

STUDENT, <i>B/N/F</i> PARENT,	§	BEFORE A SPECIAL EDUCATION
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
SAN ANTONIO INDEPENDENT SCHOOL	§	
DISTRICT	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, ****, b/n/f **** (Student or Petitioner), filed a Request for Due Process Hearing (Complaint) with the Texas Education Agency (TEA), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 *et. seq.* Student asserted multiple issues in Student's Complaint against San Antonio Independent School District (Respondent or the District or SAISD), alleging that the District denied Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE) based upon multiple substantive and procedural violations of IDEA occurring from September 4, 2017, to September 4, 2018:

- (1) Respondent continually failed to implement Student's Individualized Education Program (IEP) and Behavior Intervention Plan (BIP), within the one-year Statute of Limitations (September 4, 2017 – September 4, 2018);
- (2) Respondent failed to develop and provide Student with an appropriate IEP and BIP containing measurable goals and objectives and containing appropriate related services, such as counseling;
- (3) Respondent failed to provide staff working with Student with sufficient behavioral supports and training to address Student's behavior;
- (4) Respondent interfered in the Parents' ability to be a meaningful participant in Student's Admission, Review, and Dismissal Committee (ARDC) by predetermining the outcome of Student's Manifestation Determination Review (MDR);

- (5) Respondent failed to assess Student properly to determine the nature and extent of Student's needs, particularly in the area of behavior, by failing to provide an appropriate Functional Behavior Assessment (FBA);¹
- (6) Respondent failed to provide Student with appropriate Extended School Year ("ESY") services;
- (7) Respondent failed to provide Student with, and placement in, an appropriate educational placement.

Petitioner generally requested that Respondent provide Student with FAPE, which requires the granting of the following relief:

- (1) An order directing Respondent to place Student in a private educational setting and to pay for all related services, including transportation;²
- (2) An order directing Respondent to pay Petitioner's attorneys' fees and costs;³
- (3) Alternatively, an order directing Respondent to take specific actions required by IDEA;⁴
- (4) An order directing Respondent to provide Petitioner with an appropriate behavior plan, which is (a) based on data collected over a period of time, (b) reviewed periodically, and (c) measurable. Basic to this behavior plan is the use of a positive behavior system;
- (5) An order requiring Respondent to adopt the recommendations of Respondent's evaluations;
- (6) An order requiring Respondent to develop an educational plan that will reduce or eliminate Student's undesirable behaviors;
- (7) An order requiring Respondent to reimburse Student's parents for all out-of-pocket expenses, including those related to Student's private summer school placement;⁵
- (8) An order requiring Respondent to teach Student effective behavioral and functional skills;
- (9) An order requiring Respondent to provide Student with one-on-one support; and

¹ Petitioner requested an Independent Educational Evaluation (IEE) and an independent FBA as relief for this issue; during the PHC the parties stated that these requested assessments were no longer in issue.

² The undersigned ordered Petitioner to provide Respondent with the name and address of the requested private placement prior to the Due Process Hearing. Petitioner provided only "****."

³ SEHOs do not have jurisdiction over an award of attorneys' fees. The undersigned directed the parties to raise this issue in federal court, if appropriate, after the Decision is rendered.

⁴ The undersigned ordered Petitioner to provide Respondent with a list of the specific actions required by IDEA that are not already clearly presented in this case. Petitioner failed to do so.

⁵ The undersigned ordered Petitioner to provide Respondent with a list of all requested reimbursement requests. Petitioner only requested solely ***

- (10) An order requiring Respondent to provide Student with compensatory educational and related services in a placement that has fully trained personnel who are equipped to work with Student appropriately.

II. PROCEDURAL HISTORY

Student filed Student's Complaint against the District on September 4, 2018. On that same day, TEA assigned this matter to the undersigned Special Education Hearing Officer (SEHO) and sent a copy of the Complaint and Notice of Filing to Respondent. On September 5, 2018, the undersigned sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference (PHC) would convene on October 10, 2018; the Due Process Hearing would take place on October 29, 2018; and the Decision would issue on, or before, November 18, 2018.

On September 14, 2018, Respondent filed its (1) Response to Petitioner's Request for Special Education Due Process Hearing and Required Notice, and (2) Respondent's Motion for More Definite Statement. After reviewing the Complaint and Respondent's Motion, the undersigned denied Respondent's Motion for More Definite Statement on September 17, 2018.

The parties convened the Resolution Session on September 17, 2018, but failed to reach an agreement.

On October 10, 2018, the parties convened the PHC. In attendance were the following: (1) Ms. Karen Seal, Petitioner's counsel; (2) Ms. Stacy Ferguson, Respondent's counsel; (3) the undersigned SEHO; and (4) the court reporter, who made a record of the telephone conference. The parties discussed the issues and Respondent requested that Petitioner provide additional information regarding the following: (a) the name and address of Petitioner's requested private placement; (b) a list of the specific actions Respondent was required to take under IDEA that are not already clearly presented in Petitioner's complaint; and (c) a list of all items for which Petitioner seeks reimbursement requests.

Also during the PHC the parties jointly requested a continuance of the Disclosure Deadline, Due Process Hearing, and Decision Deadline to allow time for additional preparation and discussion. Finding good cause for the requested continuance, the undersigned granted the requests and continued the Disclosure Deadline to October 29, 2018, the Due Process Hearing to November 6-7, 2018, and the Decision Deadline to November 27, 2018.

On October 24, 2018, Petitioner filed a second Motion for Continuance of the Due Process Hearing, set for November 6-7, 2018, stating that counsel had personal and work responsibilities that required the undersigned to re-schedule the Due Process Hearing to mid-January. Respondent objected to such continuance but agreed to continue the matter to November 27-28, 2018. The undersigned contacted the parties and informed them that the continuance would be granted but not for the period requested by Petitioner. Petitioner and Respondent agreed to hold open the dates of December 17-19, 2018, for the Hearing. Accordingly, the Petitioner's Motion for Continuance was granted and the new dates for the Hearing and Decision were continued as follows: December 10, 2018, Disclosure Deadline; December 17-19, 2018, Due Process Hearing; and January 18, 2019, Decision Deadline.

On Thursday, December 6, 2018, Petitioner filed a third Motion for Continuance, stating that counsel for Petitioner had failed to confirm the availability of the Student's therapist, who was unavailable to attend the December 17-19, 2018, Due Process Hearing. Petitioner requested that the Hearing be re-scheduled to January 17, 18, or 19, 2019. Respondent opposed this third continuance request, asserting that Petitioner had options available to garner the therapist's testimony. Respondent contended that further continuance would necessitate redundant work and expense as well as the Student's continued placement in a setting that Respondent believed is harmful. Finding that Petitioner's third Motion for Continuance failed to present a good-cause basis for continuing the matter to mid-January, the undersigned denied this motion and reiterated the previously agreed Hearing dates: December 10, 2018, Disclosure Deadline; December 17-19, 2018, Due Process Hearing; and January 18, 2019, Decision Deadline.

The parties presented their Disclosures on time. The Due Process Hearing convened on December 17, 2018, and concluded on December 20, 2018. ⁶ The Hearing convened at San Antonio ISD. Both parties introduced documentary evidence; Petitioner called several witnesses who were cross-examined by Respondent; Respondent called several witnesses who were cross-examined by Petitioner. Petitioner was represented by Student's attorney, Ms. Karen Seals. Also in attendance were Petitioner's Mother and Mr. Rafael Anguiano Arzola, Ms. Seal's intern. Respondent was represented by counsel, Ms. Stacy Ferguson. Also in attendance was Ms. ^{***}, Senior Executive Director of Special Education for the District.

During the Hearing Petitioner attempted to include an additional issue, failure to include, and provide, appropriate speech to address Student's speech impairment (SI). Respondent objected that nowhere in Petitioner's Complaint was any speech issue raised either in the list of issues or requested relief. Respondent pointed out that during the PHC, the undersigned specifically asked Petitioner's counsel whether speech was an issue, to which Petitioner's counsel failed to respond, stating vaguely that she did not know what speech services were being offered this school year, 2018-19.

Petitioner's counsel responded that the Complaint included a catch-all issue, which one could infer includes issues with speech. ⁷ The undersigned granted Respondent's objection to Petitioner's seeking any relief for issues relating to speech therapy but invited Petitioner to provide a supporting case for this position [T1 p.212/12-p.221/4]. Petitioner did not provide any legal support during the Hearing; Petitioner filed a Sufficiency Argument on January 28, 2019, the same date the parties' briefing was due, which sets out Petitioner's argument in support of allowing unidentified issues under the catch-all phrase. Respondent filed a Response on January 29, 2019. Petitioner's Sufficiency Argument was filed after the Hearing was closed. Case law does not support Petitioner's assertion. ⁸

At the conclusion of the Hearing, the parties requested time to make a written closing argument. Expecting that the record would be delivered on January 9, 2019, the agreed briefing deadline was set for January 21, 2019, and the Decision Deadline was extended to January 28, 2019. The complete record was not delivered until January 11, 2019. As such, the parties requested additional time and an extension of the Decision Deadline. Finding good cause, the undersigned continued the briefing deadline to January 28, 2019,

⁶ The Hearing convened over three full days of testimony, December 17-19, 2018. On December 20, 2018, the parties, SEHO, and court reporter convened via telephone to take the testimony of one remaining witness for Petitioner.

⁷ Petitioner's catch-all issue states as follows: Whether the Respondent agency failed to identify the child as having a disability needing special education and **related services** such as counseling as a related service with a sufficient amount of time to support Student's needs, behavioral interventions, **and other services**.

⁸ Petitioner's Sufficiency Argument is denied in this Decision.

and the Decision Deadline to February 4, 2019.

Respondent and Petitioner filed and served their closing arguments on January 28, 2019. The Decision of the Special Education Hearing Officer is being delivered to the parties on the agreed deadline: February 4, 2019.⁹

III. FINDINGS OF FACT

Based upon the evidence presented in the Due Process Hearing, the following Findings of Fact are rendered:

1. SAISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEA and its implementing rules and regulations.
2. Petitioner is ***-year-old student who currently attends school at the ***, (***) ***, in SAISD.¹⁰ Student is in the *** grade. Student qualifies for special education and related services under the primary disability of Other Health Impairment (OHI), based upon Attention Deficit Hyperactivity Disorder (ADHD); Emotional Disturbance (ED); and Speech Impairment (SI).
3. Student attended *** at *** and ***. Student had already been diagnosed with ADHD. Because Student was having behavior problems at ***, the school asked Student to withdraw from the campus until Student's medication could be regulated [T2, p.326/18 – p.327/9].

School Year 2015-16 (** Grade):

4. In school year 2015-16, Student attended *** grade at *** in the *** Independent School District, where Student received special education services under the eligibilities OHI (ADHD) and SI [R#25-23; R#11-1]. Student manifested a severe speech impairment in the area of fluency (***) [R#11-31]. Petitioner received special education services in the general education setting, with the exception of speech services [R#11-15]. Student was performing at an appropriate age/grade level on all academics, except *** [R#25-4]. Student's *** teacher rated Student's academic characteristics as poor, noting that Student was reading on a *** level in *** [R#25-4]. Student's November ***, 2015, ARDC determined that Student would receive special education forty (40) minutes per week (pull-out speech therapy); and general education *** minutes per week, including sixty (60) minutes per week reading support [R11-49]. Student's April ***, 2016, ARDC maintained these services [R#11-15].
5. Student's behavior in *** grade was not so severe that Student was ever sent home [T2. p.322/16]. The ARDC recommended some accommodations for teachers and staff working with Student: (1) establish a calm, relaxed atmosphere; (2) speak in a relaxed, unhurried way, pausing frequently

⁹ References to the Due Process Hearing Record are identified as follows: "T#, p.#/#." refers to the particular volume of the Certified Court Reporter's Transcription of testimony and the specific page and line numbers contained therein; "P#-#" refers to Petitioner's Exhibits by number and page; "R#-#" refers to Respondent's Exhibits by number and page.

¹⁰ *** is not Student's home school. It is a ***. Parents *** students are ***. *** is not just district-wide; *** [T3. p.618/22 – p.619/11]

when talking to Student; and (3) try not to interrupt Student when Student is speaking [R#11-8 & 42]. Student's October ***, 2015, ARDC noted that Student's emotional/behavioral/social skills were poor in the following areas: (1) adapting to new situations without getting upset; (2) making and keeping friends at school; (3) working cooperatively with others, and (4) initiating activities independently [R#25-4; T2, p.324/15 - p.326/2].

6. *** ISD never developed a BIP for Student.

School Year 2016-17 (** Grade):

7. Student's family returned to San Antonio in school year 2016-17. Student attended *** in San Antonio. Student's Mother had attempted to enroll Student in the *** but the District could not guarantee Student's placement for 2016-17. Accordingly, she placed Student in this private school with the hope of getting Student accepted at *** for the 2017-18 school year.

School Year 2017-18 (** Grade):

8. Petitioner's Mother enrolled Student in ***, ***, at the beginning of school year 2017-18. At that time, Respondent had no information that Petitioner had ever received special education services. The prior year Student attended a private school that provided no special education services to Student. Accordingly, there was no IEP to implement.
9. On September ***, 2017, Respondent received records from *** ISD showing that Petitioner had received special education two years earlier in *** grade. The District immediately contacted *** ISD requesting information related to Student's special education program [R#55-1]. At this time Student's teachers were beginning to observe Student struggling.
10. Subsequently, Student's Mother provided the District with a binder containing special education information from *** ISD.¹¹ Although Student's Mother believed she provided the special education information at the beginning of the school year, District witnesses established that she did not do so until October 2017 [T2, p.399/4-25; T3, p.623/9-12; R#55-1].
11. The District's "child find" duty was triggered upon its receipt of (1) the special education information from *** ISD, (2) the Parent's binder of special education services, and (3) information from Student's teachers concerning Student's emerging struggles.¹²
12. The District immediately put in motion appropriate steps to place Student in special education if that was deemed appropriate. The campus counselor requested a Tier 3 meeting on October ***, 2017 [R#56]. Tier 3 meetings are part of a District's Response to Intervention (RTI) process and are typically convened to see whether a student should be referred to special education [T3, pp.7-24]. The school's Associate Principal arranged for observations of Student's classroom *** [R#58; T3, pp.630-631]. The *** has a partnership with ***. *** in that *** provide support through

¹¹ Student's Mother was unclear as to when and to whom she provided this binder of information [T2, p.329/12-25; p.330/1-11].

¹² Student was exhibiting behaviors that disrupted Student's learning and the learning of others during certain times of the day [R#10-21]

professional development. The *** have the flexibility and ability to fill in the classrooms and provide coaching for the teachers. Student's general education teacher requested the observations to aid her in developing appropriate strategies with Student [T3, pp. 630-31]. At that time, the Special Education teacher also provided behavioral support that was not scheduled or required by Student's IEP. This "unscheduled" behavior support was provided two (2) or more times a week on average [T.2, p.402/15-25; p.403/1-18].

13. On October ***, 2017, the District executed an Agreement to Implement, which officially placed Student in Special Education [R#11-1&2]. The District established Student's interim special education services to run from October ***, 2017, to November ***, 2017: ***, thirty (30) minutes two (2) times per week classroom reading support [R#11-2]; and speech therapy thirty (30) minutes eight (8) times per nine (9) weeks in special education [R#11-2].¹³
14. On November ***, 2017, Student's ARDC convened a permanent placement ARDC and although the Committee agreed that additional behavioral testing was needed, the Committee wanted to give Student's medication and routine a chance to stabilize [R#10-22]. The ARDC determined that Student would remain in general education ***, thirty (30) minutes two (2) times per week classroom support for ***, direct speech therapy thirty (30) minutes every other week during the first eight (8) weeks of a grading period, *i.e.*, four (4) sessions per nine-week grading period with the ninth (9th) week for monitoring Student's progress and generalization of skills in the classroom. Speech therapy was to be provided by a licensed speech language pathologist or a licensed speech language pathology assistant [R#10-18].
15. The Committee developed measurable goals in the areas of Adaptive Behavior; English/Language Arts and Reading; Speech Therapy - Language, Speech Therapy – Articulation, and Speech Therapy- Fluency [R#10, pp. 7-10].
16. The November ***, 2017, ARDC discussed Student's increasing behavioral problems. Student had difficulty staying on task; Student constantly was moving unless Student was reading or using technology; Student had difficulty making transitions; Student showed impulsive frustration and anger, mostly over causes that were not immediately apparent to others; Student's anger drove Student to ***, and *** when Student was upset with them [R#10-4]. The Committee likewise noted that some accommodations were working on Student's behavior: frequent and consistent breaks with exercise (especially between ***); shortened assignments; working in small groups with the teacher in subjects other than reading; using a visual behavior log with points earned for rewards; asking Student if Student ***, written reflections; and environmental change when Student became upset [R#10-4].
17. While stating that Student's behavior impeded Student's learning and/or that of others, the November ***, 2017, ARDC did not develop a Behavior Intervention Plan (BIP). Rather, the Committee agreed upon accommodations regarding altering assignments, instructions, and managing behavior [R#10-11]; use of a Behavior Contract; consultation with a behavior specialist;

¹³ This speech therapy amount may have been a misstatement. The statement on Student's November ***, 2017, ARDC paperwork states that Student would "continue direct speech therapy services / 30 minutes / 1 x every 2 weeks / weeks 1-8 of a 9 week grading period" [R#10-3]. This indicates the Student had been receiving speech therapy four (4) times per grading period instead of eight (8) times per grading period.

establishment of rapport; use of individualized skills training to address social and behavioral deficits; and use of reinforcement/praise for appropriate behavior [R#10-5].

18. The November ***, 2017, ARDC reached consensus [R#10-23].
19. On December ***, 2017, Student committed a very serious physical assault on another student, which resulted in Student's assignment to the Disciplinary Alternative Education Program (DAEP) from ***, through ***. Prior to convening the Student's Manifestation Determination Review (MDR), the District performed a psychological evaluation to determine if Student had an Emotional Disturbance (ED). This evaluation did not find that Student met the qualifications for eligibility as a student with an ED [R#8-2]. The District assigned a *** to be with Student in the *** setting.
20. On December ***, 2017, Student's ARDC met for the MDR. Noting that Student's recent evaluation did not find Student eligible for special education services under the qualifying disability of ED, the Committee determined that the physical aggression against the student was not a manifestation of Student's OHI disability. The ARDC reviewed the December ***, 2017, FBA and developed a BIP that would address Student's physical aggression and verbal aggression [R#8-2].
21. Student's BIP provided that Student would follow the Student Code of Conduct, subject to IDEA limitations. The BIP provided aid to teachers and staff in establishing the classroom environment, classroom strategies, a reward system, social skills training, and consequences reasonably calculated to improve conduct [R#8, pp.6-7].
22. Student's December ***, 2017, Manifestation ARDC reviewed recent information regarding Student's spiraling negative behaviors. Student's behavior had come to the attention of school staff and included physical aggression toward other students and adults. Student manifested severe *** reactions if Student ***, ***, or if Student received a directive with which Student did not agree [R#8-8].
23. The December ***, 2017, Manifestation ARDC reached consensus [T2, p.343/16-17; R#8-2]. Student's Mother was in attendance and was allowed to say what she wanted during the MDR [T2, p.349/6-21]. During that time, Student's Mother failed to raise any concern regarding whether the ARDC had pre-determined the outcome of the meeting.
24. On January ***, 2017, Student's Mother wrote a letter specifying concerns about the MDR. She stated her disagreement with the MDR and every component of Student's IEP, BIP, FBA, FIE, and psychological assessment. She requested an IEE that would include an FBA, which the District granted. However, she did not mention any belief that the MDR had been pre-determined [R#7-11].
25. ***'s Associate Principal observed Student in the DAEP. There were ***. Student was compliant and worked well [T2, p.642/1-14]. The classroom was highly structured [T2, p. 643/2-5]. Student did not display any physical or verbal aggression at DAEP [T#5-2]
26. Student completed Student's DAEP assignment on ***, 2018, and was released to return to Student's *** on February ***, 2018 [R#64-1]. Student's Home School Transition Report showed that Student made a *** in *** classes and *** [T#64-4].

27. On ***, 2018, Student's ARDC met to assist Student in Student's transition back to *** [R#6]. Student would be provided with a written schedule for each day to help Student transition. Stories and visuals were developed to help Student understand expectations for indoor recess due to inclement weather and/or due to Student's inability to follow outside recess rules [R#6-2]. Student would have *** and would be allowed to ***. Student would use a daily behavior report card to earn points towards rewards. Points would not be taken away when Student made poor choices [T#6-2]. The Committee developed plans for Student's use of technology. Student would be able to use technology instructionally and as a reward at the end of the day [R#6-2].
28. Student's ARDC developed a social skills plan, which provided Student with one-on-one social skills training by a staff member for fifteen (15) minutes every day before lunch. The skills would gradually be integrated into Student's class time and interactions with other students [R#6-2]. The ***, 2018, ARDC reached consensus [R#6-3].
29. *** [T2, p.360/11-361/12].
30. On March ***, 2018, the District held a Staffing in light of Student's recent ***. The group met to discuss counseling services, to consider revising Student's goals based upon Student's recent FBA and BIP, and to address *** recommendation for Autism testing [R#30-2].
31. The ARDC met on April ***, 2018, to review Student's progress. The Committee review Student's most recent FBA [P#7-2]. The ARDC added individual weekly counseling sessions: one (1) forty-five (45) minute session per week for twelve (12) weeks [P#7-5]; the Committee adjusted Student's behavior goals by removing the consequence of calling Student's Mother and/or sending Student home for the remainder of the day [P#7-2 & 10]; the ARDC made changes to Student's behavioral contract/point sheet to reduce the possibility Student would lose Student's rewards early in the day, and the Committee recommended that Student's technology reward time last for five (5) to ten (10) minutes at the time [P#7-2].
32. On April ***, 2018, Student was again *** for serious physical aggression. ***. The District decided to change out the Student's *** for a *** (***), who would have more training in aiding Student to control Student's behaviors to see if the Student's behaviors could be brought under control.
33. On May ***, 2018, Student's ARDC met to review Student's status. The most recent psychological testing, done on the basis of the recommendation of ***, showed that Student did not meet the eligibility criteria for Autism; however, Student did meet the criteria for ED [R#4-23]. The ARDC discussed Extended School Year (ESY) services but nothing was agreed. Student's Mother requested that Student be *** grade during school year 2018-19.
34. The May ***, 2018, ARDC proposed that Student be placed in a ***, which is *** and it is a more restrictive environment than ***. Student's Parent voiced concerns about the proposed placement on the grounds that Student had endured many classroom changes. The District explained that in the ***, there would be smaller classes and an integration of social skills into the curriculum [R#4-23]. The ARDC was tabled to allow the Parent to visit the recommended *** at *** and ***.

35. The ARDC reconvened on May ***, 2018. The Parent shared her concerns about the *** she visited. She believed that Student would not do well in a classroom with many students; she was concerned that the *** would not push Student to excel academically. The Parent's real concern with both of the *** was her perceived notion that both schools were substandard and beneath her ***'s academic capabilities. The Parent visited *** but only drove by ***.
36. The District raised concerns about the multiple behavior problems Student had been demonstrating since the May ***, 2018, ARDC meeting. The Parent requested that the District pay for ***; the District refused but offered ESY services to address Student's behavior needs. The Committee did not reach consensus.
37. The Committee continued Student's goals for Adaptive Behavior; English/Language Arts and Reading; Speech Therapy – *** (developed at the April ***, 2018, ARDC meeting); and Counseling as a related service [R#4/6-11]. Although the ARDC paperwork noted that Student's IEP would continue to be delivered at *** in the general education setting, with speech and counseling pull-out, the ARDC strongly recommended that Student be placed in a *** [R#4-24].
38. Student's ARDC met on June ***, 2018, to review Student's continuation of eligibility and program specifics for special education [R#3]. The Committee discussed the status of the IEE, which was expected at the end of July or early August. The District again recommended Student's placement in a *** so that Student's academic and behavioral needs could be met. The Parent voiced concerns that Student would mimic the behavior of other student in the ***. The Parent wanted continued *** placement but in the *** *** grade for the 2018-19 school year [R#3-24].
39. The June ARDC recommended ESY services, with transportation available. Student would be working on targeted behavior goals and Student would receive counseling service one (1) time per week. The Parent declined these ESY services because they were not provided throughout the summer and she felt the services would not be individualized to meet Student's targeted needs [R#3-24].
40. The June ARDC noted that Student would be placed in a *** on August ***, 2018 [R#3-24].
41. On August ***, 2018, Student's ARDC met to address Student's 2018-19 IEP and placement. The Committee reviewed the behavior data found in Review 360 and gathered through the FBA. *** incidents of physical aggression were noted. Student's noncompliance, verbal outbursts, physical aggression, and elopement were reported. The Committee discontinued Student's singular Adaptive Behavior goal and adopted four (4) new goals that were broken down based on the FBA. The Committee agreed to continue an academic goal for writing; it agreed that Student's Speech Therapy-*** goal would be addressed through the modifications of the goal [R#2-24].
42. The ARDC proposed to place Student at *** in the *** [R#2-24]. Student's Mother did not agree with this recommendation and requested a ten-day reconvene ARDC.
43. The ARDC reconvened on August ***, 2018 [R#1]. The Committee placed Student at *** in the ***, which is a *** class [R#1-25]. The Committee reviewed an OT evaluation and determined that Student did not need OT for Student's ***. Student's Advocate disagreed with Student's behavior

goals. She disagreed with how the supporting data was collected and how it was used to write the FBA. The disagreement centered on the definition of “physical aggression” and “elopement.” The Committee disagreed with the Advocate’s position, noting that the operational definition of “elopement” was broad and understandable [R#1-28].

44. Student’s Mother did not agree with the FBA; she did not agree with Student’s placement in the ***. The Committee did not reach consensus [R#1-28 & 31].
45. Student’s behaviors continued to escalate throughout the spring, despite the help of a *** and ***, a comprehensive BIP, an appropriate tracking system, and trained teachers and staff who implemented Student’s program and manifested a genuine desire to help Student succeed academically and behaviorally. When Student continued to engage in serious physical and verbal aggression, which resulted ***, the ARDC made the recommendation to move Student to a more restrictive setting. At the time, Student’s Mother and Student’s doctors did not know why Student’s behaviors were escalating. Student’s *** had been reviewed and revised during Student’s *** [T#2, p.361/5-9; p.583/1-5]; however, this did not account for the increasing severity and frequency of Student’s behaviors [R#45].
46. As the school year progressed, Student exhibited numerous and very serious and dangerous behaviors:
 - *** [R#45/1,2,4,23,45,56];
 - *** [R#45/3,4,7];
 - *** [R#45/5-8];
 - *** [R#45-10; T2/8-12];
 - *** [R#45/12 & 14];
 - *** [R#45/16-17];
 - *** [R#45-24];
 - *** [R#45-33].
47. The evidence failed to prove that Student’s appropriate placement for school year 2018-19 was at ***. To the contrary, the evidence proved that Student needs a very structured environment in a low student-to-teacher ratio; Student needs to have very limited transitions; Student needs teachers trained in behavioral management [T4, pp. 975-981].
48. Student’s appropriate placement for the remainder of this school year is in the *** at *** or ***. This decision was made by a group of persons knowledgeable about Student, the meaning of Student’s evaluation data, and the placement options. The Student’s removal from general education into a *** classroom is based upon Student’s dangerous behaviors, which were continuously escalating despite the use of supplementary aids and services. The dangerous and intrusive behaviors were affecting Student’s and Student’s class mates’ ability to achieve educational success.
49. The evidence did not to prove that Respondent continually failed to implement Student’s IEP and BIP between September 4, 2017, and September 4, 2018’

50. The evidence did not prove that Respondent failed to develop and provide Student with an appropriate IEP and BIP, containing measurable goals and objectives, and containing appropriate related counseling service.
51. The evidence did not prove that Respondent failed to provide teachers and staff, who were working with Student, sufficient behavioral supports and training.
52. The evidence did not prove that Respondent continually failed to implement Student's IEP and BIP between September 4, 2017, and September 4, 2018. During the first month of starting school, the District had no reason to suspect that Student needed special education services. At the point when the District had reason to suspect a need for special education services, the District contacted the *** ISD for all of Student's special education paperwork, convened an October ***, 2017, meeting to enroll Student in special education, and by November, the District had an IEP in place, and by December, the District had a BIP in place.
53. The evidence did not prove that Respondent interfered in the Parent's ability to be a meaningful participant in Student's ARDC by pre-determining the outcome of Student's MDR.
54. The evidence did not prove that Respondent failed to assess Student properly to determine the nature and extent of Student's needs, particularly in the area of behavior. The evidence did not prove that Respondent failed to provide an appropriate FBA.
55. The evidence did not prove that Respondent failed to provide Student with an appropriate ESY in summer 2018.
56. The evidence did not prove that Respondent failed to provide Student an appropriate educational setting.

IV. DISCUSSION

Student was enrolled in the ***, ***, at the beginning of the 2017-18 school year. *** advertises that it is a place ***." *** fosters a depth of thinking, problem-solving, creative design, and real-world applications as students develop deep content knowledge and cutting-edge learning skills to prepare them for any and all futures they can envision.

The students are ***. ***. The students are expected to work across grade levels. They engage in collaborative work; if a *** is reading at a *** level, *** has the flexibility during reading workshop to go into the *** classroom, if it is socially and emotionally appropriate for that student. The students do project-based learning, which is a huge part of the school and its culture. Project-based learning gives students an essential question to focus on. Students are expected to work collaboratively as a team, oftentimes with students from other grade levels.

Student started the 2017-18 school year with little problem. Student's academics were at, or above, grade level. As school progressed into September, Student's teachers began noticing some issues with Student's behavior. By November 2017, Student was spiraling out of control. In ***, Student was placed in DAEP for assaulting another student. When Student returned from DAEP in *** 2018, Student appeared to

have made little-to-no progress in controlling Student's behaviors. By May 2018, the ARDC was recommending that Student be placed in a ***, ***, that is ***, to focus on remediating Student's behaviors so that Student and Student's future *** classmates can receive an appropriate education.

Petitioner raised seven (7) issues, all related to, and somewhat intertwined with, Petitioner's basic complaint about Student's proposed 2018-19 special education program and placement and its alleged denial of FAPE.

IDEA defines FAPE as special education and related services that (1) are provided at public expense, (2) meet the standards of the state education agency, (3) include an appropriate preschool, elementary school, or secondary school education in the State involved, and (4) are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§300.320 – 324.

The United States Supreme Court established a two-part requirement for determining whether a district has provided a student FAPE: (1) the district must comply with the procedural requirements of IDEA, and (2) the district must design and implement a program reasonably calculated to enable the child to receive an educational benefit. An educational benefit must be meaningful and provide a "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982).

The educational program must be specially designed to meet the child's unique needs. Although the district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. The program must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R. and Caius R.*, 200 F.3d 341, 347 (5th Cir. 2000).

Petitioner alleged multiple issues regarding the District's on-going efforts to provide Student an appropriate education in the LRE. The foregoing Findings of Fact set out specifically how Petitioner failed to prove Petitioner's case. The District worked tirelessly with Student and Student's Mother. From immediately initiating a plan to provide Student with special education services when the District learned in late September that Student had been in special education two years earlier, to conducting FBAs, providing the Parent with any and all assessments requested, and designing and re-designing IEPs and BIPs based upon Student's ever changing behavior, the District did not fail its duty to Student.

Implementing Student's IEP and BIP:

At the beginning of the school year, Student did not present any IEP or BIP to the District to indicate that Student had previously received special education services in *** ISD. Indeed, Student had attended private school the previous year and Student received no special education services. Student's potential need for such services did not appear until late September when the District received Student's *** ISD information. The District immediately worked to get all the information needed and to execute an Agreement to Implement on October ***, 2017. By November ***, 2017, the permanent placement ARDC was convened, assessments were addressed, and IEPs were developed to address Student's then-known disabilities of OHI and SI.

Notwithstanding these steps, the District immediately pulled together other options in the interim. The campus counselor requested a Tier 3 meeting on October ***, 2017. The Associate Principal arranged for several observations of the Student's classroom **. Student's permanent placement ARDC discussed and implemented behavioral accommodations and a behavior contract for the Student, but determined that a BIP was not necessary, which was a reasonable decision in light of the fact that Student's Parent was present for the November ***, 2017, ARDC meeting and agreed to all decisions made on that date, including the decisions regarding the Student's behavior accommodations and behavior contract; Student had been enrolled at *** for a short time and had only *** office referrals prior to the November ***, 2017, ARDC meeting; and *** ISD never determined that a BIP was necessary for Student.

Measurable Goals and Objectives; Counseling Services:

Throughout the school year, the District worked with specialists to develop IEP goals and objectives that were measurable. At each of the multiple meetings Student's ARDC reviewed the goals, updated Student's progress, or lack thereof, and when necessary, re-wrote objectives and expanded goals based upon assessments and Student's status.

Student's Mother testified that she did not notify Respondent, prior to filing her Complaint, that Student's goals and objectives were not measurable [T2, p. 377/8-14]. Petitioner put on no evidence to support the claim that Student's goals and objectives were not measurable.

Additionally, the District assessed Student and provided counseling services throughout the school year. The District provided Student with counseling services from fall through summer. Initially, Student received counseling services from the campus guidance counselor in the form of behavioral support. In April 2018 Respondent increased the counseling support by recommending weekly individual counseling sessions for Student with a Licensed Specialist in School Psychology (LSSP) [R#29].

Notwithstanding the fact that Petitioner provided no evidence in support of a claim that the counseling services were provided late in the school year or that the counseling sessions did not occur at all, Student's Mother never informed the District that she was unhappy with Student's counseling services prior to filing her Complaint.

Staff Training:

Respondent provided staff with behavioral training; Student's *** and Student's special education teacher were CPI certified in conducting appropriate restraints [T2, p.474/17-19; & p.541/5-6]; Student's special education teacher received extensive training in behavioral issues from *** and professional workshops [T2, p.474/17-25; p.475/1-16]. *** provided three (3) trainings during school year 2017-18 related to behavior management, ADHD, and outside training by a behavior specialist [R#97, 99, & 100].

Interference in the Parent's participation in Student's ARDC:

Petitioner contends that Respondent pre-determined the outcome of the December ***, 2017, MDR meeting. The facts do not support this position. Student's Mother was present for the meeting and indicated she was in agreement with all decisions made by the MDR Committee at the end of the meeting [T2,

p.343/16-17] At no time during the MDR did the Parent raise any concerns about her ability to participate in this meeting or her belief that Respondent had pre-determined the outcome of the meeting. Additionally, Student's Mother wrote a letter dated January ***, 2018 [R#7/7-11]. The Parent outlined all of her concerns from the MDR held on December ***, 2017; however, she did not include any statement the MDR was pre-determined or that she was not a meaningful participant.

Appropriate FBAs:

Respondent provided two (2) FBAs and granted Student an IEE with an FBA component. The first FBA was conducted on December ***, 2017, in preparation for Student's MDR [R#8-11]. The behaviors included classroom disruption, verbal aggression and physical aggression [R#16B]. The second FBA was conducted in March 2018 in response to the Parent's request for another FBA [R#16B]. The April FBA was comprehensive. The assessors utilized the following procedures: review of records; teacher interview; parent interview; student interview; and direct observations. Based upon the information obtained using these procedures, the examiner determined the target behaviors: non-compliance; verbal outbursts; physical aggression; and elopement [R#16B-12]. The data suggested that the primary hypothesized function of Student's target behaviors is to escape work demands, with a potential secondary function of obtaining tangibles, particularly access to technology. The examiners recommended Intervention Strategies [R#16-20]. The April FBA provided Student's teachers the ability to understand the function of the target behaviors. Understanding the function of the behavior allowed for the development of a plan that directly targets the identified behaviors.

Appropriate ESY Services:

Respondent offered ESY services to Student that would target behaviors. Student would attend classes four (4) hours per day, four (4) days per week, for three (3) or four (4) weeks. The District offered counseling services one (1) time per week. The District offered transportation [R#3-24]. This was an appropriate offer of EYS services. The Parent wanted the District to pay for *** and provided services to students with ADHA and Autism. The length of time away *** and the schedule of services were inadequate to address Student's behavior issues.

Student's Appropriate Educational Placement:

The District met its legal obligations with regard to Student's educational placement. The placement decision on May ***, 2018, was made by a group of persons, including the parent, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. 300.116. Student's removal from the regular educational environment only occurred because the nature or severity of Student's disability was such that education in regular classes, with the use of supplementary aids and services, was not able to be achieved satisfactorily. 34 C.F.R. 300.114(a). The decision to move Student to *** was not made until the very end of the 2017-18 school year at Student's May ***, 2018, ARD meeting. This recommendation was made only after Student had been allowed to remain in the general education classroom with a multitude of supplementary aids and services that were not sufficient to overcome the nature and severity of Student's disability.

The ARDC worked with Student all of school year 2017-18 in an effort to garner control over Student's behaviors. Student is a very bright young *** and excels in Student's academics. However,

Student's behaviors so affect Student's and Student's classmates' ability to acquire an appropriate education, that the District determined that for an unspecified time, Student should be moved to a highly structured, *** setting where the focus can be on Student's acquisition of skills to correct behaviors that are robbing Student of Student's academic potential.

**V.
CONCLUSIONS OF LAW**

1. Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C.F.R. §300.301 and 19 TEX. ADMIN. CODE §89.1011.
2. Respondent is responsible for properly identifying, evaluating, and serving Student under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
3. Respondent did not deny Student a FAPE. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
4. Petitioners failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).

**V.
ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and that all claims of Petitioner are DISMISSED WITH PREJUDICE TO REFILEING.

Signed this the 4th day of February 2019.

Deborah Heaton McElvaney
Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision issued by the Hearing Officer is final, except that any party aggrieved by the Findings and Decision made by the Hearing Officer, or the performance thereof by any other party, 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. A civil action brought in state or federal court must be initiated not more than 90 days after the date the Hearing Officer issued her written Decision in the Due Process Hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).

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