report omitted reporting measures where Student scored within normal limits, including adaptive behavior that would be indicative of autism, giving a false impression of Student's performance compared to same-age peers. Dr. *** did not do any direct assessment of Student for autism or include assessments by a speech and language pathologist or an occupational therapist, which would have been best practice. A clinical diagnosis of autism is not equivalent to meeting the eligibility criteria for autism under the IDEA.[32]

31. Dr. *** also produced a shorter summary of the evaluation. The 10-page summary only includes the numeric table of scores and the diagnoses and recommendations section. On May ***, 2022, Parent provided the summary document to the *** campus diagnostician. The diagnostician responded requesting Parent availability to hold an ARD Committee meeting to discuss additional areas of assessment needed in Student's upcoming triennial evaluation in light of Dr. ***'s autism diagnosis. On May ***, 2021, Parent and the

[31] PE 1.

[32] PE 1 at 20; RE 37 at 32, 235; Tr. I at 323; Tr. II at 49, 60, 73, 236-38; 240-47, 251-54, 262-70, 322.

diagnostician exchanged emails about holding an in-person ARD Committee meeting in the next school year.[33]

2021-2022 School Year

32. On August ***, 2021, Parent emailed the full version of Dr. ***'s report to the diagnostician. The diagnostician did not understand then that Parent was sending a different document than the summary that had been sent in May.[34]

33. An ARD Committee meeting was held on August ***, 2021, the first day of school for the fall semester. The meeting notice indicated that 45 minutes was allotted for the meeting. Parent attended accompanied by an advocate. The ARD Committee reviewed academic performance and behavior information. Parent did not want Student's placement to remain in the *** classroom. The advocate requested to review Dr. ***'s evaluation. It became clear that there had been a miscommunication about receipt of Dr. ***'s report; the LSSP present at the ARD Committee meeting had only received the summary document and had not reviewed the full report. The LSSP recommended that the District conduct an autism assessment based on Dr. ***'s ASD diagnosis. The advocate argued with the school staff about the amount of time allotted for the meeting, which lasted approximately one hour, and the District's offer to schedule another meeting to continue the discussion after the LSSP had time to review the full *** report. The advocate and Parent abruptly left the meeting.[35]

34. The present due process hearing request was filed on August 24, 2021.

35. The parties subsequently corresponded regarding additional ARD Committee meetings. Petitioner's counsel indicated Petitioner's position that the August ***, 2021 meeting had been completed, ended in disagreement, no reconvene was sought, and therefore no further ARD Committee meetings should be held. Respondent's counsel indicated the District's intention to hold a continuation of the ARD Committee meeting as the District did not consider the prior meeting completed.[36]

36. Another ARD Committee meeting was held on September ***, 2021. Notice was provided, but Parent did not attend. The ARD Committee reviewed Dr. ***'s full report,

[33] PE 11 at 143, 165, 214; RE 23.

[34] PE 11 at 355-75; PE 36 at 58:30.

[35] PE 36; RE 25 at 11-12; RE 32.

[36] RE 26.

determined that it was not sufficient to establish any new eligibilities or services for Student, and discussed that additional assessment was needed. The ARD Committee recommended that, in addition to the testing agreed to at the March ***, 2021 ARD Committee meeting, the District also conduct assessment in the areas of speech/language, OT, formal adaptive behavior, and autism. The ARD Committee also reviewed Student's progress so far in the new school year and recommended adjustments to Student's goals and accommodations based on Student's current progress and Dr. ***'s recommendations. The ARD Committee also recommended that Student attend *** as another out class in addition to ***. A prior written notice and notice of evaluation were generated.[37]

37. On September ***, 2021, the District's special education director emailed Parent the paperwork from the August and September ARD Committee meetings and the consent form pertaining to the expanded evaluation requested. The special education director asked Parent to respond whether she wanted the District to proceed with the evaluation as agreed to in March, proceed with the expanded evaluation now being offered, or not conduct any evaluation at this time. Through subsequent communication between counsel for the parties on September ***, 2021, it was agreed that the District would proceed with the evaluation within the scope of the consent provided in March.[38]

38. Student was absent from school between September *** and October ***, 2021. On October ***, 2021, Parent withdrew Student from the District to be homeschooled. At the time Student was withdrawn, Student's grades were high in all classes. Student had ***. Student had exhibited minimal targeted behaviors so far that school year.[39]

39. Petitioner has since utilized an online homeschool program called ***. Parent has also employed various tutors to work with Student on the *** courses since Student began homeschooling. At least one of the tutors also provides childcare to Student when Parent travels for her work.[40]

40. The District completed an FIE report dated October ***, 2021. The FIE primarily summarized past evaluations, including Dr. ***'s evaluation. No new assessment had been conducted with Student. Parent did not make Student available for the District to conduct any direct assessments with Student following the clarification of consent on September ***. The FIE obtained updated information from Student's then-current

[37] RE 25 at 12-13, 20-23, 33, 42-47; RE 27; Tr. II at 230-31.

[38] RE 28; Tr. II at 229.

[39] RE 25 at 13; RE 28; RE 29; RE 31 at 16; RE 35 at 7; Tr. II at 144-45.

[40] Tr. I at 174-78, 253, 259.

teachers, including updated behavior and adaptive behavior rating scales. The FIE concluded that Student is still eligible for special education based on ED and OHI and recommended updated testing to obtain further information.[41]

IV. DISCUSSION

Petitioner alleges that the District denied Student a FAPE by failing to devise and implement appropriate IEPs for Student in the LRE with necessary related services for the 2020-2021 and 2021-2022 school years. Petitioner also alleges that the District failed to timely reevaluate Student, including evaluating for OT services, and failed to identify Student as a student with autism. Petitioner further alleges that the District failed to timely review an IEE and failed to hold necessary ARD Committee meetings. Petitioner seeks an order mandating private placement, compensatory services, an FBA IEE, and reimbursement for privately obtained services.

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the IEP and/or placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in this case is on Petitioner to show that 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. *Tatro v. State of Tex.*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984), and *vacated in part*, 741 F.2d 82 (5th Cir. 1984).

[41] RE 30; Tr. I at 252; Tr. II at 229.

B. FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001. The district is responsible for providing Student with specially-designed, personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9)*; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

Determining compliance with the IDEA requires a two-part inquiry: first, whether the school district has complied with the procedural requirements of the law, and second, whether the student's program is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

C. Procedural Requirements

Liability for a procedural violation only arises if the procedural deficiency impeded Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

1. 2020-2021 School Year

Petitioner alleges the District violated Student's procedural rights under the IDEA by failing to conduct necessary ARD Committee meetings. Petitioner argues that if an ARD Committee meeting had been held earlier than March 2021, Student's behavior decline would have been averted and the change of placement to *** avoided. When a parent makes a written request for an ARD Committee meeting, the school district must either 1. schedule a meeting, or 2. give the parent prior written notice within five school days explaining why a meeting will not be held. 19 Tex. Admin. Code § 89.1050(e). Here, the evidence establishes that Parent made multiple written requests for ARD Committee meetings during the 2020-2021 school year and that the District did not always respond as required by the regulations.

On August ***, 2020, Parent emailed the case manager asking for an ARD Committee meeting, wanting to change Student's *** class. The District procedurally violated the IDEA when it did not schedule an ARD Committee meeting or issue a prior written notice in response to this request. However, this violation did not impede Student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. The case manager got the Student's *** class changed the same day that Parent requested it as that schedule change did not require an ARD Committee meeting to effectuate.

On September ***, 2020, Parent again emailed the case manager asking for an ARD Committee meeting to add more support for Student. The case manager responded to this request by engaging Parent in a conversation about whether changes could be made through an IEP amendment instead of holding a meeting. On September ***, 2020, Parent confirmed that she would rather have a meeting, and therefore an ARD Committee meeting was held on September ***, 2020. The District responded appropriately to this request and did not violate the IDEA.

Parent exchanged a series of emails with various District staff in November and December 2020 in which Parent stated "I think we should ask for an ard meeting," "I guess its time for an[] ard meeting," and asking "to see when Student's next ard meeting would be scheduled." None of these were a clear request for an immediate ARD Committee meeting. The District responded appropriately by interpreting Parent's comments as an invitation for further conversation about Student's progress, needs, and expected annual ARD due date. The District was not required to hold an ARD Committee meeting or issue a prior written notice in response to these communications.

On January ***, 2021, Parent emailed the case manager requesting an ARD Committee meeting in response to the case manager's explanation about the involvement of the behavior interventionist. An ARD Committee meeting was not held until March ***, 2021, after Parent had followed up again on March ***, 2021 requesting an ARD Committee meeting. The District procedurally violated the IDEA when it did not schedule an ARD Committee meeting or issue a prior written notice in response to the January ***, 2021 request. Roughly six weeks elapsed between the January request and the March meeting, during which time Student's behavior was continuing to regress. District staff were meeting amongst themselves and consulting with the behavior interventionist during this time to better support Student, however this did not constitute a legally compliant response to Parent's request for an ARD Committee meeting. The District's actions between the request and the subsequent March meeting did not affect any changes to Student's IEP outside of the ARD Committee process. Student's placement and special education supports were not changed until the March ***, 2021 ARD Committee meeting, which was done with Parent agreement. Therefore, Parent was not denied her opportunity to participate in the decision-making process about Student's program and the District's offer of FAPE. However, this delay allowed Student to continue to decline before the ARD Committee met to provide additional support. The District's failure to respond to the January ***, 2021 request for an ARD Committee meeting denied Student educational benefit.

Petitioner argues in Student's Closing Brief that the *** placement was predetermined. "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, District staff had multiple conversations with Parent leading up to the March ***, 2021 ARD Committee meeting about the *** placement, as well as other options for supporting Student. There is no evidence that the District committed to *** too early in the planning process or that the District wasn't open to Parent's opinions about Student's program. Parent agreed with the change of placement. Petitioner did not meet Student's burden to show that the District predetermined the *** placement.

2. 2021-2022 School Year

Petitioner alleges various procedural violations pertaining to the August ***, 2021 and September ***, 2021 ARD Committee meetings. First, Petitioner argues that Parent's schedule takes priority over the District staff and therefore the District violated the IDEA when it attempted to end the August ***, 2021 ARD Committee meeting to continue the discussion another day, relying on *Doug C. v. Hawaii Department of Education*, 720 F.3d 1038 (9th Cir. 2013). In *Doug C*., the school district held an IEP committee meeting without the parent present after the parent became ill that morning and called seeking to reschedule it. 720 F.3d at 1042. The Ninth Circuit Court of Appeals held that the school district violated the IDEA by refusing to reschedule and moving forward without the parent when Student clearly wanted to attend. *Id*. at 1045. The present situation is not analogous to *Doug C*. Here, the District designated in advance that the meeting would be 45 minutes long, which was not an unreasonable amount of time in these circumstances. When the meeting

had exceeded the allotted time, and it became clear that the LSSP was not prepared to review the full *** report, the District sought to schedule another meeting **with Parent's participation** to continue the discussion. The District did not attempt to exclude Parent from the decision-making process or prioritize staff schedules over Parent's right to participate. Parent's right to participate in the decision-making process does not include a right to hold the other members of the ARD Committee hostage for as long as it takes to complete a meeting in one sitting.

Petitioner's Closing Brief also argues that allowing the District to hold another ARD Committee meeting and call it a continuation circumvents the disagreement and reconvene process to the detriment of Parent. Petitioner's argument misunderstands the procedural rights of parents and the corresponding procedural obligations of school districts in the disagreement and reconvene process. "When mutual agreement about **all required elements** of the IEP is not achieved, the parent who disagrees must be offered a single opportunity to recess and reconvene the ARD committee meeting." 19 Tex. Admin. Code § 89.1050(g)(1) (emphasis added). The District has an obligation to go over all required elements of an IEP in an ARD Committee meeting to attempt to reach mutual agreement with Parent. The meeting on August ***, 2021 was called to review the *** report and Parent's concerns about the *** placement. As part of a reevaluation, an IEP team must review an evaluation provided by parents. 34 C.F.R. § 300.305(a)(1)(i). Student's triennial reevaluation was pending and the District had an obligation to review the *** report. When the full *** report had not been reviewed yet at the expiration of the reasonable amount of time scheduled for the August ***, 2021 meeting, the District responded appropriately by attempting to schedule a continuation meeting with Parent to fulfill that obligation. The District was justified in not considering the August ***, 2021 meeting as having ended in disagreement where the ARD Committee had not yet reviewed and attempted to reach mutual agreement on all of the required elements for the particular meeting. Parent or advocate may not want to hear what else the District staff have to say, but that is a failure to collaborate on their part and not a relieving of the District's obligation to go over all required elements of the IEP. The disagreement and reconvene procedure

does not initiate until all required elements have been reviewed. The District did not violate the IDEA in scheduling a continuation of the August ***, 2021 meeting.

Petitioner alleges that the District violated the IDEA by failing to timely review the *** evaluation. There is not a statutory deadline in federal or state regulations setting a timeframe by which a school district must review an evaluation privately obtained by a parent. There is likewise no regulation establishing a deadline by which a school district must review even its own reevaluation of an IDEA-eligible student. The only tangentially related statutory deadline is the state regulation requiring that a school district must convene an ARD Committee meeting within 30 calendar days of completion of an initial FIE to determine whether or not the student has met initial eligibility criteria under the IDEA. 19 Tex. Admin. Code § 89.1011(d). The *** summary was provided to the District on May ***, 2021, during the last week of school, and the full report was provided to the District on August ***, 2021. At the August ***, 2021 ARD Committee meeting, on the first day of school, the LSSP began to review the summary by offering her recommendation that the District conduct its own autism evaluation. The District completed reviewing the *** report at the September ***, 2021 ARD Committee meeting, 31 calendar days and 19 school days after the full report had been received. There is no IDEA procedural requirement establishing how quickly the District needed to review the *** evaluation, thus none could be violated. Further, the District responded reasonably in reviewing it in roughly the same timeframe in which it would be required to review its own initial evaluation of a student to establish IDEA eligibility.

Petitioner's Closing Brief also argues that the District violated the IDEA by not having a speech pathologist or an occupational therapist present at the August ***, 2021 ARD Committee meeting to review Dr. ***'s recommendation for speech therapy and OT, contained in both the summary and the full report. However, Petitioner offered no evidence or authority that these professionals were required members of the ARD Committee to review the *** recommendations. Dr. *** is a licensed psychologist, not a speech pathologist or an occupational therapist. The District was prepared for the August ***, 2021 ARD Committee meeting with a licensed psychologist and

LSSP present to review the recommendations of a similarly qualified professional. The District's inclusion of a speech pathologist and an occupational therapist in the September ***, 2021 meeting does not *ipso facto* mean that they were required participants at either meeting. Petitioner failed to meet Student's burden to establish any procedural violations related to the review of the *** report.

Overall, the Hearing Officer concludes that the District is liable for a procedural violation of failing to give a legally compliant response to Parent's January ***, 2021 request for an ARD Committee meeting. The Hearing Officer further concludes that the District procedurally complied with the IDEA as to all other allegations.

D. Appropriate Program

The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program is reasonably calculated to enable the child to receive educational benefit. Those factors are:

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

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).[42]

[42] 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.*, 909 F.3d at 765 (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017)).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. Leah Z.,* 580 F. 3d 286, 294 (5th Cir. 2009).

In this case, there are multiple IEPs at issue during the relevant time frame of the 2020-2021 school year and the 2021-2022 school year. At the beginning of the 2020-2021 school year, Student's program was contained in the April ***, 2020 IEP from Student's previous annual ARD Committee meeting. Modifications were made to that program during the September ***, 2020 Brief ARD Committee meeting. A new IEP was adopted at Student's annual ARD Committee meeting on March ***, 2021, which remained Student's program for the beginning of the 2021-2022 school year. Lastly, modifications to that program were proposed at the September ***, 2021 ARD Committee meeting. This case was already pending at that time and the record does not reflect whether or not those changes were implemented by agreement before Student stopped attending school in the District on September ***, 2021. Each IEP is analyzed below under the *Michael F*. factors.

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide 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, 300.320, 300.323(a). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and

supports and other behavioral strategies 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).

The District's obligation when developing Student's IEP and BIP is 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. § 300.320(a)(1)(i). 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 Indep. 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 IEPs implemented by the District were "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999.

The evidence showed that all four of the IEPs at issue were individualized on the basis of assessment data and Student's performance. At the April ***, 2020 annual ARD Committee meeting, the ARD Committee considered a recently completed FBA and updated Student's BIP accordingly. The program proposed for Student's *** grade year took into consideration Student's strengths and needs, evaluation data, and information on Student's performance. Then, in the early part of the *** grade year, the District responded to Parent's concerns by revising Student's program through the September ***, 2020 ARD Committee meeting. The additional support in *** and to help Student manage assignments was a proactive modification to Student's program before Student's behavior began to decline. Despite that, Student exhibited increasing behavior issues as the school year continued. The March ***, 2021 IEP was based on performance data indicating the serious escalation in Student's needs for behavior support, including data from another new FBA. The change of placement to ***, increased counseling support, and BIP updates were informed by Student's burgeoning needs and performance, as

well as Parent concerns. Finally, the September ***, 2021 ARD Committee meeting made modifications to the annual IEP developed in March that were informed by updated assessment data from Dr. *** and updated information about Student's performance in that school year.

Petitioner argues that Student's targeted behaviors, BIP, and behavior goals haven't changed much over the years, going back to *** grade. The appropriateness of Student's FBAs and IEPs from *** and *** grade are not before the Hearing Officer in this case. Student's BIP was updated at both annual ARD Committee meetings at issue here, as well as the September ***, 2021 meeting, and is replete with positive behavior supports, in addition to the positive behavior supports included in Student's accommodations, which were also updated and revised at every meeting in response to new information. Although Student's targeted behaviors have been consistent over the years, an IEP is not required to cure the symptoms of a student's disability to be effective and legally compliant. The District continually offered new strategies to address Student's targeted behaviors in response to present data.

Petitioner also alleged as an issue in this case that the District failed to provide Student with necessary related services. However, Petitioner provided no evidence of assessment data or performance establishing that Student required any additional related services not already provided by Student's IEPs. All of the IEPs developed for the 2020-2021 and 2021-2022 school years were appropriately individualized on the basis of Student's performance and assessment.

2. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved

satisfactorily. This provision is known as the "least restrictive environment requirement." 34 C.F.R. § 300.114(a)(2)(i)-(ii). State regulations require a school district's continuum of instructional arrangements be based on students' individual needs and IEPs and include a range 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 a student's LRE 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 consideration of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting and modify the general education curriculum to meet the student's needs;
- the educational benefit a student is receiving while placed in the general education setting;
- the child's overall experience in general education, balancing the benefits of general and special education; 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.

Id. at 1048-49.

In this case, Petitioner asserts that the *** placement is not Student's LRE and implies that the more appropriate placement for Student would be in general education with additional supports and services. Petitioner's Closing Brief also argues that the District should have conducted a new evaluation and/or reviewed Dr. ***'s evaluation before moving Student to ***. Petitioner has not challenged the restrictiveness of Student's placement in general education with *** support during the majority of the 2020-2021 school year, therefore only the IEPs with the *** placement are analyzed under this factor.

a. Efforts to educate in general education setting

Here, the District made efforts to educate Student in the general education setting. Prior to the *** placement, Student's placement for the past several years had been primarily in the general education setting with behavior support from ***. Like ***, *** is a special education classroom that Student would access, although for a smaller proportion of Student's day than when Student was placed in ***. *** is also a flexible placement, where students may eventually end up spending the majority of their time in general education out classes. During Student's attendance in the *** placement, Student was still integrated in the general education setting for ***. Petitioner argues that the District should have done more to support Student in the general education setting as Student's behavior declined in the November 2020-March 2021 time frame. The District did attempt new behavior strategies with Student in general education. Student was continuing to struggle in the general education placement when the change to *** was proposed.

"'The Act does not permit states to make mere token gestures to accommodate' a disabled student, it instead provides a broad, but not limitless, requirement to modify and supplement the regular or general education setting for the student." *H.W., by & through Jennie*

W. v. Comal Indep. Sch. Dist., 2021 WL 3887696, at *14 (W.D. Tex. Aug. 31, 2021) (quoting *Daniel R.R*., 874 F.2d at 1048). Here, the District's efforts to accommodate Student in general education were legally sufficient.

b. Educational benefit in general education

It is undisputed that Student is cognitively and academically capable of succeeding on grade-level curriculum and that Student did so while enrolled at the District. Student's academic IEP goals require mastery of grade-level material. Student's teachers testified repeatedly that Student's academic skills are on par with Student's same-age peers. Although the record reflects that Student sometimes struggled with completing assignments and taking Student's time on tests, Student's grades remained high even when Student's behavior was escalating. Student was experiencing an academic educational benefit in general education and continued to do so once placed in the *** class. Student's grade in *** was a ***% all year, Student's one general education class that continued after the *** placement. Student experienced educational benefit in general education.

c. Overall experience in general education, balancing the benefits of general and special education

The overall benefits of the special education setting to meet Student's behavior needs outweigh the evidence of Student's academic success in the general education setting. Guidance from the Office of Special Education Programs states that "[t]here is no requirement that a student fail in a less restrictive environment before moving to a more restrictive environment." Office of Special Educ. Prog., *Letter to Richards*, 211 IDELR 433 (1987). Although Student experienced an academic educational benefit from the general education setting, Student began regressing on Student's IEP goals. It is undisputed that Student's behavior in the November 2020-

March 2021 time frame declined markedly. Student needed more support, which is available in a special education setting like ***.

It is also undisputed that the change to the *** setting did not immediately reverse the trends in Student's behavior. During the final grading period of the spring 2021 semester, Student exhibited targeted behaviors at a frequency that was on par with, or more than, what had been observed in the preceding months of escalation. However, multiple witnesses with expertise in this area testified about extinction bursts, a common reaction to a new behavior intervention being an immediate increase in the targeted behavior before the intervention eventually lessens the behavior. This is supported by the evidence from the fall 2021 semester, before Student stopped attending, in which Student was exhibiting minimal targeted behaviors in the *** placement. The failure of the *** placement to immediately curtail Student's targeted behaviors does not disprove the benefits available in that setting to meet Student's needs.

It is also notable that the *** placement is a blended placement that included at least one general education class from the beginning, and a gradual increase in exposure to general education classes as Student's behavior coping skills improve. Further, Student's *** program still included grade-level academic content equivalent to what Student's non-disabled peers received in their general education classes. Student's overall experience in general education, balancing the benefits of general and special education, weigh in favor of the *** placement.

d. Impact on general education setting and students

When the ARD Committee agreed to change Student's placement to ***, the March ***, 2021 IEP reflects that Student's behavior was disrupting the general education classroom and the

learning of other students. While not dispositive, this is a relevant consideration when a school district proposes a change of placement.

Overall, although Student is academically capable of succeeding in the general education setting, the level of behavior support that Student needs can only be provided in a special education setting. The *** placement consists of time in both general education and special education classes, mainstreaming Student to the maximum extent appropriate. Petitioner offered no authority for Student's argument that the District should have re-evaluated or considered the *** evaluation before changing Student's placement. The ARD Committee had sufficient information to make the change when it did. When balancing the considerations required under *Daniel R.R.*, the Hearing Officer determines that the *** placement is Student's least restrictive environment.

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

The IDEA contemplates a collaborative process between school districts and 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*.

Petitioner argues that the District failed to include Parent in the collaborative process, including through the allegations analyzed above as procedural violations. Specifically, Petitioner

complains that Parent made multiple requests for ARD Committee meetings in the 2020-2021 school year that were not granted, campus staff had staffing meetings without her, Parent was not involved in the decision to seek assistance from a behavior interventionist or implement a point sheet, and the *** placement was predetermined. Petitioner also argues that the District failed to collaborate in failing to begin the triennial evaluation until the fall 2021 semester and failing to be adequately prepared for the August ***, 2021 ARD Committee meeting.

Overall, the evidence supported extensive collaboration among the District staff working with Student. Student's case manager while Student was in the *** placement exhibited particular care in ensuring that information flowed among the various staff members, Parent's concerns were addressed, and Student's needs were met. District staff communicated regularly with Parent. The District also held four ARD Committee meetings in the relevant time frame to collaborate on Student's program. As discussed above in reference to the procedural allegations, the District was responsive and collaborative in response to Parent's requests for ARD Committee meetings in most instances. However, the District procedurally violated the IDEA by failing to respond appropriately to Parent's January ***, 2021 request for an ARD Committee meeting.

Petitioner presented no evidence or authority to support that the decision to seek assistance of a behavior interventionist, hold staffing meetings, or try a point sheet with Student were changes to Student's program that required parent permission or ARD Committee agreement. Educators make countless daily decisions within their professional judgment on how to support students, including consulting with colleagues on possible strategies. An IEP represents an annual plan outlining required supports for a student with a disability, but it does not dictate every decision a teacher makes in working with that student. The decision to meet with staff, consult with the behavior interventionist, and try using a point sheet with Student were within the pedagogical judgment of Student's teachers. All of this was communicated contemporaneously with Parent, even if her permission was not sought in advance. The District's

actions regarding the behavior interventionist, the staffings, and the point sheet trial do not evidence a failure to act in a coordinated and collaborative manner.

Petitioner alleges that District staff failed to coordinate with each other by "forgetting" that Parent provided consent for evaluation during the March 2021 ARD Committee meeting. This was not substantiated by the evidence. The evidence established that the consent obtained during the March 2021 meeting was preparation for a triennial reevaluation due in October and there was no expectation that the evaluation would commence immediately.

There was a noteworthy miscommunication between Parent and District regarding the receipt of the full *** report on August ***, 2021, distinct from the summary that had been provided at the end of the previous school year. This unfortunately resulted in the District being unprepared to discuss the full *** report at the August ***, 2021 ARD Committee meeting held five days later. However, there is no requirement that the District review a privately obtained evaluation on such a short time turnaround, even if the diagnostician had understood at the time that it was a different document. The District responded collaboratively by attempting to schedule another time to review it with Parent.

Overall, the evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders. Even though the District's response to the January ***, 2021 ARD Committee meeting request was procedurally inadequate, it did not overall indicate a failure to work in a coordinated and collaborative manner. District staff were still communicating with Parent about her concerns at that time and attempting to address them. Petitioner failed to show that the District excluded Parent in bad faith or refused to listen to her.

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.*, 703 F.3d at 812-13.

As discussed above, Student received some academic benefit throughout Student's attendance at the District as evidenced by Student's consistent on-grade-level academic performance. However, the evidence also supports that Student experienced behavioral decline from November 2020 through March 2021 that remained consistent through the end of the school year. As discussed above in analyzing the procedural violation, the District's failure to respond adequately to Parent's January ***, 2021 request for an ARD Committee meeting produced a delay in getting additional support for Student in Student's IEP, which was not remedied in the interim by the District's efforts with the behavior interventionist and the point sheet. The evidence does not support a conclusion that an earlier ARD Committee meeting would have necessarily avoided the *** placement recommendation. But the evidence does indicate that an earlier ARD Committee meeting would have provided greater, necessary supports to Student, impacting Student's academic and non-academic benefits from Student's IEP.

Once the ARD Committee met on March ***, 2021 and made changes to Student's program, including the change of placement to ***, Student continued to achieve academically on par with Student's non-disabled peers. Although the *** placement did not immediately change Student's targeted behavior trends, this is not conclusive on whether Student was receiving academic and non-academic benefit from the placement. The evidence supports an extinction burst in which the new expectations initially challenged Student before changing Student's behavior, which was occurring during Student's attendance in the fall 2021 semester. The Hearing Officer finds that the change of placement to *** resulted in academic and nonacademic benefit for Student. The record does not reflect whether the modifications to the *** placement at the September ***, 2021 ARD Committee meeting were implemented before

Student stopped attending a few weeks later. Therefore, the Hearing Officer is unable to draw any conclusions about whether that IEP modification provided academic and non-academic benefit. However, the changes made therein were consistent with data to support that it would provide academic and non-academic benefit.

5. FAPE Conclusion

When looking at the totality of the *Michael F*. factors as applied to all of the IEPs at issue here, the evidence showed that all of the IEPs were individualized based on Student's assessment and performance, represented Student's LRE, and were provided in a coordinated and collaborative manner by the key stakeholders. However, there was a failure in providing Student academic and non-academic benefit from January ***, 2021 to March ***, 2021, a critical factor in the FAPE analysis.

The evidence showed that Student's program was reasonably calculated to provide meaningful educational benefit and was appropriately ambitious in light of Student's unique circumstances from the beginning of the 2020-2021 school year to January ***, 2021, from March ***, 2021 to the end of the 2020-2021 school year, and for the 2021-2022 school year. *Endrew F*., 137 S. Ct. at 992. Based on the four factors of *Michael F*., the evidence establishes that the District offered a FAPE in the LRE from the beginning of the 2020-2021 school year to January ***, 2021, from March ***, 2021 to the end of the 2020-2021 school year, and for the 2021-2022 school year. However, the same cannot be said for the period from January ***, 2021 to March ***, 2021. The District denied Student a FAPE during this period.

E. IEP Implementation

Petitioner alleges that the District failed to implement Student's IEP. When determining whether a school district failed to adequately implement a student's IEP, a hearing officer must determine whether a FAPE was denied by considering under the third *Michael F*. factor whether there was a significant or substantial failure to implement the IEP and whether, under the fourth *Michael F*. factor, there have been demonstrable academic and nonacademic benefits from the IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). To prevail on Student's claim under IDEA, Petitioner must show more than a *de minimis* failure to implement all elements of Student's IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

Petitioner did not present evidence that the District failed to implement Student's IEP during the relevant time period. As discussed above, factor three was resolved in favor of the District. Under factor four, there were deficiencies in the academic and non-academic benefits from Student's IEP. However, those deficiencies did not arise from a failure to implement the existing IEP. No evidence was offered of that. Instead, the failures arose from a delay in making changes to Student's IEP. Petitioner therefore did not meet Student's burden on this claim.

F. Evaluations

Petitioner alleges that the District failed to timely conduct a full re-evaluation, failed to timely complete a new FBA, and failed to evaluate for OT. Generally, a school district must re-evaluate a student with a disability when the school district determines it is warranted or when a parent or teacher requests it. 34 C.F.R. § 300.303(a). A school district must re-evaluate a student with a disability at least every three years unless the school district and parent agree that an evaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). Evaluations must be sufficiently comprehensive to identify all of a student's special education and related services needs. 34 C.F.R. § 300.304(c)(6).

Petitioner complains that the District did not start conducting the triennial re-evaluation when Parent provided consent on March ***, 2021, and instead waited until the fall 2021 semester close to the October due date. Petitioner did not meet Student's burden to show that the District's evaluation was untimely. The evidence shows neither that the District believed it was necessary to expedite the reevaluation earlier than its triennial deadline nor that Parent requested that the District do so. Petitioner argues that Parent thought that the District would start right away when she signed consent in March 2021, however this is contradicted by other evidence. The REED from the March ***, 2021 meeting indicates the evaluation would be completed by October ***, 2021, instead of any earlier date. Further, when Parent provided the *** summary to the diagnostician in May, they exchanged emails about meeting in the fall semester to add an autism evaluation to the pending triennial – a clear indication that the evaluation would be completed in the fall. The evidence supports that the ARD Committee was in agreement that Student's triennial would be completed by its natural due date and not earlier.

The District ultimately did complete a triennial re-evaluation, albeit without Petitioner's participation, by the deadline.[43] The District delayed attempting to conduct any direct assessment of Student until the scope of consent was clarified, which ultimately was received from Petitioner's counsel on September ***, 2021, at which point Student stopped attending school. Petitioner complains about this as well, arguing again that the District should have started earlier. Petitioner has offered no authority to support this micromanaging of the District's processes beyond meeting the statutory deadline for completion of a report. Further, the District responded reasonably in

[43] Petitioner's Closing Brief argues that the October ***, 2021 FIE does not meet IDEA criteria. The substantive adequacy of the District's October ***, 2021 FIE was not raised as an issue for hearing in Petitioner's Amended Complaint, only the timeliness of its completion. As such, the substantive adequacy was not at issue in the hearing and is not analyzed here.

attempting to clarify consent, particularly in light of the pending litigation and expanded evaluation request on the table. Petitioner failed to show that the District's re-evaluation was untimely.

As to the claim that an FBA was not completed timely, it is not clear when Petitioner expected the District to conduct another FBA. A new FBA had just been completed, dated March ***, 2021, the same date that Parent signed consent for the triennial re-evaluation. A request for another FBA was not included in the March ***, 2021 REED. No evidence was offered that either District or Parent requested an updated FBA following that ARD Committee meeting. Petitioner failed to show that the District did not complete a timely FBA.

Lastly, Petitioner argues that the District failed to conduct a timely OT evaluation. No evidence was offered to establish that anyone suspected that Student might have autism or need OT services until the Dr. *** summary and report were provided to the District. The District timely reviewed that private evaluation, properly determined that additional testing would be necessary to establish additional eligibility, and timely requested consent to conduct its own testing. Petitioner declined to consent. Petitioner failed to show that the District did not timely evaluate for OT services eligibility.

G. Eligibility Determinations

Petitioner alleges that the District failed to identify Student as a student with autism. An eligibility determination is made on the basis of an evaluation that meets IDEA criteria. 34 C.F.R. §§ 300.8(a), 300.304-.311; 19 Tex. Admin. Code § 89.1040(b). Assessments and other evaluations must assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4). An evaluation must also be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). The school

district should also consider a student's academic, behavioral, and social progress in determining whether the student needs special education for purposes of IDEA eligibility. *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F. 3d 378, 384 (5th Cir. 2007); *D.L. v. Clear Creek Indep. Sch. Dist*., 695 F. App'x 733 (5th Cir. 2017) (unpublished) (*per curiam*).

Eligibility for services under the IDEA is a two-pronged inquiry: (1) whether the student has a qualifying disability, and (2) whether, by reason of that disability, the student needs IDEA services. 20 U.S.C. § 1401(3)(A); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 215 (5th Cir. 2019). In making an eligibility determination, the ARD committee must "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.306(c)(1)(i).

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. An autism eligibility does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. § 300.8(c)(1)(i)-(ii).

Petitioner did not meet Student's burden to show that the District failed to identify Student as a student with autism. Petitioner's evidence on this issue is Dr. ***'s evaluation. The testimony of the District's lead psychologist showed that the *** report was riddled with errors in its scoring and methodology, making it questionable whether the diagnosis of autism was accurate even within its own parameters. Further, even if Dr. ***'s diagnosis of autism is clinically sound, Dr. *** does not hold an LSSP license and is therefore not qualified to opine on whether

Student meets the distinct IDEA eligibility criteria for autism. Of note, Dr. *** made clinical diagnoses of ASD and *** and recommended that Student is eligible for special education based on ASD, but did not grapple at all with the thorny issue of whether the autism or the emotional disturbance is predominant, as required by the IDEA regulations. The District responded appropriately by reviewing the *** report, and timely requesting consent for assessment in order to explore any additional eligibility. Further, the District has an absolute "right to test a student itself in order to evaluate or reevaluate a student's eligibility under the IDEA." *Andress v. Cleveland Indep. Sch. Dist*., 64 F.3d 176, 178 (5th Cir. 1995). Petitioner has not consented to the District's proposed evaluation. Petitioner failed to show that Student should be eligible for special education under the eligibility category of autism based on currently available assessment data.

H. Private Placement

Student must meet a two-part test in order to secure placement at *** at District expense. First, Student must prove the District's proposed program was not appropriate under the IDEA. Second, Student must prove placement at *** is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Comm. v. Dept. of Educ.,* 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter,* 510 U.S. 7 (1993).

The District's program was appropriate; therefore, the Hearing Officer need not address whether placement at *** is appropriate. Petitioner failed to meet Student's burden in proving the District's program was not appropriate under the IDEA. Further, Petitioner also appears to have abandoned this requested relief by not addressing it at all in Student's Closing Brief. Therefore, the Hearing Officer will not address private placement at District expense.

I. Counterclaim

Petitioner seeks an FBA IEE. Respondent filed a counterclaim asserting the appropriateness of its FBA and requesting an order denying Petitioner's request for an FBA IEE. Respondent also asserts that an FBA does not trigger a right to an IEE.

A parent of a student with a disability has the right to obtain an IEE at school district expense if the parent disagrees with the school district's evaluation. 34 C.F.R. § 300.502(b)(1). However, a school district may challenge the parental right to the IEE at school district expense by filing a request for a due process hearing to show its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2)(ii). This may also be effectuated by filing a counterclaim in an already pending parent-initiated due process proceeding. If the school district meets its burden on that issue, although parents are still entitled to secure an IEE, they do so at their own expense. 34 C.F.R. § 300.502(b)(3).

In 2009, the United States Department of Education Office of Special Education and Rehabilitative Services (OSERS) issued a non-binding question-and-answer guidance document stating its position that parents may obtain an FBA IEE at public expense, pursuant to the IEE criteria in the federal regulations. *Questions and Answers on Discipline Procedures*, OSERS, 52 IDELR 231 (June 1, 2009). However, in *D.S. v. Trumball Board of Education*, the Second Circuit Court of Appeals examined this novel legal issue and concluded otherwise. 975 F.3d 152, 163 (2nd Cir. 2020). The *Trumball* court grappled with the OSERS guidance and held that the guidance misapplied the IDEA. The court reasoned that the IDEA defines an evaluation as comprehensive in nature, designed to assess a child in all areas of suspected disability. *See id*. (citing 20 U.S.C. § 1414(b)). Likewise, the right to an IEE is triggered by disagreement with a comprehensive evaluation. *See id*. (citing 34 C.F.R. § 300.502(b)(1)). The court explained that "an FBA is not a comprehensive assessment of a child's disability;" instead "[i]t is a purposefully targeted examination of the child's behavior." *Id*. Therefore, an FBA is not an evaluation that triggers a parent's right to an IEE at public expense. *Id*. at 167. OSERS has recently indicated that it is

reviewing its previous guidance in light of the *Trumball* decision. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, OSERS, 122 LRP 24161 (July 19, 2022).

In light of the persuasive and thorough reasoning of the *Trumball* court and the lack of binding authority in this jurisdiction, the Hearing Officer agrees that a stand-alone FBA is not an evaluation that triggers a parent's right to an IEE at public expense. Therefore, Respondent's counterclaim is **GRANTED** to the extent that the Hearing Officer **ORDERS** that the District may deny the requested FBA IEE at public expense. The counterclaim is **DENIED** to the extent that the Hearing Officer declines to opine on the appropriateness of the District's FBA as such an analysis is unnecessary to reach the relief sought. Parent may still obtain an FBA IEE, however only at her own expense.

J. Remedy

The District procedurally violated the IDEA, leading to a denial of a FAPE for Student. The District did not respond as required to Parent's January ***, 2021 request for an ARD Committee meeting. Student continued to struggle during this time, before the District held an ARD Committee meeting on March ***, 2021, in response to another request from Parent. Student was denied a FAPE in the interim. As such, the District must compensate Student for this failure.

An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite educational benefit denied by the school district's failure to comply with the IDEA. *Letter to Kohn*, 17 IDELR 522 (OSERS 1991). Compensatory education imposes liability on the school district to pay for services it was required to pay all along and failed to do so. *See Meiner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *D.A. v. Houston Indep. Sch. Dist*., 716 F.Supp.2d 603, 612 (S.D. Tex. 2009),

aff'd, 629 F. 3d 450 (5th Cir. 2010) (upholding decision that student failed to prove amount of compensatory reimbursement for school district's failure to timely evaluate).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided prospectively in order to compensate the student for a deficient educational program provided in the past. *G. ex. rel. RG v. Fort Bragg Dependent Schs*., 343 F. 3d 295 (4th Cir. 2003). 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. 35, 374 (1996); *Harris v. Dist. of Columbia*, 19 IDELR 105 (D.D.C. 1992). A qualitative, rather than quantitative, standard is appropriate in fashioning compensatory and equitable relief. *O.W*., 961 F.3d at 800; *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516, 523-24 (D.C. Cir. 2005).

Petitioner has requested privately provided compensatory services and reimbursement of Parent's expenses on education services. The only admitted evidence of privately obtained educational services during the period of FAPE denial consists of Parent's handwritten notes that she paid a tutor $*** on February ***, 2021 and $*** on February ***, 2021.[44] These handwritten notes and associated testimony from Parent are not competent evidence upon which to establish an order of reimbursement. Petitioner also submitted evidence of Parent's expenses obtaining the *** evaluation, private OT services from December 2021 to May 2022, *** enrollment from October 2021 to April 2022, and tutoring services provided at other times from March 2021 to May 2022. None of these constitute appropriate relief. Assuming without deciding that check images submitted as tutoring payments were for tutoring and not also childcare, these do not constitute appropriate relief as it was obtained outside the violation period and no evidence supported that this tutoring was an appropriate remedy for the FAPE

[44] PE 5 at 1.

violation at issue. Likewise, assuming without deciding that *** provides appropriate services, the *** homeschool services were not obtained during the violation period. The *** evaluation does not form the basis of any IDEA violation in this case and thus reimbursement for it is not appropriate relief. Petitioner has not shown that Student is eligible for OT services under the IDEA, therefore reimbursement for private OT is not appropriate relief.

Petitioner brought forward no expert testimony or evidence explaining the nature and scope of the compensatory services Student requires to remedy the denial of FAPE in this case. Of relevance, when the ARD Committee met in March 2021, the Committee agreed to increase Student's counseling services from biweekly to weekly. The ARD Committee also changed Student's placement to increase behavior support for Student. In light of the approximately six-week period in which Student was denied a FAPE, and the Hearing Officer's broad discretion to fashion appropriate relief, the Hearing Officer grants compensatory counseling services in the amount of three 20-minute sessions. These services may be provided by a District LSSP or special education counselor, or by a qualified private provider, at the discretion of the District. The Hearing Officer further grants compensatory social skills instruction by a District special education teacher in the amount of 300 minutes, to be allocated at the discretion of the District. The compensatory services awarded herein must be provided within the 2022-2023 school year to the extent that Student re-enrolls at any point before the conclusion of the fall 2022 semester. If Student re-enrolls in the spring 2023 semester, the compensatory services may be provided in the spring 2023 or fall 2023 semesters. To the extent that Student does not re-enroll in the District during the 2022-2023 regular school year, the District's obligation to provide these compensatory services is extinguished.

V. 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. Petitioner met Student's burden of proving that Respondent failed to comply with student and parent procedural rights under the IDEA regarding Parent's January ***, 2021 request for an ARD Committee meeting. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a), 300.513(a)(2); 19 Tex. Admin. Code § 89.1050(e).

3. Petitioner did not meet Student's burden of proving that Respondent failed to comply with student and parental procedural rights under the IDEA as to all other allegations. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a), 300.513(a)(2); 19 Tex. Admin. Code § 89.1050(e).

4. Student was provided FAPE and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances for the period from the beginning of the 2020-2021 school year to January ***, 2021; from March ***, 2021 to the end of the 2020-2021 school year; and for the 2021-2022 school year. *Rowley*, 458 U.S. 176; *Endrew F.*, 137 S. Ct. 988.

5. Petitioner met Student's burden of proving that Respondent denied Student a FAPE for the period of January ***, 2021 to March ***, 2021. *Rowley*, 458 U.S. 176; *Endrew F.*, 137 S. Ct. 988.

6. Petitioner did not meet Student's burden of proving that the District failed to implement Student's IEP. *Schaffer*, 546 U.S. at 62; *Bobby R.*, 200 F.3d at 349.

7. The District timely reevaluated Student in all areas of suspected disability. 34 C.F.R. §§ 300.303, 300.304.

8. Petitioner did not meet Student's burden of proving that Student should be identified as eligible for special education as a student with autism. *Schaffer*, 546 U.S. at 62; 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(c)(1).

9. Petitioner is not entitled to private placement at District expense. *Burlington Sch. Comm.,* 471 U.S. at 370.

10. Respondent is not required to grant Petitioner an FBA IEE at public expense. 34 C.F.R. § 300.502(b)(1).

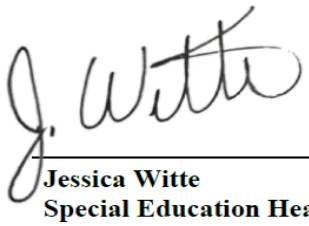
VI. ORDERS

Given the broad discretion of the Hearing Officer in fashioning relief, the Hearing Officer makes the following orders:

1. Subject to the time limitations and service provider requirements described in Section J above, the District shall offer Student three 20 minute counseling sessions and 300 minutes of direct social skills instruction, in addition to any like services that are provided through an IEP adopted by Student's ARD Committee.

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

SIGNED August 1, 2022.



Jessica Witte
Special Education Hearing Officer
For the State of Texas

VII. 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. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).