

DOCKET NO. 002-SE-0917

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, ***, b/n/f *** (Parent) (collectively, “Petitioner”) brings this action against the El Paso Independent School District (“Respondent,” or the “District”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1482 (IDEA) and its implementing state and federal regulations. The main issues in this case are: (1) whether the District met its Child Find obligation by appropriately and timely evaluating and identifying Student’s disabilities; (2) whether the District devised and implemented an individualized educational program (IEP) designed to challenge Student and promote academic and nonacademic progress based on present levels of academic achievement and functional performance (PLAAFP); and (3) whether the District can provide a free and appropriate public education (FAPE) and, if not, whether placement in a residential care and treatment facility is necessary to provide a FAPE.

The Hearing Officer concludes Student met Student’s burden of proof and prevailed on the Child Find issue. Petitioner did not meet Petitioner’s burden on the remaining issues. Prolonged absences from school, *** resulted in insufficient classroom observation and data for the District to effectively evaluate and plan an appropriate educational program.

A. Continuances and Extension of Decision Due Date

There were five continuances and/or adjustments to the hearing schedule with corresponding extensions of the decision due date for good cause, including the District’s two

requests for short post-hearing adjustments to the decision due date to allow the parties time to submit written closing arguments with the benefit of the hearing transcripts.

B. Legal Representatives

Student was self-represented throughout this litigation by Parent. The District was represented throughout this litigation by its legal counsel Eric Rodriguez of Walsh, Gallegos, Treviño, Russo, and Kyle P.C.

C. Resolution Session and Mediation

The parties conducted an unsuccessful Resolution Session on October 17, 2017. The parties did not pursue mediation.

D. Preliminary Motions

There were several preliminary motions resolved prior to the due process hearing related to jurisdiction, an ARDC meeting, a set of independent educational evaluations (IEEs) in nine different areas, discovery, and authorization of a non-attorney representative.

II. DUE PROCESS HEARING

The due process hearing was conducted on March 22-23, 27-28, 2018. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be self-represented. In addition, Student's ***, attended the due process hearing throughout the four days of hearing. ***, ***, and *** provided certified interpreter services for Student throughout the due process hearing.

Respondent continued to be represented by its legal counsel Eric Rodriguez. In addition ***, Assistant Superintendent for Special Education and Special Services, and ***, the Director of Special Education for the District, alternated attending the hearing as party representatives. Both parties filed written closing arguments in a timely manner. The Decision in this case is due May 23, 2018.

III. ISSUES

A. Petitioner's Issues

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

Did the District fail to provide Student a FAPE by:

1. Evaluation:

- a. Did the District fail to timely evaluate Student in all suspected areas of disability in violation of its Child Find duty?
- b. Has the District failed to identify Student as qualifying for special education as a student with autism?

2. FAPE:

- a. Did the District fail to devise and implement an IEP designed to challenge Student and to promote academic and nonacademic progress based on PLAAFP with measurable goals?
- b. Did the ARDC consider autism strategies based on peer reviewed, research-based educational practices to the extent practicable when devising Student's individual education program as outlined in the Autism Supplement at 19 Tex. Admin. Code § 89.1055(e)?
- c. Did the District fail to conduct a timely functional behavior assessment (FBA) and devise and implement an appropriate behavior intervention plan (BIP)?
- d. Services: Did the District fail to provide necessary and/or sufficient services, in the areas of physical therapy and autism?
- e. Training: Did the District fail to provide adequate staff training?

B. Respondent's Legal Position and Additional Issues

The District denies it failed to provide a FAPE. The District noted Student was served and accommodated under a Section 504 plan at the beginning of the 2016-2017 school year. The District contends, on September ***, 2016, Student's Section 504 Committee placed Student in Homebound based upon a physician's recommendation due to *** (***) and ***.

The District argues a Full Individual Evaluation (FIE) and a psychological evaluation were conducted and completed in a timely manner. According to the District an initial Admissions Review and Dismissal Committee (ARDC) convened on December ***, 2016, and properly identified Student for special education as a student with an emotional disturbance (ED) and other (unspecified) health impairment (OHI). The District asserts the ARDC decided to continue Student's Homebound placement. The District further contends the Homebound placement was Student's least restrictive environment (LRE) and the District provided Student with an appropriate IEP designed to achieve meaningful academic and non-academic progress. Finally, the District argues Petitioner's IDEA claims are time barred by the one-year statute of limitations (SOL) and the case should have been dismissed.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. Change of placement to an appropriate private placement that can meet Student's unique needs.
2. An order requiring additional staff training to meet Student's unique educational needs as an autistic student.
3. A finding that Student's principal and teacher *** be held "legally responsible" and have adverse administrative action taken against their teaching licenses. [Dismissed by Order No. 6]
4. Reimbursement for Legal Services. [Dismissed by Order No. 6]
5. Mileage reimbursement.
6. Reimbursement for necessary private physical therapy (PT) and psychological treatment.
7. Referral of criminal charges against Student's principal and teacher *** [Dismissed by Order No. 6]
8. Reimbursement for private tutoring expenses.

B. Respondent's Requested Relief

1. Dismiss any claims arising outside the one year statute of limitations rule as applied in Texas;
2. Dismiss all claims arising under laws other than the IDEA; and
3. Find in favor of the District's proposed program and placement.

V. CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

The jurisdiction of a special education Hearing Officer in Texas is strictly limited to claims arising under the IDEA. Specifically, a Hearing Officer has the authority to determine claims related to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student. 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code §§ 89.1151(a), 89.1170.

Therefore, to the extent Petitioner raises claims under laws other than the IDEA, those claims have been or shall be dismissed as outside the jurisdiction of the Hearing Officer, including specifically claims under Section 504 of the Rehabilitation Act of 1973 (Section 504); the Americans with Disabilities Act; the Family Educational Rights & Privacy Act; the No Child Left Behind Act; Section 1983 and Title VI of the Civil Rights Act of 1964; and, the Technology Related Assistance for Individuals with Disabilities Act.

VI. FINDINGS OF FACT

1. Student is *** years old.¹ Student has a history of sporadic and inconsistent public school attendance with the District. Student first enrolled for *** on August ***, 2013, but was placed into *** (***) on September ***, 2013 at Parent's request.² Student completed *** on June ***, 2014. Student began *** grade on August ***, 2015, and withdrew on September ***, 2015, to be Homeschooled.³ Student attended *** grade for approximately *** days in 2015; Student was absent *** of those *** days.⁴ The record

¹ Respondent's Exhibit (RE)-3 at 1.

² RE-4 at 12.

³ RE-38, 39.

⁴ RE-3 at 2; Transcript (Tr.) at 346.

- is void of information concerning Student's education during the remainder of Student's *** grade year. Student initially enrolled for *** grade on September ***, 2016, and withdrew on March ***, 2017.⁵ Student reenrolled for *** grade on April ***, 2017, and completed *** grade on June ***, 2017.⁶ The record contains no explanation concerning the early withdrawal in March from *** grade.
2. Student has not attended school during the current 2017-2018 school year.⁷
 3. On September ***, 2016, Student was identified as qualifying for services under Section 504 for *** (***), ***, and ***. The Section 504 Committee determined Student had a physical or mental impairment that substantially limited Student's ability to perform major life activities. Student was placed in a Homebound setting.⁸
 4. Immediately after Student was placed in Homebound, the special education Full Individual Evaluation (FIE) process began. A psychological evaluation was completed on October ***, 2016, as a component of the FIE.⁹ The remaining portions of the FIE were completed on November ***, 2016.¹⁰ Excepting Behavior and physical therapy (PT), Student was timely evaluated in all suspected areas of disability.¹¹
 5. The ARDC informed Petitioner of the results of the FIE and made the Homebound placement decision on December ***, 2016.¹²
 6. Prolonged placement in a Homebound setting is educationally harmful and a very restrictive environment.¹³ Student has been provided Homebound services for two school years based upon a July 2016 physician's statement.¹⁴
 7. Student was *** District simultaneously conducted the FIE. Student was ***, with a medical diagnosis of (1) ***, (2) ***, and (3) Attention Deficit Hyperactivity Disorder (ADHD) (Combined Type).¹⁵
 8. *** suspected Student might have an autism spectrum disorder and recommended a

⁵ RE-58 at 2.

⁶ Tr. at 425.

⁷ RE-58.

⁸ RE-1, 2.

⁹ RE-3.

¹⁰ RE-4.

¹¹ RE-59.

¹² RE-23.

¹³ RE-1; Tr. at 497: "It is harmful to a student to stay on homebound. It's not – it's not good for a student to be in the most restrictive environment." *Id.*

¹⁴ *Id.*

¹⁵ Petitioner's Exhibit (PE)-45, 46 at 1.

- formal autism evaluation.¹⁶
9. The clinical psychologist who evaluated and treated Student, diagnosed Student with an autism spectrum disorder, below average adaptive behavior skills, ADHD, ***, ***, ***,¹⁷
 10. The District did not consult with the medical and psychological providers who were treating Student while the District was conducting its evaluation.¹⁸
 11. The FIE utilized appropriate assessment tools and strategies, did not focus on a single measure or assessment, used technically sound instruments, assessed Student in all known areas of disability except for Behavior and PT, and was sufficiently comprehensive to identify Student's educational needs.¹⁹
 12. Student's Admission, Review, and Dismissal Committee (ARDC) met on December ***, 2016, and based upon the FIE determined Student qualified for special education as student with: (1) an emotional disturbance, (2) a specific learning disability, and (3) a speech disorder.²⁰
 13. The District's psychological evaluation identified Student as "****" and severe ADHD and *** (***), ***, and ADHD (Hyperactive/Impulsive Presentation).²¹
 14. The FIE identified significant weakness in reading (reads at *** grade level in both English and Spanish), writing without assistance, and significant deficits in math (***). The FIE also identified behavior as a strength.²²
 15. The FIE and early school records identified problematic behavior issues. In May 2015 Student received an out of school suspension for *** days after ***.²³ The District's psychological assessment took into consideration the Parent's reports that Student had difficulties with other students and school staff bullying and hitting Student; and the school staff's reports that Student was physically aggressive with other children and that Student was a bully.²⁴
 16. Despite the prior aggressive behavior, the District did not conduct a Functional Behavior

¹⁶ PE-47.

¹⁷ PE-55.

¹⁸ Tr. at 313-14.

¹⁹ RE-4.

²⁰ RE-23.

²¹ RE-3 at 7.

²² RE-23 at 2-6.

²³ RE-37.

²⁴ RE-3 at 3; Tr. at 347-48 ("Because [Student] was giving problems with other kids Student was the bully. Student ***. Student was the one ***.").

Assessment (FBA) nor did the IEP include a Behavior Intervention Plan (BIP).²⁵ In fact, the initial IEP identified behavior as one of Student's strengths.²⁶

17. Student suffers from a "****" which is part of Student's ****. To treat a ****, the student must be reintegrated carefully and quickly back into a school setting—the longer a student suffering with a **** is kept out of school, the harder it is to reintegrate the student back into a school setting.²⁷
18. Student displays **** behaviors which are symptoms of Student's **** and are behaviors that impede Student's learning.²⁸
19. Parent strongly believes that on September ***, 2015, while Student was in **** grade, a teacher ***. Parent contends the ***. Parent conveyed these allegations to private medical providers resulting in Student's **** diagnosis. Private medical evaluations determined Student does have significant **** issues (***).²⁹
20. The District investigated the allegations of **** and was aware of Student's **** issues and how those issues made it more difficult for this ADHD student to sit and focus.³⁰ The FIE did not include a PT evaluation and the IEP does not provide for PT support.³¹
21. The evidence showed the District was aware that outside healthcare providers suspected Student suffers with an autism spectrum disorder and recommended further evaluation.³²
22. Student had normal peer interactions at home. Student played ***, had friends outside of school, and played ***. Student's social problems at school were the result of Student's ADHD and **** which caused Student to feel inadequate and ***. Because Student did not exhibit the same kind of social problems at home that Student did at school, Student did not qualify for special education as a student with autism. An autism spectrum disorder would manifest across all settings; it would not be limited to the school setting.³³
23. Student's FIE, including the psychological evaluation, determined Student does not have language or speech disorder, a nonverbal communication disorder, and does not have socialization disorder.³⁴ These are the three major criteria for identifying a student

²⁵ RE-23.

²⁶ RE-23 at 6.

²⁷ RE-3 at 5-6; PE-46 at 2; PE-50; Tr. at 217-19, 469-72.

²⁸ Tr. at 459-60.

²⁹ PE-46, 52.

³⁰ RE-27, 28.

³¹ RE-4, 23.

³² PE-47, 55.

³³ Tr. at 461-62.

³⁴ RE-4 at 2-6, 9-10; RE-23 at 3-4, 7-8.

with autism.³⁵

24. The ARDC convened to review Student's initial IEP on December ***, 2016. The IEP identified strengths and weaknesses in core academic subjects (***, ***, ***, ***, and ***), ***, and ***. The IEP contained measurable goals based upon present levels of performance: 2 goals for ***, and Reading; 2 Math goals; and 1 Reading goal. The IEP also contained a Counseling goal intended to address *** but that goal is not objectively measurable. The IEP included an extensive list of accommodations.³⁶ The IEP placed Student in a special education setting after the ARDC conducted a review of the Least Restrictive Environment (LRE) and concluded placement in a general education setting would prevent student from achieving Student's IEP goals and objectives and Student's intellectual deficits render Student's current levels of performance significantly below Student's current grade placement. The schedule of services provides for 30 minutes of counseling per week at flexible locations that include Student's home. The IEP identifies the immediate need to reintegrate Student back into a school setting.³⁷
25. At the conclusion of the 2016-2017 school year Student received passing final grades ***: (1) ***, (2) ***, (3) ***, (4) ***. Student failed *** and ***.³⁸
26. The duration of Student's December 2016 IEP was one-year; it expired on December ***, 2017.³⁹ Student has not had a current IEP since December ***, 2017.
27. Another FIE including a new psychological evaluation is needed before reintegrating Student back into school due to the amount of time Student has been out of a school setting.⁴⁰
28. Addressing and mitigating a *** requires parental cooperation, counseling offered by a Licensed Specialist in School Psychology (LSSP), and counseling delivered by related service providers.⁴¹
29. The District recognized the need for a reintegration transition plan, identified the needed components for the plan, but a reintegration transition plan has not been formally devised or implemented.⁴²
30. Parent agreed with the IEP goals and objectives and expressed satisfaction with the

³⁵ Tr. at 463-64.

³⁶ Re-23 at 12.

³⁷ RE-23.

³⁸ RE-56.

³⁹ RE-23 at 9-12.

⁴⁰ Tr. at 245.

⁴¹ Tr. at 217-18, 470.

⁴² Tr. at 219, 470-72.

Homebound teacher.⁴³

31. The plan to reintegrate Student back into school should include: (1) Prior to Student actually going to school, a counselor will teach *** techniques, ***; (2) Have Parent rehearse with Student ***.); (3) The following day Parent will drive Student to school ***. ***. *** (4) A positive reinforcement such as being allowed to *** or *** is provided as Student successfully completes each phase of the reintegration plan.⁴⁴
32. The District offered to fund IEEs in the areas of adaptive behavior and an FBA on November ***, 2017.⁴⁵ Parent withdrew consent for IEEs on January ***, 2018.⁴⁶
33. No evidence was presented to indicate the District failed to provide adequate staff training to assist with Student's academic and non-academic progress.
34. In the Complaint, Petitioner requested a private residential placement at ***. *** is not equipped to provide the necessary behavior supports Student needs to succeed academically and non-academically.⁴⁷
35. The District has the capability of integrating Student, with Student's unique issues and problems, into an appropriate educational setting, can offer necessary accommodations and behavior supports, and can provide a FAPE.⁴⁸

VII. STATUTE OF LIMITATIONS

Petitioner alleges Child Find claims under the IDEA beginning with Student's initial *** enrollment on September ***, 2013, but did not plead either exception to the Texas one-year SOL.⁴⁹ The District argued the accrual date, the "known or should have known" date, is December ***, 2016, because that was the day the ARDC made Student's initial placement decision.⁵⁰

During the due process hearing Petitioner did not offer any evidence concerning the

⁴³ RE-23 at 21.

⁴⁴ RE-23 at 21-22; Tr. at 470-74.

⁴⁵ RE-36; Order No. 8.

⁴⁶ Order No. 10.

⁴⁷ Tr. at 272.

⁴⁸ Tr. at 468-69.

⁴⁹ 20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C)-(D); 34 C.F.R. §§ 300.507(a)(2), 300.511(f); 19 Tex. Admin. Code § 89.1151(d)(1)-(2).

⁵⁰ 19 Tex. Admin. Code § 89.1151(c).

accrual date. The District's Student Summary Data was admitted into evidence without objection.⁵¹ That exhibit establishes the ARDC identified Student for special education, made Student's initial IDEA placement decision on December ***, 2016, assigned Student to *** for administrative tracking, and placed Student on Homebound services for the remainder of the 2016-2017 school year. The December ***, 2016, placement decision was the date Parent "knew or should have known" about the alleged action that serves as the basis for the Complaint. Therefore, December ***, 2016, is the accrual date for statute of limitations purposes.⁵²

VIII. DISCUSSION

A. Identification and Child Find

The IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The "Child Find" obligation is triggered when the school district has reason to suspect the student has a disability and to suspect the student is in need of special education services.⁵³

As discussed below, the credible evidence supports the conclusion that during the time period the FIE was being conducted, the District had reason to suspect Student had behavior issues and *** potentially requiring a FBA, BIP, and PT services to assist Student in benefitting from special education.⁵⁴

The failure to assess Student for behavior and PT were Child Find violations.

B. Duty to Provide FAPE

A free, appropriate public education is defined as special education, related services and specially designed personalized instruction with sufficient support services to meet the unique

⁵¹ RE-59.

⁵² 34 C.F.R. § 300.511(e); 19 Tex. Admin. Code § 89.1151(c).

⁵³ 34 C.F.R. §§ 300.8 (a)(1); .111(a)(c)(1).

⁵⁴ 34 C.F.R. § 300.34(a).

needs of the child in order to receive a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP.⁵⁵ The IDEA guarantees only a "basic floor of opportunity" the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction.⁵⁶

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, but the school district must provide Student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement.⁵⁷ The basic inquiry in this case is whether the IEP implemented by the District was reasonably calculated to provide the requisite educational benefit given Student's unique circumstances.⁵⁸

C. IEP

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. 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, and the duration and frequency of the services, and the location where the services will be provided.⁵⁹

D. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁶⁰ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999

⁵⁵ 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

⁵⁶ *Rowley*, 458 U.S. at 188-189.

⁵⁷ *Houston Ind. Sch. Dist. v. VP*, 582 F. 3d 576, 583 (5th Cir. 2009) *cert. denied*, 559 U.S. 1007(2010).

⁵⁸ *Rowley*, 458 U.S. at 206-20; *Andrew F. v. Douglas Cnty. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

⁵⁹ 34 C.F.R. §§ 300.22, 300.323(a).

⁶⁰ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

F.2d 127, 131 (5th Cir. 1993). In this case the school district was obligated to provide Student with FAPE during the 2016-2017 school year *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for this 2017-2018 school year. The burden of proof in this case is on Petitioner to show the school did not do so. *Id.*

In addition, Petitioner seeks a residential placement at *** at the District's expense with a slow reintegration plan for Student's eventual return to school, Student's home, and Student's community. The burden of proof is on Petitioner to show the proposed special education placement is not appropriate *and* placement at *** is essential and primarily oriented to enable Student to obtain an education.⁶¹

E. IEP Goals and Objectives

In developing an IEP, the ARDC must consider the student's strengths, parental concerns for enhancing the student's education, the results of the most recent evaluation data, and the student's academic, developmental and functional needs. For students whose behavior impedes his or her learning or the learning of others, the IEP must also consider positive behavioral interventions and supports and other behavioral strategies.⁶² The ARDC is also required to review, at least annually, the student's IEP and make any revisions needed to address lack of expected progress or on the basis of any re-evaluations, information provided by parents, or the student's anticipated needs. Consideration of the student's behavioral needs must be addressed in the annual review.⁶³

The evidence showed the ARDC convened on December ***, 2016, developed appropriately ambitious goals and objectives for the remainder of the 2016-2017 school year and for the upcoming 2017-2018 school year. The IEP was individualized, uniquely tailored to address Student's unique needs, and reasonably calculated to enable Student to achieve passing

⁶¹ *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009); 20 U.S.C. § 1412(a)(10)(c); 34 C.F.R. § 300.148(c).

⁶² 34 C.F.R. § 300.324(a).

⁶³ 34 C.F.R. § 300.324(b).

marks and advance from grade to grade.⁶⁴ At the conclusion of the 2016-2017 school year Student received low passing final grades ***: (1) ***, (2) ***, (3) ***, (4) ***. Student failed ***.⁶⁵ All academic goals and objectives were based upon present levels of achievement, contained measurable goals, and provided a description of specialized services and instruction Student was to receive.⁶⁶

F. Behavior

The December ***, 2016, IEP acknowledged Student was never observed in an educational setting while being evaluated or while the IEP was being drafted, and that Student was receiving Homebound services since September ***, 2016. All FIE observations were done in Student's home while Student was Homebound and receiving 1:1 services. The IEP identified behavior improvements comprising of the ability to ***, improved eye contact, and improved manners (*e.g.*, ***). The IEP notes Student had problems with aggression in ***, but concluded Student did not exhibit behaviors that impeded Student's learning or the learning of others as a *** grader in 2016. The IEP also notes Student frequently exhibited *** behaviors as an aspect of Student's ***. The District did not conduct a Functional Behavioral Assessment (FBA) as a component of the FIE and BIP was not included as a component of Student's FIE.

In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider -- and, when necessary to provide FAPE, include in the IEP -- the use of positive behavioral interventions and supports, and other strategies, to address that behavior.⁶⁷ Student's *** and ***, which are symptoms of Student's ***, are behaviors that impede Student's learning. As such, the District had reason to believe that Student, who has been identified with an Emotional Disturbance,⁶⁸ had behavior issues impeding Student's learning and

⁶⁴ 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)–(IV); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 102 S.Ct. at 3052-53 (holding an adequate education was provided when the student received personalized instruction and related services calculated by school administrators to meet the student's educational needs).

⁶⁵ RE-56.

⁶⁶ RE-23 at 9-11; 20 U.S.C. §§ 1414(d)(1)(A)(i)(II), (IV).

⁶⁷ 34 C.F.R. §§ 300.320(a)(4), 300.324(a)(2)(i), 300.324(b)(2).

⁶⁸ *See* 34 C.F.R. § 300.8(c)(4)(B)-(C) (listing two of the five identification criterion for an emotion disturbance as: “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; and/or

required assessment and interventions to mitigate.⁶⁹ The failure to consider and provide for needed behavior supports in an IEP and throughout the continuum of placements, risks denying FAPE and placing Student in an overly restrictive placements.⁷⁰ An FBA should have been conducted as a component of the FIE and a BIP should have been included in the December ***, 2016, IEP.

However, Student was enrolled for only *** days in *** grade during the 2015-2016 school year, and Student was absent several of those days. After *** days Student was withdrawn by Student's Parent to be homeschooled. During the 2016-2017 school year Student re-enrolled and was able to attend school through most of *** grade. There is nothing in the record to show Student had any significant disciplinary problems during *** grade (2016-2017).

Student has not attended school during the current 2017-2018 school year. At this point Student has been removed from an educational setting for too long to speculate whether positive behavior interventions, based upon assessment, are currently necessary to provide a FAPE. Prior to hearing, the District offered to fund IEEs in the areas of adaptive behavior and an FBA. Petitioner withdrew consent for those IEEs.

G. Services

1. Autism Evaluation

For students with autism in Texas, the ARD must also consider whether the student's IEP should include the following: extended educational programming, daily schedules reflecting minimal unstructured time and active engagement in learning activities, in-home and community-based training, positive behavior support strategies based on relevant information, future planning for post-secondary environments, parent/family training and support, suitable staff-to-student ratios, communication interventions, social skills supports, professional

inappropriate types of behavior or feelings under normal circumstances.”).

⁶⁹ 34 C.F.R. § 300.304(c)(4).

⁷⁰ See OSEP Dear Colleague Letter, 68 IDELR 76 (Aug. 1, 2016).

educator/staff support, and teaching strategies based on peer-reviewed, research-based practices for students with autism.⁷¹ This regulation is commonly referred to as “the Autism Supplement.”

The evidence showed the District was aware that outside healthcare providers suspected Student suffers with an autism spectrum disorder and recommended further evaluation. However, the FIE determined Student did not fit the IDEA’s autism criteria. Student did not display a developmental disability significantly effecting Student’s verbal and non-verbal communication. Student was assessed and determined not to have a speech disorder.

The Licensed Specialist in School Psychology (LSSP) who supervised Student’s FIE, has over 40 years’ experience as a LSSP and previously had a separate clinical practice. The Hearing Officer found the LSSP to be knowledgeable and very credible – her testimony was given significant weight. The LSSP testified that Student essentially had normal peer interactions at home. Student played with ***, had friends outside of school, and played ***. The LSSP attributed Student’s social problems at school to Student’s ADHD and *** which caused Student to feel inadequate and ***. Because Student did not exhibit the same kind of social problems at home that Student did at school, the LSSP concluded Student did not qualify for special education as a student with autism. This was persuasive evidence. An autism spectrum disorder would manifest across all settings; it would not be limited to the school setting.

Because Student was not identified with a developmental disability affecting verbal and non-verbal communication (*i.e.*, Student does not have a speech disorder) and social interactions (across all settings) Student is not eligible for special education as a student with autism.⁷² Consequently, the District did not fail to identify or provide services required by the Autism Supplement.

2. Physical Therapy (PT)

⁷¹ 19 Tex. Admin. Code § 89.1055(e).

⁷² See 34 C.F.R. § 300.304(c)(4), (6).

Petitioner contended that ***. Any claims that arose from that alleged incident are outside the one-year SOL and were not issues for the due process hearing. However, the record shows the District had notice that Student potentially has a physical condition that adversely impacts Student's ability to learn. The record showed prior to being identified for special education, Student received services and accommodations under Section 504 for *** and ***. As a related service, PT is required if necessary to assist Student to benefit from special education.⁷³ Thus, the District was obligated to evaluate in all areas related to the suspected disability which, under these circumstances, includes a PT evaluation.⁷⁴ In these circumstances, the remedy for failing to timely conduct a PT evaluation is to order the evaluation.

H. Staff Training

Petitioner alleged the District failed to provide adequate staff training to assist Student's academic and non-academic progress considering Student's unique circumstances. As with all issues designated for hearing, Petitioner bore the burden of proof on this issue.⁷⁵ No evidence was introduced at hearing that any of the District staff were inadequately trained or that the special education teachers were not "highly qualified." Petitioner did not meet Petitioner's burden of proof on this issue.⁷⁶

I. FAPE

The Four Factors Test

In Texas, the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and

⁷³ 34 C.F.R. § 300.34(a).

⁷⁴ 34 C.F.R. § 300.304(c)(4), (6).

⁷⁵ *Schaffer v. West*, 546 U.S. 49, 58 (2005).

⁷⁶ *Schaffer v. West*, 546 U.S. 49, 58 (2005); 20 U.S.C. § 1401(10)(B)(i)-(iii).

performance;

- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the “key” stakeholders; and,
- Positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

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 for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

1. Individualized on the Basis of Assessment and Performance

First, the evidence showed the December 2016 IEP was to be implemented for the remainder of the 2016-2017 school year, and was individualized on the basis of assessment and performance. The IEP expired on December ***, 2017, and that was Student’s only IEP. Student did not attend school consistently enough to adequately implement the IEP.

2. Least Restrictive Environment

Second, the evidence showed Student needed Homebound placement in July ***, 2016.⁷⁷ Homebound is a restrictive setting because a Homebound student is isolated from their peers – both disabled and non-disabled. Homebound students are expected to be confined for a minimum of four consecutive weeks as documented by a physician’s letter. The student’s ARDC determines the amount of services to be provided to the Homebound student in accordance with federal and state laws, rules, and regulations. While acknowledging a prolonged Homebound placement is educationally harmful and one of the most restrictive environments, Student has been placed in Homebound for two school years based upon a

⁷⁷ See 19 Tex. Admin. Code § 89.63(c)(2) (defining Homebound placement).

July 2016 physician's statement.⁷⁸

Student's need to reintegrate back into a school setting is another indicator that Student needs to be reevaluated to ensure Student is appropriately placed to maximize Student's learning opportunities and to minimize Student's impediments (including physical issues) to learning.⁷⁹ Based upon the physician's statement recommending Homebound due to *** and *** which interfered with Student's ability to function at school, Student was placed Homebound by Student's Section 504 Committee, and continued by the December 2016 ARDC.

However, the evidence showed Homebound is no longer the LRE for Student but an appropriate placement cannot be determined until Student is reevaluated. The District attempted to conduct a reevaluation and has offered a full reevaluation IEE to which Parent initially consented but later withdrew that consent. Under these circumstances, Student's placement in a Homebound setting for the relevant time period was Student's LRE.⁸⁰

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

Third, the evidence showed Student's services were provided in a coordinated and collaborative manner by District staff. Student attended most of *** grade during the 2016-2017 school year and was assessed and identified that year for special education. Student's ARDC, including Parent, met in December 2016 to review and approve the IEP. The IEP continued the Homebound placement which was scheduled to end on February ***, 2017, and the ARDC agreed on the need to reintegrate Student back into a school setting. Parent was a collaborative member of the ARDC. During Student's *** periods of enrollment and attendance, the evidence shows the District provided services, or attempted to provide services, in a coordinated and collaborative manner (*e.g.*, Father agreed with the IEP goals and objectives

⁷⁸ Tr. at 497:

"It is harmful to a student to stay on homebound. It's not – it's not good for a student to be in the most restrictive environment." *Id.*

⁷⁹ 34 C.F.R. § 300.303(a)(1).

⁸⁰ 34 C.F.R. § 300.114.

and expressed satisfaction with the Homebound teacher).⁸¹

4. Academic and Non-Academic Benefits

Student's prolonged absence has resulted in a lack of sufficient observation in an educational setting to gauge Student's academic performance or progress. Student, who has ***, did marginally pass *** at the conclusion of *** grade on June ***, 2017.⁸² In addition, due to Student's disenrollment and/or non-attendance, it is not possible to determine whether Student's educational program has resulted in non-academic benefit/progress.

The IDEA does not require the IEP to guarantee a certain level of accomplishment – only that the IEP is reasonably calculated to meet Student's needs given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). Furthermore, the school district is not required to provide Student with the best possible education. Student does not need to improve in every academic and non-academic area to receive an educational benefit. The issue is not whether the school district could have done more. Instead, the inquiry is whether Student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.*, 582 F. 2d 576, 590 (5th Cir. 2009). Due to Parent's decision to remove Student from the school setting, it is simply not possible to gauge whether Student received more than a *de minimus* educational benefit from the program provided given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, *supra*.

J. Residential Placement at School District Expense

Student must meet a two-part test in order to secure the requested placement at ***. First, Student must prove the school 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.*

⁸¹ RE-23 at 21.

⁸² RE-56.

Committee v. Dept. of Educ., 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

In this case, the District's proposed program to reevaluate Student and reintegrate Student back into the public school with a new IEP based upon a reevaluation is appropriate under the IDEA. The evidence showed the District has the capability of integrating Student, with Student's unique issues and problems, into an appropriate educational setting, can offer necessary accommodations, and can provide a FAPE.⁸³

The independent diagnostician's opinion that Student requires a residential placement was persuasively contradicted by the LSSP.⁸⁴ The LSSP agreed the District has the capability to successfully integrate Student, with Student's unique issues and problems, into an appropriate educational setting, whether that is a mix of general education, special education, a resource classroom, a behavior intervention classroom, *etc.*⁸⁵

Petitioner did not meet Petitioner's burden of proving Student's placement back into the public school was not appropriate.⁸⁶

K. Implementation of the IEP

Student's IEP was only implemented during the months Student attended *** grade during the 2016-2017 school year. The IEP expired in December 2017 and was not implemented at all during the current 2017-2018 school year. The failure to implement Student's educational program during the current school year is the result of Parent removing Student from school – not through any fault of District staff to properly implement the IEP.

L. Reevaluation

⁸³ Tr. at 468-69.

⁸⁴ Tr. at 468-69.

⁸⁵ *Id.*

⁸⁶ *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009); 20 U.S.C. § 1412(a)(10)(c); 34 C.F.R. § 300.148(c).

Student only attended *** grade for *** days, *** grade for approximately *** months, and has not attended any school for *** grade during the current 2017-2018 school year. Furthermore, Student was never observed in a school setting during Student's 2016 FIE. A reevaluation is necessary to determine Student's current levels of academic performance and functioning, to devise an appropriate IEP, and to identify necessary services.

IX. CONCLUSIONS OF LAW

1. The District is an LEA responsible for complying with the IDEA as a condition of the State of Texas receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Student, by next friend, Parents, (collectively, Petitioner) bears the burden of proof on all issues raised in Petitioner's complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The Texas one-year statute of limitation (SOL) began running one year from the date Parent knew or should have known about the alleged action that serves as the basis for the request. Petitioner's IDEA claims arising during the 2016-2017 school year fall within the one-year SOL rule applied in Texas. 19 Texas Administrative Code § 89.1151(c).
4. The District timely evaluated Student in all suspected areas of disability except for physical therapy (PT) and a functional behavioral assessment (FBA). 20 U.S.C. §§ 1412(a)(3)(A), 1414(b)(3)(B); 34 C.F.R. §§ 300.304(c)(4), (6), 300.111(a)(1)(i); *El Paso Independent School Dist. v. Richard R.*, 567 F.Supp.2d 918, 949-52 (W.D. Tex. 2008).
5. Student's attendance has not permitted implementation of the IEP and necessitates the need for a reevaluation to determine Student's educational needs and need for related services. 34 C.F.R. § 300.303.
6. Student does not qualify for special education or services as a student with autism. 34 C.F.R. § 300.304(c)(4), (6).
7. The District did not violate Student's procedural or substantive rights by failing to consider the Texas Autism Supplement. 19 Tex. Admin. Code § 89.1055(e).
8. Petitioner did not meet Petitioner's burden of proof that District staff, including special education teachers, was not adequately trained. 20 U.S.C. § 1401(10)(B)(i)-(iii); Tex. Ed. Code § 21.003(a).


9. Respondent provided Petitioner with a free, appropriate public education and devised an appropriate IEP in December 2016, including appropriate IEP goals and objectives designed to challenge Student and to promote academic and nonacademic progress based on present levels of academic achievement and functional performance (PLAAFP's) with measurable goals. Petitioner did not meet Petitioner's burden of proof on this issue. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Schaffer ex. rel. v. Weast*, 546 U.S. 49, 52 (2005); *C.G. v. Waller Ind. Sch. Dist.*, 2017 U.S. App. LEXIS 11139* (5th Cir. 2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 34 C.F.R. §§ 300.22, 300.323(a); 19 Tex. Admin. Code § 89.1055(e).
10. Petitioner is not entitled to a private placement at District expense. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 297 (5th Cir. 2009).
11. All of Petitioner's claims arising under any laws other than the Individuals with Disabilities Education Act are outside the jurisdiction of a special education Hearing Officer in Texas. 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. §§ 300.503(a); 300.507; 19 Tex. Admin. Code § 89.1151(a).

X. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief is **GRANTED IN PART AND DENIED IN PART AS FOLLOWS:**

1. The District shall provide notice to Parent within ten school days of this decision becoming final of a Reevaluation that includes a physical therapy (PT) evaluation and a functional behavior assessment (FBA) and transmit the requisite parental consent. The District will conduct the Reevaluation upon receipt of consent. The District shall complete the assessments within forty-five school days after receiving parental consent.
2. The ARDC shall meet within thirty calendar days of the Report of Reevaluation to review and implement the evaluators' recommendations, including PT services and a BIP if necessary to assist Student to benefit from special education. All other relief not specifically stated herein is **DENIED**.

SIGNED May 22, 2018.



David A. Berger
Special Education Hearing Officer
For the State of Texas

XI. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code § 89.1185(p); Tex. Gov't Code § 2001.144(a)-(b).