

SOAH DOCKET NO. 701-22-0106.IDEA
TEA DOCKET NO. 013-SE-0921

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend *** (Parent or, collectively, Petitioner) brings this action against the Conroe Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations.

The main issue in this case is whether the District has provided Student with a free, appropriate public education (FAPE) in Student’s least restrictive environment (LRE) during the 2020-2021 and 2021-2022 school years, particularly after the ARD Committee agreed to transfer Student from Student’s home campus to a school in a different public system prior to the spring 2021 semester. The Hearing Officer concludes the District provided Student a FAPE in Student’s LRE during the relevant time period.

II. PROCEDURAL HISTORY

A. Legal Representation and Due Process Hearing

Petitioner was represented throughout this litigation by their legal counsel, Henry Bostwick of Henry Green Bostwick, PLLC. Respondent was represented throughout this litigation by Amy Tucker of Rogers, Morris & Grover, LLP.

The due process hearing was conducted January 11-12, 2022, virtually via the Zoom platform. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by their legal counsel, Henry Bostwick. In addition, Parent attended the due process hearing.

Respondent was represented by its legal counsel, Amy Tucker. In addition, ***, the Assistant Director of Instructional Programming over Special Education for the District, attended the hearing as the party representative. Both parties filed written closing briefs in a timely manner. The Decision in this case is due on March 18, 2022.

III. ISSUES

A. Petitioner's Issues

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

1. Whether the District has denied Student a FAPE by offering an insufficient response to Petitioner's request for a due process hearing in a prior case between the parties.
2. Whether the District has provided Student an Individualized Education Plan (IEP) with appropriate IEP goals reasonably calculated to provide Student a FAPE and

allow Student to make academic and non-academic progress during the 2020-21 and 2021-22 school years.

3. Whether the District has provided Student education in an appropriate placement in Student's LRE during the 2020-21 and 2021-22 school years prior to Student's return to an in-District placement on or about November ***, 2021.
4. Whether the District has allowed Student's parent to participate meaningfully in planning Parent's child's education.
5. Whether the District has provided Student appropriate Extended School Year (ESY) services.

B. Respondent's Legal Position and Additional Issues

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

C. Petitioner's Requested Relief

Petitioner's Complaint requested 16 items of relief. On November 2, 2021, the parties reached a partial settlement agreement. Per the partial settlement agreement, Petitioner agreed not to pursue many of the items of requested relief from the Complaint. Petitioner now requests only the following items of relief:

1. Order the District to provide Student compensatory educational services in an amount to be determined by the Hearing Officer for violations of the IDEA and related statutes accruing on or before November 2, 2021.
2. Order the District to provide any other relief to which Student is justly entitled.

IV. FINDINGS OF FACT

Background

1. Student is *** years old and attends *** grade at *** in the District. Student receives special education and related services as a child with Autism, an intellectual disability, and a speech impairment.¹
2. Student transferred into the District as a *** grader at the beginning of the 2019-20 school year. During the 2018-19 school year, when Student was in *** grade, Student resided and attended school at the ***. While the facility is designed for short-term stays, Student resided there from November 2018 until June 2019. Throughout that year, and throughout Student's childhood, Student exhibited physical aggression toward others. Student engaged in physically aggressive behavior toward others on a "daily to weekly basis" while residing at ***. Student's family cannot take Student in public due to Student's physical aggression and Student cannot reside at home due to physical aggression ***. Student has limited ability to communicate using words and *** to communicate. While Student does not fluently use or understand *** (***), Student does communicate effectively using a combination of ***.²
3. Student has *** in the District since Student was discharged from *** in June 2019. The other *** are also school-aged children with intellectual disabilities.³

Student's Full Individual Evaluation (FIE)

4. Student was assigned to *** (***) in the District as a *** grader during the 2019-20 school year. The District conducted an FIE shortly after Student transferred into the District, completing the FIE in December 2019. In developing the FIE, the District primarily relied on an FIE completed by *** Independent School District during the 2018-19 school year while Student resided at ***. The District also conducted its own assistive technology evaluation, in-home training evaluation, hearing and vision screening, and in-person observation of Student in Student's classroom. The District also spoke with Student's teachers and reviewed Student's records to develop its FIE.⁴

¹ Joint Exhibit 1, at 1, 19 (J_, at _).

² Transcript (TR) 404, 458; Petitioner's Exhibit (P) 3, at 2, 4.

³ TR 210.

⁴ J9, at 2-4, 6, 9.

5. Student was engaging in physical aggression *** during Student's first weeks of school in the District. Student began ***, 2019, a few weeks after arriving in the District. Student had an incident *** where Student attempted physical aggression against *** and the District implemented *** in response to the incident. The *** reduced Student's behavioral issues ***. The FIE recommended Student would continue to benefit from the *** for transportation.⁵
6. Student communicates with an assistive technology device using a software program called Proloquo 2 Go, a voice output program. Student requires some prompting to utilize Student's assistive technology device and sometimes uses it to play games when Student should be using it to communicate. English is Student's primary and native language. Student's signs are general approximations of ***, but Student does not communicate primarily in ***. Student's vision and hearing are both intact. Student can answer yes/no questions when prompted to do so. Student can communicate Student's wants and needs effectively using a combination of Student's assistive technology device, one-word approximations, gestures, modified signs/sound cues, and pointing. Student also uses visual supports like number charts and pictures to help Student access the curriculum. Student cannot *** to communicate Student's wants and needs, though Student can *** with significant assistance. Student gets the attention of adults by ***. The FIE recommended continued use of the assistive technology device with Proloquo 2 Go. It also recommended continued speech therapy.⁶
7. Student has no physical limitations and can walk on Student's own without assistance. Student does require occupational therapy services to address sensory processing issues that may affect Student's behavior. The evaluators did not recommend physical therapy services or occupational therapy services to address any physical needs. In Student's ***, Student is able to follow a consistent routine of getting ready for school in the morning and preparing to eat with limited assistance, engaging in preferred activities like watching television or looking through picture books, and getting ready for bed independently in the evening. Student is able to dress ***self, eat independently with utensils, and toilet independently. The FIE recommended ongoing in-home training so the *** and the District were consistently using the same approach when behavior issues arose.⁷
8. Student is able to follow directives and classroom routines. However, Student does become upset frequently during the school day, leading to ***, and occasionally attempting to harm staff or other students physically. The evaluators recommended ongoing use of behavior

⁵ *Id.*, at 22, 26; TR 469.

⁶ J9; P3; TR 142, 336-37, 411-12.

⁷ J9, at 8.

management strategies and visual cues to help Student follow Student's schedule and stay on task. Student requires two-to-one supervision in Student's educational environment.⁸

2019-2020 School Year and Fall 2020 Semester

9. During the 2019-20 school year, Student had increased behavioral issues throughout the school year. Parent requested, and the District was considering, placing Student in a private educational placement, but the school closed due to COVID-19 before the District was able to coordinate appropriately with a private placement. Student was in virtual school for the remainder of the 2019-20 school year.⁹
10. On May ***, 2020, the District held an annual Admission, Review, and Dismissal (ARD) Committee meeting to plan for the upcoming 2020-21 school year. During the 2020-21 school year, Student would move from *** to ***, where Student would begin *** grade. Parent and all other required ARD Committee members were present for the meeting and the meeting ended in agreement. The ARD Committee agreed to increase the amount of ongoing training the District was providing to the *** at Parent's request. The ARD Committee also agreed to reconsider the possibility of placing Student in a private placement once the COVID-19 pandemic allowed students to return safely to campuses.¹⁰
11. During the in-person portion of the 2019-20 school year, Student spent the entire school day, other than lunch and transportation, in a self-contained classroom at *** called the *** classroom. The ARD Committee recommended Student be assigned to the same *** placement at *** because Student's behavior was "so dangerous" that it cannot be properly contained without "intense supervision in a highly structured environment."¹¹
12. The ARD committee set 11 IEP goals for Student to achieve by May 2021. Student had a speech goal of combining ***. Student did not have any speech goals related to the use of ***. Student had a reading goal involving Student's ability to *** Student was presented. Student had three goals in the areas of behavior and functional social skills: successfully transitioning between activities and/or areas of the classroom while keeping Student's hands to ***self in nine out of ten trials, utilizing coping strategies when Student becomes upset in four out of five trials, and using an independent work station to complete Student's

⁸ *Id.*, at 36.

⁹ TR 542-43.

¹⁰ J8.

¹¹ *Id.*

academic work without leaving the area or touching anyone. Student also had challenging and measurable IEP goals in writing, math, ***.¹²

13. Student's IEP also includes a Behavior Intervention Plan (BIP). The BIP targets four particular behaviors: physical aggression, non-compliance (such as ***). Within each behavior, the IEP identifies a number of suggested interventions both to avoid the behavior and also to minimize the behavior's impact.¹³
14. By October 2020, despite having to quarantine at home due to a COVID-19 exposure for two weeks in September 2020, Student was making progress toward each of Student's 11 IEP goals. The same was true in December 2020. Student spent the fall semester entirely in a self-contained classroom with three District staff members. There was one other student in Student's classroom virtually via Zoom. Student was the ***in Student's *** classroom.¹⁴
15. Although Student made progress toward Student's IEP goals, Student's behavior escalated throughout the fall of 2020. From the first day of school, according to the data collection sheets and testimony of Student's teachers, Student had daily behavioral incidents. The incidents ranged from minor issues such as crying to more serious issues such as physical aggression, with those more serious behaviors increasing significantly after the first month of the school year. *** in the fall of 2020 and that impacted Student's behavior. When Student ***, Student's behaviors increased for several days. However, Student had at least one incident every day during the fall of 2020, even on days Student ***. From October ***, 2020, until December ***, 2020, Student exhibited at least ten minutes of physical aggression nearly every day. On some days, Student exhibited physical aggression for more than an hour and a half. There were several instances where Student *** and tried to exhibit physical aggression toward students in other classrooms. Student's teachers had difficulty introducing new concepts or lessons. Staff would decrease academic demands and strategically wait for certain times of day to introduce anything new, knowing that Student could be more easily triggered by unfamiliar material in the morning. District staff did not think that strategy was sustainable. During the entire 2020-21 school year, District staff met with Parent monthly and sent emails more frequently than that updating Parent about Student's progress and discussing potential strategies to work with Student on Student's ongoing behavioral issues. Still, serious behavioral issues, including physical aggression toward others, persisted in the fall of 2020.¹⁵

¹² J8.

¹³ *Id.*, at 45-51.

¹⁴ J12; J13; TR 205, 436, 465-66.

¹⁵ J5, at 2; P25; TR 78, 80-81, 434-36, 500, 507, 518, 550.

Student's Transfer to Out-of-District Placement

16. On December ***, 2020, the District held an ARD Committee meeting due to Student's escalating behavioral issues and the District's struggles to manage them in Student's current placement. Parent and all required ARD Committee members were present for the meeting. The District recommended Student attend school beginning after Winter Break on January *** 2021, at the ***, a public school located in *** and run by ***, where Student could receive more of the specialized behavioral instruction Student needed. Before making the recommendation, the District reached out to private educational placements, but none of them were taking new students due to the COVID-19 pandemic or other factors. The District had also discussed the possibility of *** with Parent during one of their monthly meetings in the fall of 2020. All of Student's related services would continue at ***. The meeting ended with Parent, *** staff, and all ARD Committee members in agreement that Student would transfer to ***.¹⁶
17. The bus ride to *** from Student's *** can be up to an hour and a half due to traffic. Student ***, the same type in which Student had traveled on the District school bus since September 2019. Student was placed in a self-contained life skills classroom at ***. Student's incidences of physical aggression reduced once placed at ***. During the entire spring of 2021 semester at ***, Student only had one instance of physical aggression toward another Student. Those incidents were occurring nearly daily at *** in the fall of 2020. Student never eloped from the classroom without permission, something Student was frequently doing at ***. Student had opportunities to interact with other students and even made friends. Student also went on field trips with Student's peers to the ***. Student did not have those opportunities for interaction and/or outings with peers at ***. Student did have continued behavior struggles with *** in the spring of 2021. However, on the whole, Student's behavior improved significantly at ***.¹⁷
18. The District held two ARD Committee meetings in May 2021. The District reviewed Student's progress at *** and noted Student had made a lot of progress in Student's behavior and toward Student's IEP goals, including mastering Student's speech goal among others. Student's *** director agreed that Student had made progress at ***. Parent and the *** staff were concerned, however, about the length of the daily bus trip to *** with Student ***. They were also concerned with *** Student. Petitioner did not present evidence, either at the ARD Committee meetings in May 2021 or during the due process hearing, of where*** originated or who caused them. The District recommended continuing Student's placement at ***. The District also recommended ESY for the

¹⁶ TR 544-45.

¹⁷ J4, at 5; TR 227, 334, 374-75.

summer of 2021. Parent disagreed with the ARD Committee determination, requesting that Student either be placed in a private school or back at ***. District members of the ARD Committee believed, due to Student's progress, that Student would benefit most from continuing at ***. The District's goal was to return Student to *** eventually, but the District wanted to see Student maintain Student's progress through two more grading periods before returning Student to the District. The District laid out specific return criteria over those two grading periods, including reducing instances of *** and others. The ARD Committee meetings ended in disagreement over the placement issue.¹⁸

19. The ARD Committee recommended ESY in the areas of speech therapy, ***, English, math, ***, and practical communications/social skills. Student attended ESY during the summer of 2021 at *** and received ESY services in those areas.¹⁹
20. On July 30, 2021, Petitioner filed a request for a due process hearing. Petitioner nonsuited that case in August 2021 before the case proceeded to a due process hearing. The case was dismissed without prejudice on September 1, 2021. Petitioner then filed the instant case on September 10, 2021.

Student's Transfer Back to the District

21. Parent chose not to send Student to *** to start the 2021-22 school year. The District provided some work Student could do at Student's *** so Student could maintain Student's skills. The District did not provide homebound services as Student did not qualify for those services. The District was prepared to provide Student services at *** as the placement offered in Student's IEP. *** staff provided Student home schooling and worked on the activities the District sent home. Student's behavior and ability to communicate continued to improve in the *** during the fall of 2021.²⁰
22. On November ***, 2021, pursuant to a settlement agreement in the instant due process case, the District held an ARD Committee meeting for the purpose of readmitting Student into the *** program. Student returned to *** in November 2021 and rejoined the *** program.²¹

V. DISCUSSION

¹⁸ J3, J4.

¹⁹ J3, J4, J17, TR 339.

²⁰ TR 226, 478.

²¹ J1, at 1-2.

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.²² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE in Student's LRE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

B. Duty to Provide a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The District is responsible for providing Student with specially designed, personalized instruction with sufficient support services to meet Student's unique needs and provide Student an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

For a child to receive a FAPE, a school district must provide a student an educational program reasonably calculated to enable a student to make progress appropriate in light of the

²² 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).

child's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 983, 1001 (2017). That progress must be something more than mere *de minimis* progress. *Id.* at 1000.

C. FAPE Analysis

Petitioner alleges that Student was able to receive a FAPE in the *** program and never needed to be transferred to ***. Although Parent agreed Student should be transferred to *** in December 2020, Petitioner argues that the program was inappropriate for Student and was not Student's LRE. The main question in the case is whether Student received a FAPE in Student's LRE when Student went to ***. This Hearing Officer concludes that Student did.

D. The Four-Factor Test

A hearing officer must apply a four-factor test to determine whether a Texas school district's program meets IDEA requirements. Those factors are:

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

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).²³

²³ Even after the Supreme Court's 2017 decision in *Andrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide a FAPE, a school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

The District's obligation when developing Student's IEP and BIP is to consider Student's strengths; Parent's concerns for enhancing Student's education; results of the most recent evaluation data; and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.320(a)(1)(i). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir.2012).

The evidence showed the District based the IEP on assessment and observation of Student's performance. The District conducted an FIE, which included in-person observations, upon

Student's move into the District. Based on that FIE, the District provided Student appropriate assistive technology for Student's communications needs, related services of speech therapy and occupational therapy, a small and structured classroom setting with a minimum of two-to-one supervision, and a BIP targeting four specific behaviors and providing Student with appropriate behavioral supports and services. Petitioner argues Student was not given opportunities to communicate in Student's native language of ***. However, the evidence indicates *** is not Student's native language. English is Student's native and primary language. Student uses general approximations of *** to communicate certain things in combination with ***, using Student's assistive technology device, and other communication methods. Based on assessment and observation of Student's performance, the District did not treat *** as Student's native language. The District did provide Student's speech therapy and the evidence shows Student's speech improved during the 2020-21 school year and during the fall of 2021 when Student was receiving education in Student's ***.

The District also provided Student's ESY services in the summers of 2020 and 2021. State law requires ESY to be provided in the summer to students who, "in one or more critical areas" addressed in the IEP, have exhibited regression, or reasonably may be expected to exhibit, "severe or substantial regression that cannot be recouped within a reasonable period of time." 19 Tex. Admin. Code § 89.1065(2). The evidence demonstrates the District provided Student the ESY services in all areas of need so Student could avoid losing skills Student could not subsequently recoup. Student made progress toward Student's IEP goals in the fall of 2020 after receiving ESY in the summer of 2020 and in the fall of 2021 in Student's *** setting after receiving ESY in the summer of 2021. The ESY services allowed Student to recoup Student's skills quickly and then demonstrate progress at the beginning of each school year. The District thus provided sufficient ESY services based on the District's assessment and observation of Student's performance.

The District provided Student with 11 appropriate and measurable goals based on Student's present levels of academic achievement and functional performance (PLAAFPs). An IEP must

include PLAAFPs describing the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for children without disabilities). 34 C.F.R. §300.320(a)(1)(i). They are the starting point in forming an IEP for a student. *Endrew F.*, 137 S.Ct. at 1000. The District used them as a starting point for forming Student's 11 measurable IEP goals. Student demonstrated progress and/or mastery in each of Student's goals.

In the fall of 2020, the District attempted to serve Student in the *** classroom. It provided three District staff members in the *** classroom in which Student was the only student physically present. It attempted different behavioral approaches to try to work with Student. Petitioner argues that the fall of 2020 featured an uncharacteristic increase in physical aggression and other behavior issues due to ***. Thus, rather than transfer Student to ***, the District should have exhibited patience and waited for Student's behaviors to decline again.

The evidence shows, however, that Student had a long history of behavioral issues prior to the fall of 2020. Student transferred into the District in 2019 following a ***-month stay in *** due to behavioral issues. Student resides in *** since Student cannot live at home due to the physical danger in which Student places ***. Parent cannot take Student on outings due to the potential for physical aggression toward others. During the 2019-20 school year, the District sought a potential private school placement, at Parent's urging, prior to the COVID-19 shutdown due to Student's ongoing behavior issues. The District had to place Student*** so Student could be *** in September 2019.

Student's struggles with behavior in the fall of 2020 were not novel. When District staff struggled to manage Student's behavior in the fall of 2020, rather than continue attempting behavioral strategies that were not working, District staff sought a new placement that might help Student. The goal was to bring Student back into the District from *** once Student could gain

new behavior management strategies. It was a decision appropriately based on the District's assessment and observation of Student's performance.

Further, in the fall of 2021, the District offered Student a FAPE by offering Student placement at ***. Petitioner argues the work sheets and exercises the District provided the *** so Student could maintain Student's skills were insufficient under the IDEA. The District was not obligated to provide Student any home services when Parent refused to allow Student to attend school. Even if Parent had requested homebound services and provided medical evidence Student required such services, the District would not necessarily have been obligated to defer to that medical opinion. *Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 594 (W.D. Tex. 2006). However, that inquiry is irrelevant in this case. Parent did not provide medical evidence or even try to claim Student required homebound services. Rather, Parent refused to allow Student to attend *** due to Student's good faith disagreement with the placement. Student stayed in Student's *** during school hours and worked with staff there.

In November 2021, pursuant to a settlement agreement, the parties agreed Student could come back to the *** classroom at ***. The District's obligation prior to that settlement agreement was to develop an IEP prior to the beginning of the school year and *offer* Student a FAPE. *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 309-12 (5th Cir. 2017) (emphasis added). The District developed an appropriate IEP based on assessment and observation of Student's performance in May 2021 prior to the 2021-22 school year and offered a FAPE to Student. The District thus fulfilled its obligations under the IDEA. Parent did not allow Student to attend school and chose to keep Student at the *** during the school day. The District's provision of activities and work to the *** in the fall of 2021 went beyond its obligation under the IDEA to develop and offer an IEP that would provide Student a FAPE. *See Id.*

2. LRE

The IDEA requires that a student with a disability shall be educated with peers without disabilities to the maximum extent appropriate. Special classes, separate schooling, and other removal from the regular education environment should occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “LRE requirement.” 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require a school district’s continuum of instructional arrangements be based on students’ individual needs and IEPs and include a continuum of educational settings, including mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005. Additionally, school districts may send special education students to a public school campus in another school district after holding an ARD Committee meeting to determine the appropriateness of that placement. 19 Tex. Admin. Code § 89.1094.

To determine whether a school district is educating a student with a disability in the LRE, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State Bd. of Ed., 874 F. 2d 1036, 1048 (5th Cir. 1989).

The evidence indicates Student has been educated in Student’s LRE. When Student was in the *** classroom in the fall of 2020, Student had no interaction with peers without disabilities. Student’s only classmate was learning virtually, so Student had no access to any in-person peers in class. The FIE recommended a small, structured classroom and two-to-one supervision of Student. No evaluation recommended Student be the only student in Student’s class. However,

Petitioner did not present evidence that Student could be appropriately placed in a less restrictive environment for any portion of Student’s day. *See Schaefer*, 546 U.S. at 62 (noting Petitioner bears the burden of proof). Rather, Petitioner argues that the placement in the *** classroom at ***, where Student was the only child physically present, was in fact Student’s LRE.²⁴

When the District transferred Student to ***, it did not transfer Student to a more restrictive placement. The ARD Committee held an ARD Committee meeting on December ***, 2020, to explore the appropriateness of the placement. The ARD Committee agreed it would be the best placement for Student. *See* 19 Tex. Admin. Code § 89.1094 (requiring an ARD Committee meeting about the appropriateness of a placement in a public school in a different school district before initiating that placement).

A public school placement in another public setting is not definitionally more restrictive than placement in Student’s home campus in the same way as placement in a private school or residential treatment center might be. *See* 19 Tex. Admin. Code § 1005. Student received Student’s education in a self-contained life skills setting at *** similar to the *** classroom at ***. However, unlike at ***—where Student was the only non-staff member physically present in the classroom, Student had access to in-person peers and even was able to have friendships. Student went on field trips with Student’s peers to places like ***. The placement was thus less restrictive than Student’s District placement. Student was able to make progress toward Student’s IEP goals and improve Student’s behavior in that less restrictive placement. Therefore, the evidence indicates the District educated Student in Student’s LRE while Student was placed at ***.

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

²⁴ Petitioner’s Closing Brief, at 6.

School districts must allow parents to play a key role in the development of the IEP. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 395 (5th Cir. 2012). The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence showed the District collaborated appropriately with Parent. Parent attended each ARD Committee meeting and, until May 2021, agreed with the ARD Committee decisions at each ARD Committee meeting. Parent's input was considered each time, including with the District's consideration of private school placement in both the spring of 2020 prior to the COVID-19 school closure and again in the fall of 2020 when Student's behavior issues were escalating. Throughout the 2020-21 school year, both before and after Student's transfer to ***, District staff held a monthly meeting with Parent to review Student's progress. The District held multiple ARD Committee meetings during the 2020-21 school year as well.

In May 2021, after initially agreeing on the placement at *** in December 2020, the District and Parent disagreed as to whether *** constituted the best placement for Student. The District pointed to Student's progress both behaviorally and academically at *** as evidence Student needed to remain there to continue progressing. Parent pointed to the long bus rides to *** in the ***, which Student had been using *** since September 2019, as detrimental to Student. However, Petitioner did not demonstrate that the District's recommendation of continued placement at *** was the result of "bad faith exclusion" of Parent or "refusal to listen" to Parent.

See id. The parties had a good faith disagreement over what was in Student's best interest. It was the first ARD Committee disagreement since Student had entered the District at the beginning of the 2019-20 school year. Overall, Student's services were provided in a coordinated and collaborative manner.

Additionally, Petitioner raised an issue for hearing involving a denial of a FAPE due to the District's insufficient response, and thus failure to collaborate appropriately with Parent, to the request for a due process hearing Petitioner filed in July 2021. Petitioner nonsuited that case in August 2021. The Hearing Officer dismissed the case without prejudice on September 1, 2021, and subsequently Petitioner filed the instant case on September 10, 2021. Petitioner did not present evidence regarding this issue and thus did not meet their burden of demonstrating the District's response constituted a denial of a FAPE.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012). Whether a student receives passing grades and progresses from year-to-year are factors in whether a student is receiving academic benefit, but whether a student is making more than *de minimis* progress under the IEP is the key to understanding whether a student is receiving academic benefit. *V.P. ex rel. Juan P.*, 582 F.3d at 590-91.

In this case, Student made progress toward all of Student's IEP goals during the 2020-21 school year and mastered a number of them, including Student's speech goal. Student's behavior improved such that Student went from near-daily episodes of physical aggression toward others during the fall of 2020 to only one such incident during the entire spring of 2021. Student was able to make friends and interact with peers when Student was placed in *** during the spring of 2021.

See Marc V. v. North East Indep. Sch. Dist., 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit). Student experienced both academic and non-academic benefits from Student's placement at ***.

5. Conclusion

From the evidence presented in this case, the District is basing Student's educational program on its FIE and ongoing data and observations of Student. Student's placement in the *** program is highly restrictive, but Petitioner did not present evidence that a less restrictive placement would have met Student's needs. Student's placement in a *** classroom at ***—where Student had access to peers and an opportunity to form friendships and go on field trips—was in fact less restrictive. Thus, Petitioner did not demonstrate Student's placement at *** violated the LRE requirement.

The District appropriately collaborated with Parent and other key stakeholders in developing Student's IEP, including in three ARD Committee meetings and monthly meetings with staff members and Parent during the 2020-21 school year. Finally, Student progressed toward Student's IEP goals appropriately and was able to make friends in ***, thus demonstrating academic and non-academic benefit. All four of the *Michael F.* factors weigh in favor of the appropriateness of the District's program. The District provided Student a FAPE.

VI. CONCLUSIONS OF LAW

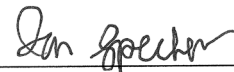
1. The District provided Student a FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Endrew F.*, 137 S. Ct. 988.
2. The District educated Student in Student's LRE both before and after Student transferred to ***. 34 C.F.R. § 300.114(a)(2)(i)(ii).

3. Parent and other key stakeholders participated appropriately in planning Student's IEP. *White ex rel. White*, 343 F.3d at 380.
4. The District provided Student with appropriate and necessary ESY services in the summer of 2021 as it stated it would. 19 Tex. Admin. Code § 89.1065(2).

VII. ORDERS

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

SIGNED March 18, 2022.



Ian Spechler
Special Education Hearing Officer
For the State of Texas

VIII. 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).