

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

STUDENT, *b/n/f* PARENT & PARENT, ("Petitioner" or "Student") filed a Request for Due Process Hearing ("Complaint") on September 20, 2019, 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.* Petitioner asserted multiple issues in Student's Complaint against Killeen Independent School District ("Respondent" or "District" or "KISD"), alleging that the District denied Student a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE") based upon multiple substantive and a procedural violation of IDEA occurring during school year 2018-19. Petitioner also presented issues disputing the decision of Student's January 2019 Manifestation Determination Review ("MDR") Admission, Review and Dismissal Committee ("ARDC") and Student's resulting thirty-day disciplinary placement in the Disciplinary Alternative Education Program ("DAEP"). These disciplinary issues would require an entirely different time line, pursuant to the expedited due process procedures under 34 C.F.R. §§300.507(a)(2); 300.532(a)(c); 19 TEX. ADMIN. CODE §§89.1151(c) & 89.1191. Because Petitioner withdrew these expedited issues during the October 9, 2019, prehearing conference ("PHC"), the subsequent scheduling order was issued with agreed deadlines that were unrelated to those required by the expedited rules.

On November 4, 2019, Petitioner filed an Amended Original Complaint and Request for Expedited Due Process Hearing.¹ In this Amended Complaint, Petitioner re-asserted Student's disciplinary placement claims, which now would require an expedited time frame for addressing these issues. 34 C.F.R. §300.508-§300.515.

¹ SEHO Lockwood allowed this filing because the District previously granted Petitioner permission to file an Amended Complaint, including issues subject to an expedited hearing.

II. PROCEDURAL HISTORY

Student filed Student's Complaint against the District on September 20, 2019. On that same day, TEA assigned this matter Docket No. 021-SE-0919 and sent it to Special Education Hearing Officer ("SEHO") Lockwood. On September 23, 2019, SEHO Lockwood issued her **Order No. 1: Initial Scheduling Order**. By this Order, SEHO Lockwood scheduled the PHC for October 9, 2019; the Disclosure Deadline for October 29, 2019; the Due Process Hearing for November 4, 2019; and the Decision Deadline for December 4, 2019, all of which complied with the standard time frame for processing a complaint under IDEA.

On September 30, 2019, Respondent filed its Affirmative Defense, Motion to Dismiss & Response to Request for Due Process. Respondent asserted that (1) a hearing officer has no jurisdiction over non-IDEA claims; (2) a hearing officer has no authority to award attorneys' fees; and (3) the Statute of Limitations requires dismissal of all claims outside of the one-year Texas limitations rule.

The Parties convened the PHC on October 9, 2019, as scheduled. The following participated in the PHC: (1) Ms. Yvonnilda Muniz, Petitioner's counsel; (2) Ms. Geneva Taylor and Mr. Trevor Hall, Respondent's counsel; (3) Dr. ***, Respondent's Executive Director of Special Education; (4) Mr. ***, Respondent's Coordinator for Special Education Campus Operations; (5) SEHO Lockwood; and (6) a certified court reporter who made a record of the PHC. The Parties discussed Respondent's affirmative defenses and other claims over which a hearing officer has no jurisdiction; Petitioner's issues and requested relief; and the Parties' request for continuances of hearing deadlines.

On October 10, 2019, SEHO Lockwood issued **Order No. 2: Granting Joint Request for Continuance and Extension of Statutory Due Date for Good Cause and First Revised Scheduling Order**. By this Order, SEHO Lockwood dismissed all claims over which a Texas SEHO has no authority or jurisdiction: (1) all non-IDEA claims; (2) all claims for attorneys' fees, monetary tort-like damages, and determining prevailing party status. SEHO Lockwood defined the Statute of Limitations as the date the parent knew, or should have known, about the alleged action that forms the basis of the Complaint. Because this is a factual issue, SEHO Lockwood ordered that the limitations issue would be taken with the Due Process Hearing.²

Finding good cause for the Parties' requested continuances of the timelines set out in the initial scheduling order, SEHO Lockwood and the Parties agreed to the following revised scheduling order: (1) November ***, 2019: Parties submit Joint Exhibits, Stipulations of Fact, Disclosures of Exhibits and Witnesses; (2) December 4-5, 2019: Parties convene Due Process Hearing; and (3) January 14, 2020: SEHO issues Decision.

On November 4, 2019, Petitioner filed an Amended Original Complaint and Request for Expedited Due Process Hearing.³ In this Amended Complaint, Petitioner added an issue to Student's regular track

² No evidence was introduced related to the one-year statute of limitations. Accordingly, no finding or conclusions are appropriate.

³ SEHO Lockwood allowed this filing because the District previously granted Petitioner permission to file an Amended Complaint, including issues subject to an expedited hearing.

issues set out in the original Complaint ⁴ and revived Student's disciplinary placement claims, which would require an expedited time frame for addressing these issues. 34 C.F.R. §300.508-§300.515.

On November 5, 2019, SEHO Lockwood issued **Order No. 3: Bifurcating Hearings**. By this Order, Petitioner's issues were split under two (2) docket numbers: Docket No. 021-SE-0919-A, which contained the expedited disciplinary placement issues; and Docket No. 021-SE-0919-B, which contained the non-expedited issues clarified in the October 10, 2019, Order No. 2: Rescheduling Order.

A. Docket No. 021-SE-0919-A (Expedited Hearing)

On November 5, 2019, SEHO issued **Order No. 1: Expedited Due Process Hearing Scheduling Order** in Docket No. 021-SE-0919-A. SEHO Lockwood's order set out the shortened time line for this expedited proceeding: (1) November ^{***}, 2019: PHC; (2) December 2, 2019: Disclosure Deadline; (3) December 10, 2019: Due Process Hearing; and (4) January 7, 2020: Decision Deadline.

B. Docket No. 021-SE-0919-B (Regular Track Hearing)

Because Petitioner filed its Amended Complaint which contained some additional non-expedited issues, SEHO Lockwood issued a new scheduling order. On November 5, 2019, SEHO Lockwood issued **Order No. 4: Second Revised Scheduling Order Following Filing of Amended Complaint** in Docket No. 021-SE-0919-B. By this Order, SEHO Lockwood issued a new hearing schedule based upon the November 4, 2019, Amended Complaint as follows: (1) November ^{***}, 2019: PHC; (2) December 19, 2019: Disclosures; (3) December 30, 2019: Due Process Hearing; and (4) January 18, 2020: Decision Deadline.

On November 6, 2019, the Parties filed a Joint Motion to Consolidate Trial of Issues. The Parties requested that all issues in both cases be heard together. The Parties suggested that the consolidated hearing occur on December 4-5, 2019, as previously scheduled in SEHO Lockwood's October 10, 2019, Order No. 2: First Revised Scheduling Order. (Page 2, *supra*)

On November 8, 2019, both cases were transferred to the undersigned SEHO.⁵ Accordingly, SEHO Lockwood did not rule on the Parties' Joint Motion to Consolidate Trial of Issues. The undersigned notified the Parties that the PHC in both cases would proceed on November ^{***}, 2019, as scheduled in both of the last scheduling orders issued by SEHO Lockwood.

On November ^{***}, 2019, the Parties convened the PHC to discuss the new issues and pending Motion to Consolidate Trial of Issues. The following participated in the PHC: (1) Ms. Yvonnilda Muniz and Ms. Dorene Philpot, Petitioner's counsel; (2) Ms. Geneva Taylor and Mr. Trevor Hall, Respondent's counsel; (3) Dr. ^{***}, Respondent's Executive Director of Special Education; (4) Mr. ^{***}, Respondent's Coordinator for Special Education Campus Operations; (5) the undersigned SEHO; and (6) a certified court reporter who made a record of the PHC. The Parties discussed the feasibility of trying all issues in both cases on December 4-5, 2019. Based upon their clear intentions and expectations, the undersigned granted their Joint Request to Consolidate Trial of Issues, Docket Nos. 021-SE-0919-A and 021-SE-0919-B, under the expedited matter: **021-SE-0919-A**. The Parties and SEHO agreed on a new scheduling order for the consolidated trial.

⁴ The additional issues presented in the Amended Complaint are as follows: (1) whether Respondent failed to train school district staff with proper training in Student's IEP and BIP

⁵ SEHO Lockwood was retiring in December so all of her cases were transferred to other SEHOs.

On November 26, 2019, the undersigned issued **Order No. 6: (1) Granting Parties' Joint Motion to Consolidate Trial of Issues and (2) Rescheduling Due Process Hearing In Regular Track and Expedited Cases Following Prehearing Conference**. By this Order consolidating the cases under docket No. 021-SE-0919, the undersigned recalculated the applicable expedited time line as follows: (1) November ***, 2019: Parties submit Joint Exhibits, Stipulations of Fact, Disclosures of Exhibits and Witnesses; (2) December 4-5, 2019: Parties convene Due Process Hearing; and (3) December 19, 2019: SEHO issues Decision.

III. RESOLUTION SESSIONS

The Parties agreed to convene mediation in lieu of the Resolution Session in Docket No. 021-SE-0919-B. The Parties convened the mediation on October 31, 2019, but did not settle. The Parties agreed to waive the Resolution Session in Docket No. 021-SE-0919-A and proceed to hearing.

IV. CONSOLIDATION OF ISSUES AND REQUESTED RELIEF

The following sets forth all of the issues and requested relief presented in this case: (1) the delineated regular track issues and requested relief, set out in SEHO Lockwood's October 10, 2019, Order No. 2: Granting Joint Request for Continuance and Extension of Statutory Due Date for Good Cause and First Revised Scheduling Order; (2) the additional regular track issue set out in Petitioner's Amended Complaint and summarized in SEHO Lockwood's November 5, 2019, Order No. 3: Bifurcated Hearing; and (3) the delineated disciplinary placement issues and requested relief, set out in SEHO Lockwood's November 5, 2019, Order No. 3: Bifurcating Hearings:

1. Respondent failed to provide Student a free, appropriate, public education ("FAPE") during the 2018-19 school year when it failed to provide Student with an appropriate educational program, individualized to meet Student's educational needs, including, but not limited to, Student's academic, social, emotional, and behavioral needs;
2. Respondent failed to conduct proper evaluations, including an appropriate Functional Behavior Assessment ("FBA");
3. Respondent failed to provide Student with an appropriate Behavior Intervention Plan ("BIP");
4. Respondent failed to provide school staff proper training in Student's Individualized Education Plan ("IEP") and BIP;
5. Respondent violated the Parents' procedural rights by failing to provide Student's Parent with Admission, Review, and Dismissal Committee ("ARDC") documents in her native language ***;
6. Respondent discriminated against Student solely by reason of Student's disability; Respondent discriminated against Student's Mother and violated her parental rights under

IDEA and Section 504 of the Rehabilitation Act of 1973 when she advocated for Student and contested the outcome of an MDR ARDC as “predetermined.”⁶

7. Respondent failed to conduct a proper MDR; the MDR decision was erroneous; Respondent should have concluded Student’s conduct was caused by, or had a direct and substantial relationship to, Student’s disability or it was a result of Respondent’s failure to implement Student’s Individualized Education Plan (“IEP”);
8. Respondent failed to utilize the proper definition of “serious bodily injury” in making its MDR and disciplinary alternative education placement (“DAEP”) decisions;
9. Respondent made an improper decision that Student’s conduct met the correct definition of inflicting serious bodily injury on another person and thus failed to meet the criteria for “special circumstances,” which authorized the placement in the DAEP;
10. Respondent violated 34 C.F.R. §300.530 when it removed Student from Student’s current education placement to the DAEP; and
11. Respondent’s change in Student’s educational placement violated IDEA.

Petitioner requested that the SEHO order Respondent to provide Student with the following relief:

1. Reversal of the disciplinary placement in the DAEP;
2. Reimbursement for the cost of private school tuition for the 2018-19 school year and fall 2019;
3. Fund the cost of continued private school placement for the 2019-20 school year;
4. Provide Student with compensatory social skills training at Respondent’s expense using an evidence-based curriculum during summer 2020;
5. Provide Student with compensatory counseling and occupational therapy (“OT”) services at Respondent’s expense;
6. Fund monetary damages to Student to compensate for Respondent’s alleged intentional, deliberate discrimination as a result of Respondent’s failure to provide appropriate services to which Student was entitled as a person with a disability;⁷

⁶ Petitioner included in the Complaint issues attendant to non-IDEA statutes. These claims have been dismissed.

⁷ Monetary damages are not an appropriate form of relief under the IDEA and are outside of the jurisdiction of a SEHO. This requested relief has been dismissed.

7. Reimburse Student's reasonable attorneys' fees;⁸
8. Make a finding that Student is a "prevailing party" entitled to attorneys' fees and costs;⁹ and
9. Order such other and further relief the Hearing Officer deems just and proper.

The Expedited Due Process Hearing convened on December 4-5, 2019. Both Parties introduced documentary evidence and a binder of Joint Exhibits;¹⁰ Petitioner called several witnesses, who were cross-examined by Respondent; Respondent called several witnesses, who were cross-examined by Petitioner.

During the Hearing, Petitioner was represented by Student's attorneys, Ms. Yvonnilda Muniz and Ms. Olivia Ruiz.¹¹ Also in attendance were Ms. *** and Mr. ***, Student's Parents. Respondent was represented by counsel, Ms. Geneva Taylor and Mr. Trevor Hall. Also in attendance were Dr. ***, Executive Director for Special Education; and Mr. ***, Coordinator for Special Education Campus Operations. Mr. *** served as the *** Interpreter for Student's Mother, Ms. *** Because Petitioner opened the Hearing, numerous individuals attended parts of the Hearing for observance.

At the conclusion of the Hearing, counsel requested time to make a written closing argument, which was granted. Under the applicable expedited statutes, the Decision Deadline was confirmed to be December 19, 2019. Both Parties filed and served their Closing Arguments on the agreed briefing deadline, December 16, 2019. This Decision of the Special Education Hearing Officer is being delivered to the Parties on the statutory deadline: December 19, 2019.¹²

⁸ SEHOs do not have jurisdiction over an award of attorneys' fees under IDEA. This requested relief has been dismissed.

⁹ A "prevailing party" who is the parent of a child with a disability may be entitled to an award of attorneys' fees. However, SEHOs do not have authority to award attorneys' fees. Accordingly, to the extent Student seeks reimbursement of attorneys' fees and a finding as a "prevailing party" for that purpose, these items have been dismissed.

¹⁰ The Parties assert that on November ***, 2019, they filed their (1) Joint Stipulation of Facts; (2) Disclosures of Witnesses and Exhibits; and (3) Joint Exhibits Nos. 1-68. The undersigned did not see this filing at that time. At the Due Process Hearing, neither party moved to admit the Joint Stipulation of Facts. Upon discovery of this error, the Parties filed a post-hearing Joint Motion to Admit Evidence, which was granted.

¹¹ Ms. Muniz's co-counsel originally was Ms. Dorene Philpot. However, due to scheduling conflicts, Ms. Philpot was unable to attend the Hearing and in her place, Ms. Olivia Ruiz made an appearance on December 4, 2019.

¹² References to the Expedited Due Process Hearing Record are identified as follows: "T#.##" refers to the two-volume Court Reporter's Transcription of testimony made on December 4-5, 2019, and the specific volume, page, and line numbers contained therein; "JX#.##" refers to the Joint Exhibits by number and page; "P#.##" refers to Petitioner's Exhibits by number and page; and "JSF#" refers to the Joint Stipulation of Fact by number. There are no Respondent's Exhibits because they were deemed untimely under the Scheduling Order.

V.
FINDINGS OF FACT

1. KISD 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 a *** child who qualifies for special education and related services under the primary disability of Autism ("AU") and the secondary disabilities of Emotional Disturbance ("ED") and Other Health Impaired ("OHI"), based upon Attention Deficit-Hyperactivity Disorder ("ADHD") (JX4).
3. Student resides within KISD's jurisdictional boundaries with Student's mother, father, *** (JX1.09). KISD is responsible for providing Student with an appropriate education under IDEA and its federal and state implementing statutes.
4. Student enrolled in KISD at the beginning of school year 2014-15 and was placed in *** (JSF1). At that time, Student was *** living in home in which *** was the primary language. *** (JX1.2). Student's Mother reported that Student had attended school in *** prior to ***. During those earlier years, Student had difficulties with ***. At one point, Student was suspended for *** (JX1.9). (JSF9).

2014-15 School Year: *. *****

5. At home, Student had tantrums frequently, usually when Student did not get Student's way. At times Student displayed aggression towards others as well as ***.¹³
6. At school, Student's major problems were difficulty focusing, being too active, and having difficulty socializing. ***. The other children seemed to dislike Student and did not follow Student's behavior because they felt Student would get them into trouble. *** (JX1.10).
7. Academically, Student was working on grade level and turning in most of Student's homework. Student displayed a good memory but difficulty with listening to stories and participating in classroom discussions. During class Student was extremely active, playful, but loud with difficulties attending and concentrating. During this school year, Student did not have an absentee problem (JX1.10).
8. Because Student's Mother and Student's teacher had some concerns about Student's behavior, the District conducted a Full and Individual Evaluation ("FIE") as well as a Psycho-educational Evaluation. The District completed the Psycho-educational Evaluation on November ***, 2014, and the FIE on November ***, 2014. These assessments found that Student did not meet TEA guidelines as a student with a Specific Learning Disability ("SLD"), AU, Speech Impairment ("SI"), or Cognitive Disability ("CD"). The District referred Student for a Section 504 assessment to determine qualifications for accommodations and modifications under that federal statute (JX1.17).
9. Student's pediatrician referred Student for a Psychological Evaluation, dated April ***, 2015, in order to obtain diagnostic clarification and treatment recommendations for Student's increasingly poor behavior. The examiner provided diagnoses of ADHD, Combined Presentation and *** ("***"). The

¹³ *** (JX1.9).

examiner noted that Student displayed some symptoms of AU, but there was insufficient evidence to support a formal diagnosis. The examiner recommended future re-evaluation in the AU area (P2) (JX5.51).

10. Based on the findings of ADHD characteristics in the District's FIE and the Parent's report that Student had been diagnosed with ADHD in May 2014, the District gave Student's Mother an OHI Physician's Report to be completed in the spring of 2015 (JX2.19). Student's Mother obtained two OHI Physician's Reports, one dated April ***, 2015, and one dated April ***, 2015, but failed to sign consent for testing.

School Year 2015-16: *, *****

11. Student transferred to *** at the beginning of Student's *** year (JSF11).
12. On August ***, 2015, Student's Parent requested another FIE, which was completed on September ***, 2015. Student was continuing to have behavior problems at home and at school. The FIE was conducted to investigate possible OHI eligibility for ADHD. Student's Mother had returned two (2) OHI Physician's Reports in April 2015. Both reports indicated severe ADHD (JX2.25). Student's ADHD appeared to interfere with Student's ability to participate in the general education process; Student's ADHD affected Student in all academic and non-academic areas; Student's attention to tasks, speed in operation, ability to follow directions, and comprehension of material were affected by Student's ADHD; and accommodations for Student's educational program could best be provided through special education (JX2.26).
13. On September ***, 2015, Student's ARDC determined that Student met TEA guidelines as a student with OHI based upon ADHD. The ARDC developed a behavior plan and requested a Psychological Evaluation of Student to determine whether Student had an ED (JX3.29) (JSF13).
14. Student's Parent provided written consent for a Psychological Evaluation after providing the District with medical records ***, where Student received services during summer 2015. ***. On November ***, 2015, KISD completed the FIE report, concluding that Student met the eligibility criteria for ED and OHI (ADHD) (JX3.29) (JSF15).
15. On October ***, 2015, KISD completed an FBA, and determined three (3) targeted behaviors from teacher input and disciplinary reports (P6). The three (3) behaviors included: (1) aggression in the form of ***; (2) noncompliance in the form of following teacher directives in general; and (3) classroom disruption (P6.2). At the time the FBA was conducted, Student had received *** office referrals; had been sent to ***; and had served in-school suspension *** times (P6.4). The FBA contained multiple recommendations, the lion's share of which related to Student's disruptive and aggressive behaviors towards students and staff (P6.5).
16. On November ***, 2015, KISD completed a FIE report (JSF16). Student's teacher reported that Student exhibited unprovoked outbursts of aggression, which were uncontrollable; Student *** (JX3.35). At times, Student's behavior was so out of control that the other students had to be removed from the classroom. Student had problems paying attention and focusing in class, although Student could generally do the work. *** (JX3.36).

17. Academically Student appeared to be able to do the work but often refused, and attempts to get Student to work could result in aggressive acting out. Classroom observations revealed that Student appeared easily distracted and frequently got up out of Student's chair and moved around the room. Testing revealed social and communication deficits causing Student's behavior to impede Student's learning and the learning of others. Student exhibited significant emotional, behavioral, and/or attentional problems (JX3.37).
18. Testing revealed that Student met eligibility criteria as a student with an ED. Over a long period of time, and to a marked degree, which adversely affects educational functioning, Student displayed (1) a general pervasive mood of unhappiness or depression, and (2) inappropriate types of behavior or feelings under normal circumstances (JX3.38) (TI.220.19-25). Specifically, Student demonstrated symptoms of a thought disorder consistent with Student's outside diagnosis of ***.
19. Student's primary disability was changed to ED and Student's OHI became Student's secondary disability (JSF15).
20. In January 2016, Student's ARDC transferred Student to *** and placed Student in *** classroom. However, Student did not thrive in this environment. Throughout the spring semester Student was routinely restrained for aggressive behavior towards staff, students, and property; *** (P7.1-89).
21. On May ***, 2016, KISD completed a Review of Existing Evaluation Data of Student ("REED") (P8). The ARDC met to discuss discipline and the next year's IEP (P8.5). The Committee determined that Student did not show any need for further evaluations in the areas of cognitive abilities; speech/language communication; health/vision/hearing; and fine/gross motor needs (P8.1-4).
22. Student's teacher and other service providers reported that Student continued to refuse to work; Student challenged authority; and Student displayed destructive behaviors on a daily basis. Student's disciplinary records showed *** out-of-school suspensions and *** in-school suspensions over the course of the school year (P8.14).
23. Throughout the 2015-16 school year, Student manifested *** challenging behaviors: (1) off task; (2) emotional outburst/tantrum; (3) defiance of authority; (4) incomplete assignments; (5) leaves assigned area; (6) physical aggression; (7) disruption inside the classroom; (8) noncompliance; and (9) social isolation/withdrawal (P8.14). The ARDC updated Student's September 2015 BIP and requested a new AU evaluation (P8.4;14).

School Year 2016-17: *** at ***

24. Student continued Student's placement at *** when Student entered ***. Student's negative and aggressive behaviors continued. ***. ***. Student's Parents reported that Student was coming home with *** allegedly caused by staff restraining Student (T2.503.1-505.24). Student's Parents became very alarmed upon learning Student had to be restrained from negative behaviors often.
25. An FBA was completed on January ***, 2017, to address the significant behavior problems that were increasing substantially (P11). Student's *** increased; *** (P11.2). Likewise, Student ***. The FBA identified several target behaviors: (1) negotiating; (2) verbal refusal; (3) ***; (4) ***; (5) physical

aggression; and (6) *** (P11.3). The FBA offered a BIP that included (1) Antecedent Based Strategies (prevention); (2) Consequence-Based Strategies (responding to target behaviors); and (3) Replacement Behaviors/Goals (P11.3-5).

26. In spring 2017, an outside provider conducted an Independent Educational Evaluation (“IEE”) (JX5). The purpose of the IEE was to determine whether Student met the criteria of other disabilities; to determine Student’s present levels of educational performance; and to aid in determining services. Specifically, the IEE addressed AU, ED, and OHI (JX5.46). The IEE indicated that Student displayed impairments in verbal and nonverbal communication as well as social interaction, all of which was consistent with AU (JX5.82). Student’s emotional and behavioral functioning was also consistent with an ED (JX5.82).
27. On May ***, 2017, Student’s ARDC met to review the results and recommendations of the independent examiner as well as its own recent evaluations (P12). The Committee declined to add the AU disability recommended by the independent examiner and continued Student’s primary disability as ED with OHI as the secondary disability (P12.38-39).
28. The District agreed to conduct an Occupational Therapy (“OT”) evaluation in the areas of fine motor skills and sensory needs and an in-home training assessment. The ARDC recommended continued placement ***. The District agreed to transition Student to *** minutes a day if Student’s behavior allowed it (P12.39).

School Year 2017-18: *** at ***

29. Student continued Student’s placement *** at *** during school year 2017-18. There is a dearth of evidence in the record regarding Student’s behaviors during this school year. Only one (1) discipline report is in evidence and it relates to a serious offense of ***. *** (P13.1). Student’s October 2018 FBA notes the following 2017-18 violations: *** (JX27.485-86).
30. During the last weeks of school year 2017-18, Student displayed negative behavior when attempting to ***. Student would become aggressive and defiant in Student’s adherence to directives from the ***. Student’s behavior would escalate to the point that Student would have to be removed from *** (JX13.376).

School Year 2018-19: *** at ***

31. Student transferred to *** at the beginning of the 2018-19 school year. On August ***, 2018, Student’s ARDC met and completed a REED (JX13). The Committee concluded that no additional data was required and continued Student’s eligibility for special education services under the categories of ED and OHI. The ARDC developed an IEP and a Behavior Support and Intervention Plan (“BSIP”). The ARDC requested an In-Home Training Assessment and an FBA. Student’s Parent signed the consent form that day (JSF6).
32. In reviewing Student’s Present Levels of Academic Achievement and Functional Performance (“PLAAPF”), the Committee noted several concerns. In reading ***, Student would often stop trying

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

STUDENT, b/n/f PARENT & PARENT, v. Killeen ISD (Docket No. 021-SE-0919-A)

- to read or become frustrated ***. Student became easily agitated when having to learn strategies, concepts, *** Student determined to be too difficult. Student refused to submit to any reading assessment *** and would walk away or attempt to destroy the reading material (JX13.363).
33. The Committee noted concern with Student's impulsivity, Student's becoming visibly upset, and getting excited when presented with an academic task or behavioral demand that Student viewed as too difficult or requiring too much time to complete. Student would leave Student's area, ***, or just stop working (JX13.363).
34. The Committee noted concerns about Student's avoidance behaviors. Student would assess the circumstances surrounding an academic or behavioral task. If Student determined that the task was something Student did not want to attempt or complete, Student would initiate various levels of *** aggression. *** (JX13.364).
35. The BSIP set out three (3) targeted behaviors:
- (1) Student has episodes of refusing to begin and/or complete academic tasks. Student states that Student ***. The behavior occurs several times a day and can last several minutes with mild to moderate intensity (JX13.373).
 - (2) Student exhibits oppositional and defiant behavior towards teachers and authority figures. During these episodes, Student demonstrates behaviors such as ***. This behavior had lessened considerably with the implementation of Student's BIP but when it occurred, it could last up to an hour with moderate to extreme intensity (JX13.375).
 - (3) During the last weeks of school year 2017-18, Student displayed negative behavior when attempting to ***. Student would become aggressive and defiant in Student's adherence to directives from ***. Student's behavior would escalate to the point that Student would have to be removed *** (JX13.376).
36. On September ***, 2018, Student received a disciplinary referral for insubordination (PX16.1). Student was also restrained on that day when Student refused to *** (JX20.459).
37. Student was restrained on September ***, 2018, because Student got physically aggressive with staff *** (JX21.464).
38. Student received *** disciplinary referrals during the first reporting period and *** disciplinary referrals during the second (JX8.170).
39. On October ***, 2018, KISD completed its In-Home Training Assessment. The report indicated that Parents did not participate in the assessment. The report concluded that the lack of Parents' participation resulted in not recommending In-Home Training or Parent Training (JSF16).
40. On October ***, 2019, Student's father reported that Student seemed to be happier at school because the personnel at the new school knew how to deal with Student. At that time, the Parents were pleased with Student's progress (JX27.487).

41. On October ***, 2018, KISD completed the FBA (JSF18).
42. Student's ARDC met on November ***, 2018 to conduct its annual ARDC meeting. Prior to the meeting a District Licensed Specialist in School Psychology ("LSSP) and an Educational Diagnostician accepted the March ***, 2017, IEE as a re-evaluation and at that point, AU became Student's primary disability; ED became Student's secondary disability; and OHI became Student's tertiary disability (JX4.43).
43. At this point in Student's *** year, Student was refusing to complete assignments, especially those in reading; Student was not turning in Student's work in math; *** (JX.37.536). The challenging behaviors listed on the BIP were the same behaviors listed since May 2017, which appeared to indicate that Student's BIP was inappropriate or was not being implemented. The District's LSSP testified where intervention is utilized, one could expect behavioral change. However, given Student's multitude of fairly significant eligibilities, behavioral growth can be inhibited (T1.143.20-25).
44. The ARDC considered Student's strengths, parental concerns, the result of recent evaluations, and Student's academic, developmental, and functional needs. The Committee considered the use of positive behavioral interventions to address behavior as well as Student's *** needs as a student ***. The Committee determined that Student continued to meet the eligibility requirements for the categories of AU, ED, and OHI.
45. In reviewing Student's PLAAFP, the Committee noted several on-going and increasing concerns. Student refused to read and write, which affected Student's grades in other subjects such as math, science, and social studies. ***. When frustrated, Student ***. ***. When extremely upset, staff had a difficult, if not impossible, time redirecting Student. Due to Student's disabilities, Student had a difficult time controlling impulsivity behaviors (JX37.538-9). Due to Student's disabilities, AU, ED, and ADHD, Student needed self-regulation goals to help Student understand how Student can make better choices (JX37.539).
46. The Committee developed an IEP that included (1) a statement of Student's present levels of academic achievement and functional performance; (2) measurable annual goals; (3) a description of how Student's progress toward meeting the annual goals would be measured; (4) a description of ***; (5) an AU supplement; (6) a description of *** services; (7) a BIP; (8) accommodations; (9) support services; and (10) LRE (JSF22) (JX37.540-45) (JX38) (JX39) (T1.366:1-372:15).
47. The ARDC targeted three (3) behaviors of concern:
 1. Disruptive behaviors are inordinate levels of physical motion/activity or vocalization within the classroom, which interferes with the educational process by producing turbulence and/or discord. During these episodes, Student demonstrated behaviors such as *** (JX37.553).
 2. Defiance of authority is defined as any occurrence of saying "no," "****" to any academic or non-academic requirement (JX37.556).

3. Physical/Verbal Aggression: This refers to a student's physical/verbal behaviors that are not appropriate for the classroom environment and can pose a threat to the safety of the student, other students, and to staff members. Student acted out at a moment's notice; Student could go from working successfully to having a non-compliant behavior; ***. These episodes could last for a moment or much longer. Immediate redirection would be needed to de-escalate (JX37.553-57).
48. The ARDC added two (2) *** and math goals. Student's IEP included four (4) behavior goals, two (2) of which addressed self-regulating skills to avoid engaging in an unexpected behavior, refraining from engaging in *** aggressive (JX37.544-45).
49. The November ***, 2018, ARD reached consensus.
50. Student's December 2018 Progress Report indicated that Student was making some progress on Student's goals but the progress was minimal. Student's behavior continued to impede Student's education because staff was having a difficult time keeping Student focused (JX45:638-40).
51. On January ***, 2019, Student refused to work on Student's *** test; Student proceeded *** (T1.375:24-376:3; 377:1-2). When Student's teacher ignored Student, Student started escalating *** (T1.378:1-5). *** (T1.378:1-15). Once Student was released ***, Student *** (JX55.797). ***.
52. On January ***, 2019, KISD held a Campus-Level Conference ("Conference") to determine if Student's January ***, 2019, behavior incident met the Student Code of Conduct criteria for consideration of placement at KISD's DAEP. The Conference recommended that the behavior met the criteria for DAEP placement. Student's Parents disagreed with the finding (JSR26) (JX50.705; 51; JX52).
53. Following the conference, the District convened the MDR meeting. The meeting lasted approximately three (3) hours. During the meeting, the ARDC, including the Parents, presented and considered substantial information. The ARD Committee considered documentation and witness descriptions of the January ***, 2019, incident; evaluations and IEPs describing Student's disabilities and eligibilities for special education; prior behavior incidents; and other information provided by Student's Parents ARDC members (JX57).
54. The MDRC determined that Student's conduct was not a direct result of the District's failure to implement Student's IEP; (2) the conduct in question was neither caused by, nor had a substantial relationship to Student's disabilities; and (3) Student's behavior was not a manifestation of Student's disabilities (JX50.704-06; JX51; JX52).
55. The MDRC did not reach consensus. Student's Parents disagreed with the findings and both of the LSSPs in attendance disagreed with the findings. The majority opinion found that the behavior was not a manifestation of Student's disabilities because it appears to be attention-seeking, deliberate, targeted, and done in such a way as to minimize adult attempts to intervene.
56. Student's Parents and the two (2) LSSPs relied on the recent FIE, believing that the behavior may be a manifestation of the disabilities. The testifying LSSP stated that Student's lack of functional

communication skills and social skills, noted in the most recent FIE, may have contributed to the behavior in question (JX50.706). This LSSP did not recant or negate this position.

57. The evidence supports a finding that Student's MDR ARDC incorrectly determined that Student's conduct on January ***, 2019, was not caused by, or had no direct and substantial relationship, to Student's disabilities.
58. The evidence failed to prove that Respondent conducted an improper MDR by relying on mandatory provisions of the Student Code of Conduct and/or the "special circumstances" under IDEA
59. The evidence did not prove that Student's IEPs and BIPs were not reasonably calculated to provide Student with a meaningful benefit: Student's IEPs and BIPs were individualized based upon Student's assessments and performance; Student's placement *** was the LRE; Student's program was developed in a coordinated and collaborative manner; and Student's minimal progress both academically and non-academically did not negate the appropriateness of Student's program.
60. The evidence did not prove that Student was entitled to tuition reimbursement for the unilateral placement at ***.
61. The evidence failed to prove that Respondent did not conduct proper evaluations.
62. The evidence proved that Respondent trained staff working with Student in implementing Student's IEPs and BIPS.
63. The evidence failed to prove that Respondent violated the Parents' procedural rights in failing to provide Student's Mother with ARDC documentation in her native language.
64. The evidence failed to 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.

VI. DISCUSSION

A.

Petitioner's Burden of Proof on the Issues Raised in the Complaint:

The IDEA creates a presumption favoring the education plan proposed by a school district and places the burden of proof on the Student challenging the plan. It is well-settled that a party challenging the district's eligibility determination or offer of services under IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005); *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754 (*citing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5th Cir. 2010).

B.

Manifest Determination Review

Petitioner alleges that the District violated IDEA in failing to conduct a proper MDR: (1) the MDR decision was erroneous; (2) the MDRC failed to properly define “serious bodily injury” in making its DAEP placement; and (3) the MDRC incorrectly relied upon the Student Code of Conduct in making its placement decision.¹⁴

IDEA provides that when a district decides to change a disabled student’s placement because of a violation of a code of student conduct, the student’s ARDC must determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the student’s disability, or was the direct result of the district’s failure to implement the student’s IEP. 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e). If the behavior is determined not to be a manifestation of the student’s disability, then the student may be disciplined in the same manner and for the same duration as would apply to children without disabilities. 20 U.S.C. §1415(k)(1)(C); 34 C.F.R. §300.530(c). If the behavior is determined to be a manifestation of the student’s disability then, with limited exceptions, the ARDC must either modify any existing BIP or conduct an FBA and develop a BIP. 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f).¹⁵ A child with a disability who is assigned to a DAEP must continue to receive education services to enable the child to continue to participate in the general education curriculum and to make progress on Student’s goals. 34 C.F.R. §300.530(d). The student must receive, where appropriate, an FBA and behavioral intervention services and modification that are designed to address the behavior violation so that it does not recur.

1. Basics of an MDR Appeal:

The MDR is an important discipline procedure under the IDEA. It is an evaluation of a student’s misconduct to determine whether that conduct is a manifestation of the student’s disabilities. It must be performed within ten (10) school days of the change in placement that stemmed from an IDEA-eligible student’s violation of a code of conduct. 34 C.F.R. §300.530(e).¹⁶

The MDR should be conducted by the district, the parents, and relevant members of the student’s ARDC, as determined by the parents and the district. 34 C.F.R. §300.530(c). The MDR must involve a review of all of the relevant information in the student’s file, including the student’s IEPs, teacher observations, and any other relevant information provided by the parents. 34 C.F.R. §300.530(e). While parents have the right to invite additional participants to the MDR, they do not have the right to veto a district’s choice of team members or the MDRC’s determination that the student’s misconduct is unrelated to Student’s disability. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008).

¹⁴ The Student Code of Conduct has a provision for mandatory DAEP placement for causing bodily harm to an employee.

¹⁵ The district may unilaterally remove the student to an interim alternative educational setting for not more than forty-five (45) days, without consideration of whether the conduct was a manifestation of the student’s disabilities, if the student 1) carries or possesses a weapon on school premises or to or at a school function; 2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or 3) inflicts “serious bodily injury” upon another person while on school premises or at a school function. 20 U.S.C. §1415(k)(1)(G)(iii); 34 C.F.R. §300.530(g). Section 300.530(i) specifically incorporates the definitions of “controlled substance,” “illegal drug,” “serious bodily injury,” and “weapon” from federal law.

¹⁶ A “change of placement” occurs when, as here, the district removes the IDEA-eligible student from Student’s current educational placement for more than ten (10) consecutive school days. 34 C.F.R. §300.536.

Because Student is eligible for special education and related services under the AU, ED, and OHI categories, Student's ARDC had to convene to determine whether Student's placement at the DAEP for thirty (30) successful days was a prohibited change of placement.

2. MDR Answers to MD Questions:

Student's Parents attended the January ^{***}, 2019, MDRC meeting. The MDRC reviewed Student's relevant information contained Student's file, IEP, BIP, and multiple evaluations. The MDRC likewise reviewed Student's disabilities and behaviors, class participation, class work; and anecdotal information provided by Student's teachers, staff, administrators and witnesses to the subject incident.

The first question in the MDR asks: Was the conduct in question caused by, or did it have a direct and substantial relationship to, the child's disability? 20 U.S.C. 1415(k)(1)(E)(i). In reaching an answer to this question, the MDRC must review all evaluation data, the student's discipline history, details of the incident, IEPs, teacher observations, and any relevant information provided by the Parents.

In this case, Student claims that the subject incident was certainly caused by, or had a substantial relationship to, any or all of Student's disabilities: AU, ED, and OHI. The District disagrees, claiming that Student's conduct was too measured, too deliberate and intentional; Student's language and interactions were not characteristic of Student's disabilities; Student displayed no repetitive behavior patterns; Student's aggression was targeted ^{***}, suggesting a thoughtful preference for Student's victims; ^{***}.

Evidence of a direct connection between the student's misconduct and disability will often result in a finding that the student's misconduct was a manifestation of Student's disability. *District of Columbia Pub. Schs.*, 114 LRP 3336 (SEA DC 12/19/13) (*Student's ED caused her to be impulsive and combative, which triggered her to elope from class and start a fire on school grounds*); *Manteca Unified Sch. Dist.*, 50 IDELR 298 (SEA CA 2008) (*finding that a teenage girl's misconduct – kicking a male schoolmate in the groin – was directly related to the post-traumatic stress she suffered as the result of a sexual assault*).

In this case, the MDRC did not reach consensus. The Parents and the two (2) attending LSSPs disagreed with the Committee's finding. Neither LSSP expressly revoked his or her disagreement. One LSSP is no longer with the District and was not called as a witness. The testifying LSSP tried to explain his reasoning behind his disagreement but he never recanted that position.

Notwithstanding the fact that the two (2) LSSPs disagreed with the Committee's finding, the record established that the Student's behavior was caused by, or had a direct and substantial relationship to, Student's disabilities. Over a relatively short time period, 2014 to the present, the time Student has attended KISD, the voluminous records of Student's negative behaviors; crafted and recrafted IEPs and BIPs; multiple FBAs and FIEs, all focused on finding ways to control Student's behavior so that Student, and others, can have a safe, appropriate educational experience. Each school year numerous incidents were reported about Student and Student's often uncontrollable behaviors, such as ^{***}. Student has continued to display impulsivity, aggression, tantrums, and anger. Student's IEPs and BIPs set out specifically all of these behaviors that have been acknowledged as characteristics of Student's AU, ED, and OHI. To now assert that the subject behaviors, *i.e.*, ^{***}, were not caused by, nor did they have a direct and substantial relationship to Student's disabilities is incorrect.

The second question in the MDR asks: Was the conduct in question a result of the district's failure to implement the student's IEP? 20 U.S.C. 1415(k)(1)(E)(i). This is an alternate question that does not have to be addressed given the ruling.

C. Provision of FAPE

Petitioner alleges several matters in claiming that the District denied Student a FAPE: (1) failure to provide appropriate educational programs that were individualized to Student's needs in the areas of academics, socialization, emotional health, and behavioral need; (2) failure to conduct proper evaluations; (3) failure to provide an appropriate BIP; and (4) failure to provide staff with proper training.

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). "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. A school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017). However, the IDEA cannot, and does not, promise any particular educational outcome. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. at 998.

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).

In 1997, the Fifth Circuit established a four-factor test to determine whether a school district's IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA: (1) Is the program individualized on the basis of the student's assessment and performance?; (2) Is the program administered in the LRE?; (3) Are the services provided in a coordinated and collaborative manner by the key stakeholders?; and (4) Does the student demonstrate both positive academic and nonacademic benefits? *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 249 (5th Cir. 1997). These factors were recently re-affirmed by the Fifth Circuit as appropriate under, and consistent with, *Andrew F. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

This analysis concerns the IEPs and BIPs developed in school year 2018-19. In conducting the *Michael F.* analysis, it is clear that the IEP and BIP developed by Student's ARDC, along with amendments, were reasonably calculated to provide Student a meaningful educational benefit under the IDEA.

Factors I: Was the Program Individualized Based on Student's Assessments and Performance?

Student's ARDC met and developed at least two (2) IEPs during school year 2018-19. The record is replete with evidence that the ARDC thoroughly reviewed Student's evaluations and gathered additional data to identify Student's individualized needs. Indeed, Student was evaluated multiple times as Student's behaviors morphed or academic performance changed. The IEPs included a detailed statement of Student's PLAAFP in accordance with 34 C.F.R. §300.320. The ARDC considered Student's strengths, parental concerns, the result of recent evaluations, and Student's academic, developmental, and functional needs. The Committee considered the use of positive behavioral interventions to address behavior as well as Student's *** needs as a student with ***.

In reviewing Student's PLAAFP, the Committee noted several on-going and increasing concerns. Student needed self-regulation goals to help Student understand how Student can make better choices.

The Committee developed IEPs that included (1) a statement of Student's present levels of academic achievement and functional performance; (2) measurable annual goals; (3) a description of how Student's progress toward meeting the annual goals would be measured; (4) a description of ***; (5) an AU supplement; (6) a description of ***; (7) a BIP; (8) accommodations; (9) support services; and (10) LRE. These IEPs and BIPs clearly were individualized based upon Student's assessments and performance.

Factor 2: Was the Program Delivered in the LRE?

It is well-settled that a student's IEP must be administered in the least restrictive environment. This means that KISD is required to educate Student with others who are nondisabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2). Likewise, KISD is required to offer a continuum of placements to address the needs of students with disabilities. 34 C.F.R. §300.115. In *Andrew F.*, the Supreme Court reiterated the IDEA's long-standing preference that students be "fully integrated into the regular classroom." *Andrew F.* at 1000.

It is well-settled that making a determination of LRE, a hearing officer weighs the benefits of education in the regular classroom, with the use of supplemental aids and services, against those of others. Where feasible, a district should educate the disabled student with Student's peers. However, this mandate is not limitless. A district is not required to establish a "class within a class" or to modify the general education curriculum beyond recognition to accommodate a handicapped student. Student's needs, and the impact of those needs on other children, must be considered. *Daniel R.R.*, 874 F.2d at 1048-49.

In the instant case, the evidence overwhelmingly demonstrates that Student's placement *** was the LRE. From the beginning, Student has demonstrated severe and repeated patterns of aggression toward teachers and fellow students. Student's behaviors have been so extreme that Student's teacher has had to ***. These behaviors can last for minutes up to an hour. Some of these behaviors have resulted in ***.

Neither party to this litigation disputes the frequency and severity of Student's negative behavioral conduct. Placing Student in a general education classroom would place all students at great risk of physical harm and would wholly negate any beneficial educational environment in the classroom.

The LRE requirement is one of the central components of an appropriate placement under the IDEA. Compliance is mandatory. The educators who worked with Student on a daily basis were committed to ensuring that Student had the benefit of exposure to grade-level instruction and interaction with nondisabled peers to the extent possible.

Factor 3: Was the 2018-19 Program Developed in a Coordinated and Collaborative Manner:

This third factor requires that all members of the ARDC, including parents, must have the opportunity to participate in a collaborative manner in developing the IEP. 34 C.F.R. §300.322(a). A decision of the ARDC concerning required elements of the IEP must be made by mutual agreement if possible. 19 TEX. ADMIN. CODE §89.1050(g). Courts emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances, which is entirely consistent with the third *Michael F.* factor. *Andrew F.* at 994.

For the relevant period in the present case, the record reflects that multiple individual stakeholders, including the Parents, met to develop Student's IEPs. The November ***, 2018, ARDC resulted in consensus. Student's Parents were fully involved in Student's educational decision making. Student's mother and father attended and participated in all ARD meetings. They voiced concerns and approval when necessary. KISD fully considered those concerns.

With the development caused by Student's January incident, and the resulting MDR placement, Student's Parents became angry; they distanced themselves; the collaboration with the Parents diminished. Prior to the MDR, the Parents had been critical at times but they continued attending and participating in the ARDC meetings. They shared vital information in developing Student's programs and were highly regarded as key stakeholders in Student's program development.

Factor 4: Did Student Demonstrate Positive Academic and Nonacademic Benefits?

The fourth and final factor is whether there have been demonstrable academic and non-academic benefits from the IEP. *Houston Indep. Sch. Dist. V. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). An IEP must aim to enable a student to make progress because the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Andrew F.* at 992. A student's development should be measured not by Student's relation to the rest of the class, but rather with respect only to Student.

In this case, there is little progress noted in fall 2018 through Student's withdrawal from KISD by Student's parents. Student's progress report dated October ***, 2018, reported academic and functional goals as "maintaining." However, Student was having severe attendance problems, something that had not been an issue in prior years. The report indicated that Student was not progressing in Student's use of behavior techniques, but again, the staff was concerned about Student's absenteeism.

Student is capable of doing grade-level work, as demonstrated by Student's work production during prior years and assessments. However, Student's behaviors continue to obstruct and defy a vision of

academic and social success that should be Student's to claim. Student is a work in progress. The District and family have learned so much with each semester's changes and implementation of differing techniques. Despite the current status, Student's educational program can provide Student with educational benefit if Student is given the opportunity to participate.

D.

Tuition Reimbursement for Private School Placement

To garner tuition reimbursement, Student's Parents must prove (1) that the District did not provide FAPE to Student, and (2) that Student's private placement at *** was appropriate. 20 U.S.C. §1412(a)(10)(C)(i); 34 C.F.R. §300.148(c).

The foregoing Findings of Fact and Discussion manifest that the District did not fail to provide Student FAPE. Accordingly, Student is not entitled to reimbursement for the unilateral placement at ***.

VII.

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. KISD 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. Student 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).
4. Tuition reimbursement for Student's unilateral placement in *** is not appropriate because KISD did not deny Student a FAPE. 20 U.S.C. §1412(a)(10)(C)(i); 34 C.F.R. §300.148(c).
5. Student's January ***, 2019, MDR finding was not appropriate. Student's January ***, 2019, behavior incident was caused by, or had a substantial relationship to, Student's disabilities.

VIII.

ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested is GRANTED IN PART and DENIED IN PART. It is

ORDERED that in the event Student's Parents re-enroll Student in KISD, Student's ARDC shall meet within ten (10) days and it must either (1) modify any existing BIP, or (2) conduct an FBA and develop a BIP in compliance with 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f). It is further

ORDERED that in the event Student's Parents re-enroll Student in KISD, Student's ARDC shall return Student to the placement from which Student was removed, unless the Parents and District agree to a change of placement as part of the modification of the BIP. It is further

ORDERED that all relief not specifically granted herein is DENIED.

SIGNED this the 19th day of December 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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