

TEA Docket No. 096-SE-1119

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	HEARING OFFICER
v.	§	
LAMAR CONSOLIDATED	§	FOR
INDEPENDENT SCHOOL DISTRICT	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER
NUNC PRO TUNC

Petitioner, Student b/n/f Parent, (Student and Parent) filed an Original Complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"). The complaint was received by the Texas Education Agency on November 20, 2019 and assigned to this hearing officer. Respondent is Lamar Consolidated Independent School District (District).

LEGAL REPRESENTATIVES

Student is represented by Samuel D. Wesley of the firm Sam Wesley and Associates, PLLC., and Shawn Williamson, Of Counsel. District is represented by Richard Morris and Amy Tucker of the firm Rogers, Morris & Grover LLP.

DUE PROCESS HEARING CONDUCTED

The initial scheduling order set the due process hearing for January 20-23, 2020. Both parties waived the resolution session. Mediation was declined. At a prehearing conference on January 8, 2020, all counsel reported ready.

A due process hearing was conducted January 21-23, 2020. A record was made by Mack Lane, TX CSR 3538, a Texas certified court reporter. A copy of the transcript was electronically delivered to the parties.

After the hearing the parties filed written closing arguments and agreed this decision would be timely issued on March 30, 2020. The decision deadline was extended to April 6, 2020 by agreement of the parties to allow time for submission of additional post-hearing filings.

I. STATEMENT OF CASE

The ultimate issue in this case is whether District denied Student a free, appropriate public education (FAPE) by failing to develop and implement an Individualized Education Program (IEP) that was reasonably calculated to allow Student to make educational progress in light of Student's unique circumstances.

The hearing officer concludes Student was denied FAPE during the Fall 2018 semester. The implementation of Student's IEP was not reasonably calculated to allow Student to make educational progress in light of Student's unique circumstances. Student has endured changes in placement from a *** classroom to a homebound placement, and then to a placement blending predominantly homebound with some classroom services. Student's Individualized Education Plan (IEP) must be reconsidered by the ARD committee.

The question whether Student is entitled to placement at a private school or counseling services is not ripe for decision without additional evaluation and further ARD consideration. Based on the record at hearing it cannot be determined which if any private placement and services may be required for student to obtain a FAPE, and so no decision is reached on these requests.

II. PROCEDURAL HISTORY

A. PRIOR LITIGATION

Student filed a complaint and request for due process hearing against District on March 1, 2019. It was assigned TEA Docket No. 197-SE-0319.

The due process hearing was scheduled for September 10, 2019. Student filed a Notice of Nonsuit Without Prejudice the day before the hearing, and the matter was dismissed on September 9, 2019.

Less than a year later, on November 20, 2019, Student filed this request for hearing complaining of substantially the same issues raised in the original complaint. Texas Administrative Code Section 89.1180(i) is applicable to these proceedings.

B. THE "ONE-YEAR REFILEING RULE"

Texas has a unique provision. If a party requests a dismissal or non-suit of its due process hearing after the disclosure deadline and refiles the same or a substantially similar due process hearing request within one year, then absent good cause, or unless the parties agree otherwise, the disclosure deadline for the second request for due process hearing shall be the same date as was established for the hearing that was dismissed or nonsuited. 19 TEX. ADMIN. CODE §89.1180(i).

During a prehearing conference Student was invited to brief the issue of good cause. Unsworn statements were not considered as evidence to support a good cause argument. See *Duchene v. Hernandez*, 535 S.W.3d 251, 256-57 (Tex. App.—El Paso 2017, no pet.). Even assuming the unsworn statements are true, they would not establish the good cause required. A lack of knowledge of the rules does not constitute good cause. *Woods v. Woods*, 193 S.W.3d 720, 723 (Tex. App.—Beaumont 2006, pet. denied).

C. THE "FIVE-DAY EVIDENCE RULE"

The IDEA prohibits a party from introducing any evidence at a due process hearing that has not been disclosed to the opposing party at least five business days prior to the hearing. 34 CFR 300.512(a)(3). The purpose of the rule is to allow all parties the opportunity to adequately respond to the impact of the evidence presented by eliminating the element of surprise as a strategy a party may employ to influence the outcome of the hearing decision. *Letter to Steinke*, 18 IDELR 739 (OSEP 1992). A party has a right to prohibit the introduction of undisclosed non-

evaluation evidence. A hearing officer may bar any party that fails to comply with this rule from introducing such evidence. 34 CFR §300.512(a)(3).

Nevertheless, with District's consent, Student was allowed to make additional disclosure of certain additional documents and witnesses. See *Cooper v. D.C.*, 77 F.Supp.3d 32, 39 (D.D.C. 2014) (finding that "the IDEA vests Hearing Officers with. . .discretion" to "allow[] the testimony of an undisclosed witness, . . . at the due process hearing.") (citing, inter alia, 20 U.S.C. § 1415(f)(2)(b), 34 C.F.R. § 300.512(b)(2)).

D. ADDITIONAL DISCOVERY

After announcing ready, Student sought a continuance and requested new discovery that was known well before the due process request was filed. The hearing officer declined to find good cause for a continuance or for additional discovery. More specifically, the proposed discovery may be relevant to claims Student may have under other laws besides the IDEA, but it is not relevant to this hearing. Permitting belated discovery not relevant to any issue for this IDEA hearing serves to unnecessarily delay these proceedings and a final resolution of the IDEA issues. After considering the cumulative impact of the four factors as required by Texas Administrative Code §89.1186, these requests were denied.

III. CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

The jurisdiction of a special education hearing officer in Texas is strictly limited to claims arising under the IDEA. Specifically, a hearing officer has the authority to determine claims related to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student. 34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code §§

Student requests several items of relief that are not within the hearing officer's jurisdiction. Student raises claims including monetary damages - lost wages, pain and suffering, which may be recoverable under laws other than the IDEA. Those claims are dismissed as outside the jurisdiction of the hearing officer.

The complaint also gives notice that Student intends to seek attorney's fees and litigation costs under the IDEA and other federal statutes. The parent of a child with a disability may be entitled to an award of attorney's fees as a prevailing party. However, an award of attorney's fees is within the sole discretion of either the federal district court or a state court of competent jurisdiction. Reimbursement for attorney's fees and litigation costs are outside the hearing officer's jurisdiction and therefore are denied. 34 C.F.R. § 300.517 (a) (i).

Since the hearing officer has no authority to hear claims under statutes other than the IDEA, the relief requested including monetary damages, lost wages, and attorneys' fees and any and all claims arising under laws other than the IDEA, are dismissed for want of jurisdiction.

IV. STATUTE OF LIMITATIONS

The Complaint was filed November 20, 2019. The one-year statute of limitations period applied in Texas bars claims based on events occurring before November 20, 2018. Student does not allege an exception to the limitations period.

Student concedes Student's claims are limited to the period from November 20, 2018 through February 11, 2019, the date the ARD committee agreed to provide homebound services for the remainder of the Spring 2019 semester. Tr. PHC 12/9/19 at p. 14 (lines 1-21). See also PHC of 1/8/2020 at p. 6 (lines 6-16). (attorney clarifying that the issues for hearing are limited to the "beginning of 2018 time of the year [Aug 2018] until the moment that (Student) was placed on homebound services"). See e.g., Tr. at p. 212 (lines 11-16); p. 226 (lines 8-11). See e.g., Tr. at p. 171 (lines 1-9) (parent agreeing that she has not shared any concerns about Student's educational programming with District since Student started homebound services). See Request for Hearing dated 11/19/2019. See e.g., Tr. at p. 170 (lines 17-24) (parent acknowledging that virtually everything she testified to on day 1 related to events occurring in the fall of 2018). Therefore, the relevant timeframe for FAPE claims brought in this case is limited to events occurring after November 20, 2018 and before February 11, 2019.

V. BACKGROUND

A. ***

Student *** transferred from *** another school district in Texas and enrolled at District's *** (***) at the start of the 2018-2019 school year. Student brought with Student the most recent Full and Individual Evaluation (FIE) completed on March ***, 2018. Student's most recent IEP and BIP were also provided to *** prior to the first day of attendance.

The FIE determined the student qualified for special education services with both a disability and an educational need for services. Student was qualified with Other Health Impairment (OHI) based on a diagnosis of *** (***), an *** (***), and a Speech/Language Impairment (SI) in all areas of language (receptive, expressive and pragmatic) and articulation. R's Ex. 13-17.

*** is a ***. Most children with *** experience varying degrees of ***. Most experience significant delay in expressive speech and delayed socialization. R's Ex. 13 (March 2018 FIE).

Children with *** often exhibit a ***. Autistic behaviors are common. Research indicates that children can experience "****." R's Ex. 12-22. This is consistent with testimony relating Student's behaviors. Tr. at p. 176 (lines 2-5).

Attention Deficit Hyperactivity Disorder (ADHD) is also recognized as an additional condition for Federal eligibility. Symptoms include inattention (not being able to keep focus), hyperactivity (excess movement that is not fitting to the setting) and impulsivity (hasty acts that occur in the moment without thought).

Due to Student's significant needs, Student requires a ***modified curriculum taught largely in a *** classroom. Student began In Fall 2018 with a*** program and schedule of services for core academics. R's Ex. 11-7.

B. The FIE, IEP, FBA, and BIP

The FIE contains Present Levels of Academic Achievement and Functional Performance (PLAAPF) which specify significant behavioral challenges, all of which are symptomatic of

adolescents with similar disabilities. The IEP contains a “Determination of Services to be Provided” which specifies accommodations for behavioral challenges.

The BIP identifies target behaviors and functions of those target behaviors. Targets include difficulty sustaining attention (***), and physically aggressive behaviors when upset or frustrated (***).

1. The BIP lists training techniques to promote or cue prosocial behaviors including:
 - ALL BIP implementers be familiar with Student’s BIP/IEP
 - Provide a predetermined cool down area inside the classroom
 - Initiate cool down/sensory breaks should Student become visually upset
 - Use visual prompts (e.g., ***)
 - Incorporate visual prompts into Student’s daily schedule
 - When giving independent work tasks, use one-step instructions
 - Use visual cues and nonverbal commands (including icons/photographs, etc.)
 - Provide access to various sensory items such as ***
2. The BIP warns of specific techniques to avoid. It uses the word "AVOID" typed in all caps to reinforce their importance to successful behavior management. The list includes the following:
 - AVOID known frustration triggers
 - AVOID raising voice or showing excessive emotion during redirection
 - AVOID inconsistent use of visual schedule and reinforcement system
 - AVOID vague/non-specific rules and procedures
 - AVOID use of complex or increased verbiage (especially if upset/frustrated)
3. The BIP encourages use of consequences reasonably calculated to improve targeted behavior, including:
 - Consequences based upon student’s functioning level and severity of the behavior exhibited
 - Use of developmentally appropriate consequences (e.g., failure to earn rewards)

- Verbal directive with *** assistance (which may include therapeutic***) and use of safe ***when Students behavior presents a ***
 - Prompt a sensory break if behaviors appear to be a result of sensory needs
 - Restitution
 - Calmly use coupling statements aloud (“****”)
 - Consider taking a “walking break” to help Student cool down
 - Calmly prompt Student to move to cool down area in the classroom
 - Calmly present Student’s “feelings” chart to Student
 - Regarding Crisis Intervention (when Student is being physical, aggressive)
 - Prompt for restitution (***) and attempt to redirect behaviors with verbal and visual prompts
4. The BIP lists recommended classroom strategies and reward systems, including:
- Reinforce utilizing sensory seeking behaviors during designated time
 - Student responds well to a calm, nurturing voice, and the use of humor
 - At least two walk breaks each day (***)
 - Need communication system between school and home so parents know how Student has done throughout the day (to give reward at home)

VI. ISSUES

- A. Student confirmed the following IDEA issues for decision in this case.
1. District denied Student a free and appropriate public education (FAPE) by violating the IDEA, 34 C.F.R. §300.101(a).
 2. District failed to provide individualized supports and services for challenging behaviors.
 3. District failed to consider the use of positive behavioral interventions and supports and other strategies when developing the student’s IEP, even though In the case of a student whose behavior impedes the student’s learning or that of others the IEP team is required to do so. 34 C.F.R. §300.324(a)(2)(i).

4. District failed to devise specially designed instruction for meeting individualized behavior goals to address the unique needs of the student even where they are addressed by goals in the IEP. 34 C.F.R. §300.39(b)(3).
5. *** related services were not provided to assist Student to benefit from special education. 34 C.F.R. §300.34(a), 34 C.F.R. §300.34(c)(11).
6. Student's written service plan was not implemented as written. 34 C.F.R. §300.37.
7. District failed to educate the student in the Least Restrictive Environment (LRE). 34 C.F.R. §300.114(a)(2).
8. District denied Parent meaningful participation in the ARD process.
9. District predetermined ARD decisions.
10. District failed to devise and implement an appropriate Functional Behavioral Assessment (FBA) and Behavior Intervention Plan.
11. District failed to devise an appropriate plan to teach Student communication skills.
12. District failed to devise an appropriate plan to teach Student ***.
13. District failed to devise an appropriate ***.
14. District failed to devise appropriate and measurable goals and objectives based on present levels of performance and in all of student's areas of need.
15. District failed to collect data on all IEP goals.
16. Student was subject to harassment that rose to the level of denial of FAPE.
17. District did not timely and appropriately respond to the parents record request.

B. Student's Complaints

1. FIE data, classroom data, status reports from teachers, discipline reports, attendance records, grade reports, or other data were not used as sources of information to perform the FBA in November 2018 or implement the IEP.

2. Data Collection forms do not indicate behavior issues for days when Student was disciplined (as described below), or they contain intentionally false statements made by the persons responsible for the data. P's Ex. 16 (Data Collection Forms).
 3. Behavioral goals and services were not measured at the frequency required in Student's IEP.
 4. Academic goals and services were not measured at the frequency required in Student's IEP.
 5. During Fall 2018 Parent received two handwritten progress reports of Student's academic progress. P's Ex. 15 (Progress Reports).
- C. District confirmed the following issues for decision.
1. Student did not meet the burden of proving a denial of FAPE.
 2. The actions of those responsible, while improper, did not result in a denial of FAPE.
 3. Any negative impact of improper actions was rendered harmless by the district's immediate and thorough response.
 4. Student did not prove a denial of FAPE occurred after Student began receiving homebound services.

VII. REQUESTED RELIEF

A. Student's Requested Relief

In Petitioner's Closing Brief, Petitioner requests compensatory services in the form of private school tuition for ***, transportation expenses, lunch and uniform costs, and counseling services. Specifically,

1. Compensatory educational services and/or payment/reimbursement for educational and related services obtained by parents.
2. Compensatory services in the form of private school tuition. Specifically:
 - a. Annual tuition for "****" in the amount of \$49,415.00.

- b. The cost for ten sets of private school uniforms equals \$450 per semester.
 - c. Student is a Free School Lunch recipient and school lunch at "****" totals \$5.50 per day, five times a week.
 - d. *** for school transportation services at \$400 per week.
 - e. Individual counseling for Parent, twice a month for two years, at \$140 per session with Dr. **. See P Closing Brief at pp. 13-14.
3. An award of lost wages required for Parent to stay at home with Student to receive homebound services.
 4. An award by a court of competent jurisdiction of reasonable attorney fees.
 5. Any other relief deemed appropriate by the hearing officer or by a court of competent jurisdiction.

See P's Closing Brief at pp. 13-14.

B. District's Objections to Student's Closing Brief

Respondent objects to the relief requested in the closing brief because neither Student's pleadings nor the evidence offered at hearing support the requested relief. Specifically,

1. Student failed to plead for or prove that a private placement is appropriate.
2. The law forbids a party from introducing facts into a case, by way of closing argument, that are not in the record. See e.g., *Hoskins v. Business Men's Assurance*, 116 S.W.3d 557, 578 (Mo. App. W. Dist. 2003).
3. District was denied any opportunity to challenge or offer evidence against Student's requests.
4. Reimbursement should be denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).

3. To be eligible for reimbursement, the parent must establish that 1) the school denied the child a FAPE, and 2) the private placement is appropriate. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009).

C. District's Requested Relief

1. Dismiss all claims made by Student.

VIII. CHRONOLOGY

A chronological summary of events as alleged by Student follows.

AUGUST ***, 2018

Student's first day of school at ***.

SEPTEMBER ***, 2018

Student was as a form of discipline at *** because Student "became upset, then***." Student was suspended *** and Parent was called for early pick-up. P's Ex. 2 (Notification Regarding Use of).

SEPTEMBER ***, 2018

Student was as a form of discipline at *** but was not sent home early. Student "became angry***." Student may have***. P's Ex. 3 (Notification Regarding Use of).

SEPTEMBER ***, 2018

*** conducted an annual review of Student's IEP. The IEP was updated to reflect that Student became upset and had to be while administrators were called to assist during the first and second week of the 2018-2019 school year.

Although early behavioral problems presented themselves, no changes in behavioral goals were adopted at this time. The IEP indicates that the following specific deliberations were had:

- Student's testing was up to date and no additional assessments were needed

- Student uses ***
- No changes will be made to current (KISD) behavior intervention plan
- For sensory breaks, Student likes to ***
- Parent wanted to see more challenging goals as the year progresses
- Student will shut down if the work is too easy
- New goals and objectives will be developed when the ARD committee reconvenes

See P's Ex. 2 (ARD committee report).

The decisions documented in the 2018 IEP annual review include the following:

- Current levels of special education support and services will remain the same
- The goals documented September ***, 2018 would be used for the first ***
- Student's BIP will remain the same
- Student will continue to receive*** Services including:
 - Cueing or redirection for behavior purpose
 - Observe/monitor and redirect/intervene for behavior that could be harmful to self or others.

See P's Ex. 2 (ARD committee report).

OCTOBER ***, 2018 and OCTOBER ***, 2018

Student was suspended for a second and third time. Parent asked to look at video footage of the "****" that led to the second suspension. The request was submitted to ***, the Director of Special Education for the district, who determined the video footage was not reviewable because abuse or neglect was not suspected.

OCTOBER ***, 2018

During a brief ARD meeting, *** (***) *** teachers reported that sudden behavior changes were occurring daily in the classroom. Other teachers were uncertain of reasons or explanations for such behaviors and had not experienced any aggressive behaviors in

their classrooms. Parent gave consent for a Functional Behavior Assessment (FBA) of the reported "increased behaviors in the classroom."

The district's behavior specialist, ***, conducted an FBA observation that same day. R's Ex. 8-27. *** reports that he witnessed implementation of the supports outlined in the BIP in several different settings including the *** teacher, ***. R's Ex. 8-27 – 8-28. He did not observe interactions between Student and ***.

NOVEMBER ***, 2018

The ARD committee convened to review the FBA/BIP and IEP goals. Parent expressed increasing concern and requested more recommendations to address behavior at school. She reported she was not receiving progress reports. She asked for clarity on the *** goal for ***. She requested clarity of ***'s grading rubric.

In this meeting *** represented that Student had mastered Student's IEP goals. *** also explained her grading rubric. Student was documented to have shown "great improvement (in ***) since the first week of school." Student's continuous use of "**** was reported to have made a huge impact on positive behaviors. New academic goals were developed to go into effect on November ***, 2018.

In addition to new academic IEP goals, the BIP introduced two new behavioral goals. R's Ex. 8-30. It was noted that Student "has difficulty with sustained attention during classroom activities. Student gets off task, ***." Student was documented as being "physically aggressive ***."

These are target behaviors previously documented in the BIP followed by KISD. Achievement of the behavioral goals was to be measured "****." The frequency of reporting was "every ***." *** was responsible for implementation.

NOVEMBER ***, 2018

The fourth ARD meeting was convened and the new FBA was reviewed. The sources of data were anecdotal, written documentation, information provided by the

parent, previous FBA/BIP, and classroom observations. The committee specified that only the student's special education teachers and paraprofessionals would be responsible for implementing the new BIP. R's Ex. 8-30. The ARD meeting ended in agreement. R's Ex. 8-11.

Parent continued to express concern that she was not receiving updates. R's Ex. 8-13. Parent was also concerned that data considered during the October ***, 2018 meeting (FIE data, classroom data, accommodations, and modifications, status reports from teachers) was not used in completion of the FBA.

No discipline reports, attendance records, or grade reports were used as sources of data to gather information. Ineffective strategies were never mentioned, although severe and frequent behavior problems had been reported. The frequency and intensity were documented as disruption of activity, ***, severe noncompliance, ***, and severe physical aggression, ***. The BIP was updated.

NOVEMBER ***, 2018

***'s strategies were captured on video. They run afoul of the strategies in Student's IEP and BIP. *** is seen ***.

Another staff member ***. *** says, "****." Tr. at p. 136 (lines 1-7); P's Ex. 28 (video of 11/29/18).

DECEMBER ***, 2018

Two weeks later, Parent came to the campus to observe Student. That same day a staff member reported to *** administration that ***. P's Ex. 25 (video of 12/***/18). The report prompted an investigation, including a review of video. *** completed its investigation on December***, 2018.

*** stated that she overheard *** tell Student, "****." ***. *** confirmed that *** asked Student ***."

DECEMBER ***, 2018

***. ***. Id. ***, consistent with Student's BIP, again prompted Student to *** and Student immediately complied. P's Ex. 29 (video of 12/18/18).

However, contrary to Student's BIP, ***. Id The video shows ****' Another staff member who was present did not intervene. *Id.*

*** briefly left the classroom, and the video shows another staff member begin to implement the methods described in the BIP. The video shows Student's demeanor demonstratively improved. When *** reentered the room, she resumed her form of discipline. *Id.*

The video shows other school staff come in and out of the classroom and witness various parts of the event. Id. The district explains none of them intervened or took corrective action because the BIP does not designate them to be responsible for implementing the BIP. R's Ex. 7-14. Id.

DECEMBER ***, 2018 ARD

The ARD committee reviewed the updated FBA and BIP. Additional strategies were added to the BIP. R's Ex. 7-11. *** was not present at this meeting and there was no mutual agreement among the IEP Committee Members.

It was noted that Student was successful 75% of the day, there were not as many aggressive behavior issues before lunch, Student performed well in Student's ***, and Student displays aggressive behaviors when there are changes to Student's daily schedule. Progress towards goals was to be reviewed every 3 weeks.

The updated IEP claims that additional classroom accommodations and additional state testing accommodations were added to reflect what the student was currently using in the classroom. However, the classroom accommodations and the state testing

accommodations described in the updated IEP are the same as the accommodations contained in the previous IEP dated November ***, 2018.

Even though Parent attended the ARD meeting, she was not notified of the December *** or December *** incidents involving ***. They were not mentioned by anyone during the committee meeting. Data collection forms for these days do not indicate any behavior issues.

DECEMBER ***, 2018

The next day at *** Student was as a form of discipline and again suspended for the remainder of the day. Parent was called to pick Student up early, but no one provided her any details of the incident.

A video shows ***.

Several school staff members came in and out of the classroom and witnessed various parts of the event. Id. But, none of them saw***. Id.

DECEMBER ***, 2018

It appears***. Again, staff members are seen present. P's Ex. 30.

DECEMBER ***, 2018

The investigation of the December *** incident was completed by *** administration and Parent was asked to come to campus to view the video. Tr. at p. 130 (lines 2-11).

After viewing the video, she asked school officials to also view video from November ***, 2018, because Student had ***. 2 Tr. at p. 135 (lines 17-25), p. 136 (lines

1-7). Parent submitted a Public Information Request to obtain copies of video footage. See P's Ex. 25 (video of 12/14/18).

JANUARY ***, 2019

Student was suspended again *** in early January 2019. An ARD meeting was convened upon Parent's request and homebound services were authorized. R's Ex. 6. Believing the need for homebound services was temporary, the ARD committee approved *** of homebound instruction in core academics. R's Ex. 6-7. District's Special Education Director attended this ARD and vowed to "work with Parent on Student's programming." R's Ex. 6-7.

Parent asked school officials to view video from December ***, 2018. See Tr. at p. 141 (lines 11-15). Further investigation and follow-up requests led to the discovery of other videotaped instances of concern.

JANUARY ***, 2019

The ARD committee met to discuss programming for the remainder of the 2018-2019 school year. Parent agreed to return Student to school beginning January ***, 2019. R's Ex. 5-1. The ARD committee discussed Parent's concerns, and approved numerous supports and services, e.g., private counseling, additional behavior support from her preferred private provider, and in-home parent training evaluation. R's Ex. 5-7.

The district also responded to Parent's prior request for video of December ***, 2018. The charges associated with providing the requested footage were \$91.00. Parent revised the request to a shorter length of time to reduce the fee to \$38.50.

JANUARY ***, 2019

Student returned to campus for school as planned. Tr. at p. 141 (lines 1-8).

JANUARY ***, 2019

Parent viewed the December ***, 2018 video for the first time on January ***, 2019. After viewing video, Parent refused to permit Student to attend school on campus. Student did not return to campus classes for the remainder of the 2018-2019 school year. Tr. at p. 141 (lines 11-15).

FEBRUARY ***, 2019

Homebound instruction was increased from ***. The ARD committee agreed to provide occupational therapy, ***, and ABA therapy. It also agreed that *** would be provided and that compensatory speech therapy services would be made up before the end of the school year. The District *****, was assigned to attend homebound sessions to assess current functioning levels and to work on developing *** goals. R's Ex. 4-13.

The district agreed to pay for *** private counseling sessions for Student and Parent. Parent stopped attending following the May ***, 2019 session. R's Ex. 29-10.

MARCH ***, 2019

A Dispositional Staffing Memo for Special investigator *** concludes: "Based on a preponderance of the evidence, it is reasonable to conclude that *** HAS occurred due to the following:

1. The child, Student *** (***), ***.
2. *** suffers from ***.
3. Video surveillance in the classroom revealed that Ms. ***. P's Ex. 28 (video of 11/***/18).
4. Ms. ***. P's Ex. 26 (video of 12/***/18).
5. Ms. *** P's Ex. 30 (video of 12/***/18).

*** can be characterized as:

1. ***; or
2. ***.

***.

*** notes that “none of the *** used by Ms. *** is in compliance with any acceptable***. Student is currently residing at home and the district plans to make accommodations for *** to continue Student’s education.” P’s Ex. Disclosures p.24.

April - JUNE 2019

Other than the ARD meeting held on April ***, 2019, no other ARD meetings were convened until June ***, 2019, when ESY services were recommended to assist Student with socialization with Student’s peers. Parent rejected the services for the summer. R’s Ex. 2-8.

An FIE was performed on June ***, 2019. R’s Ex. 12.

AUGUST ***, 2019

The ARD committee met to review the FIE before the 2019-2020 school year. R’s Ex. 1-15. A plan to transition Student back to campus classes was agreed upon. R’s Ex. 1-16. This plan was based on providing a combination of homebound instruction with instruction on campus. R’s Ex. 1-7.

NOVEMBER 20, 2019

Student filed this complaint with the Texas Education Agency. The district filed its response acknowledging that certain school personnel did not always interact appropriately with the student.

The district believes the parent’s concerns and the student’s needs were promptly addressed in the ARD meetings during 2019. The district believes this collaboration ensured that Student received a FAPE in the LRE.

VIII. FINDINGS OF FACT

1. District knew of Student’s behavioral challenges prior to first day of class. See P’s Ex. 2 (ARD Committee Report); R’s Ex. 11-7, 12-22, 13-7; Tr. at p. 130 (lines 2-11).

2. District did not implement Student's IEP as approved by the ARD committee. See R's Ex. 6-7; R's Ex. 7-14; Tr. at p. 141 (lines 11-15).
3. District did not implement Student's BIP as approved by the ARD committee. See P's Ex. 2 (Notification Regarding Use of); P's Ex. 3 (Notification Regarding Use of); P's Ex. Disclosures p. 24.
4. District did not collect and record data to implement the IEP and BIP. See P's Ex. 15 (Progress Reports); P's Ex. 16 (Data Collection Forms); R's Ex. 8-13.R's Ex. 8-27.
5. District failed to improve Student's communication and pragmatic skills. See R's 13 (FIE 3/***/18); Tr. at p. 171 (lines 1-9); Tr. at p. 240 (lines 11-15).
6. District failed to ***. Tr. at p. 136 (lines 1-7); Tr. at p. 521 (line 12) (weekly report); p. 526 (lines 21-25). (Tr. at p. 717); (P. Ex. 26, p. 53) CPS investigation; (R. Ex. 57A, 58A); P's Ex. Disclosures p. 23; P's Ex. 25 (video of 12/***/18); P's Ex. 26 (video of 12/19/18); P's Ex. 28 (video of 11/***/18); P's Ex. 29 (video of 12/***/18); P's Ex. 30 (video of 12/***/18).

IX. STANDARD OF REVIEW

Student claims the district violated the IDEA because it failed to implement an IEP to address Student's unique needs as a child. Student has the burden of proving the inappropriateness of the educational plan and the lack of implementation provided by the district. Student met the burden.

A. Duty to Provide FAPE

The IDEA provides an entitlement 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). See *White*, 343 F.3d at 378.

The school district is responsible for providing these children with specially designed personalized instruction with sufficient support services to meet their unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with a student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

To that end, school districts must develop an IEP for each child with a disability. An IEP must specify the special education and related services needed for a child to receive a FAPE. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320. The district has a duty to provide FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a) (3).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. In this case Student must show that the district did not provide a FAPE during the 2018-2019 school year. 202 *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

As applied by the Fifth Circuit, "the IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it." See *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003).

In addition, because Student seeks placement at a private school at District expense, Student bears the burden of proof to show the current placement is not appropriate, and that placement at the private school is essential and primarily oriented to enable Student to obtain an education. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299 (5th Cir. 2009).

C. The IEP

To meet the obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is a written statement of annual goals and objectives

and how they will be measured. It 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).

The IEP need not be the best possible one nor must it be designed to maximize a student's potential. The school district must provide each student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P.*, 582 F.3d 576, 583(5th Cir. 2009). *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998) (citing *Rowley*, 458 U.S. at 188-89); see also *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003).

Here, the basic inquiry is whether implementation of the IEP "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (referencing *Rowley*, 458 U.S. at 206-07) (citing *Rowley*, 458 U.S. at 206-07)(emphasis in original).

While Student's IEP's were reasonable and calculated to provide an educational benefit, the District failed to implement its components, "consistently or appropriately," and thereby deprived Student of a "free appropriate public education" under the IDEA, as discussed more fully in a subsequent section. See page 38 - Failure to Implement.

D. The IEP Goals and Objectives

In developing an IEP, the ARD committee must consider the student's strengths, parental concerns for enhancing the student's education, the results of the most recent evaluation data, and the student's academic, developmental and functional needs. For a student whose behavior impedes his or her learning or the learning of others, the IEP must also consider positive behavioral interventions and supports, and other behavioral strategies. 34 C.F.R. § 300.324(a).

The ARD committee is required to review the student's IEP at least annually, and to make revisions to address lack of expected progress, re-evaluations, information provided by parents, and the student's anticipated needs. Consideration of the student's behavioral needs must be addressed in the annual review. 34 C.F.R. § 300.324(b).

To determine whether the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" and thus, substantively appropriate, the Fifth Circuit uses a four-part test. See *Michael F.*, 118 F.3d at 247; see also *Ella R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765-66 (5th Cir. 2018) (confirming the *Michael F.* test is consistent with the *Andrew F.* standard).

E. The *Michael F.* Test

The Fifth Circuit articulated the *Michael F.* test as a four factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance.
- The program is administered in the LRE.
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders.
- Positive academic and non-academic benefits are demonstrated. *Michael F.*, 118 F. 3d at 253.

These four factors need not be accorded any particular weight nor must they be applied in any particular way. Instead, they are 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. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

X. DISCUSSION

A. The *Michael F.* Four Factors

1. Individualized on the Basis of Assessment and Performance

The IEP approved at the November ***, 2018 ARD meeting was in place when the limitations period commenced on November ***, 2018. The IEP is individualized on the basis of assessment and performance. Its goals and objectives were developed to address areas of need. It is based on an FIE which indicates the student needs small group instruction, and it recommends more specific instruction in social skills. The FIE also notes the student has difficulty with pragmatics and benefits from training in the social element of conversation. The PLAAFPs were derived from assessments, observations, and teacher input.

Approved accommodations consisted of visual, verbal, and tactile reminders to stay on task. The BIP was originally developed at KISD before any of the Fall 2018 incidents.

The IEP is a living document and should be updated to reflect the actual situation as Student ages, rather than using the same information year after year without revision. The IEP should continue to develop goals or objectives to help prepare Student for appropriate involvement in life outside of the public school system. The IEP should integrate and facilitate ***.

2. The Least Restrictive Environment (LRE)

The IDEA requires that a student with a disability be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment 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 requires placement in the “least restrictive environment.” 34 C.F.R. § 300.114(a)(2)(i)(ii).

An IEP must reflect that the ARD committee appropriately considered 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. The continuum of instructional arrangements must be based on students’ individual needs. 19 Tex. Admin. Code § 89.63(c).

The evidence at hearing shows Student was educated in the LRE. There is no credible evidence that any placement other than the one adopted by the ARD committee, and approved by Parent, would have been more appropriate for this student.

Indeed, there is no genuine dispute that Student has been educated in the LRE as determined in collaboration between Parent and the rest of the ARD committee. It appears Parent and the ARD committee determined the most appropriate placement in January 2019 was homebound services. See Tr. at p. 201 (lines 21-25) (parent's deposition testimony taken in May 2019 that homebound services are "what's best for Student right now."); see also, Tr. at p. 211 (lines 14-18); p. 223 (lines 8-25).

To address Parent's concerns at that time, the district offered to pay for Student to attend a private school of Parent's choice. Tr. at p. 203 (lines 19-22). District also offered a transfer to another *** school within the district. Tr. at p. 210 (lines 16-20).

Parent toured a couple of private schools and considered a couple others, but she found none that she believed were more appropriate for Student and never accepted District's offer. Tr. at p. 204 (lines 408). She researched ***— another private school. See Tr. at p. 272 (lines 1-25), p. 273 (lines 1-23).]

Parent rejected private school placement because "I don't feel like Student needs to wake up early to go to a private school where Student rightly deserves to be at ***." Tr. at p. 203 (lines 19-25).

Parent agreed with homebound services rather than a private school placement, another District *** school, or the opportunity to continue at ***. Parent also chose to reject the ESY opportunities being offered at that time.

The district contends that the only impediment to Student returning to school full-time is Parent's readiness for that to happen. Tr. at p. 465 (lines 18-22). Student's experience at KISD shows Student can function well in the *** program.

In August 2019 Student's placement changed to a mix of homebound and classroom-based services, which continues to the present. Parent testimony is that homebound services are "not ideal" because Student does not have the same opportunity as Student's peers. See e.g., Tr. at p. 241 (lines 1-6). Student questions whether the current placement is the LRE and requests placement in a private school setting at district expense. Considering the ARD committee's deference shown to Parent's preferences since early 2019, the committee may agree and revise the IEP to reflect such a placement. But for reasons discussed at Page 42 - Request for Residential Placement at District Expense, the hearing officer cannot award such relief.

Student's performance since returning part-time to campus in Fall 2019 was not addressed, leaving unanswered questions about whether Student has been successful in Student's current blended-time schedule and whether the ARD committee is meeting to consider revisions. See e.g., R's Ex. 28-1.

In post-hearing filings, in referring to the current school year, Student raises for the first time that the district "actively concealed" and "failed to disclose" information about student's behavior to Student's mother.

District responds this is erroneous for several reasons. First, the parent was notified of Student's behavior in the "exact and only manner" required by the IEP. See e.g., R's Ex. 1-26 (requiring IEP updates to be sent every 6 weeks). There is no evidence in the record that anything more was expected of LCISD.

In addition, the behavior documentation Petitioner argues was "hidden" from the parent was provided directly to her attorney during the very semester it was created. See Tr. at p. 364 (lines 2-25), p. 365 (lines 1-3) (the records provided to Petitioner on December 11, 2019 were in Petitioner's Exhibits 33-38 and are all bates labeled between LCISD1623 – LCISD1657).

In short, the preponderance of the evidence relating to the second *Michael F.* factor favors the district. Student did not meet the burden of proving that the IEP did not propose a program in the LRE.

3. Services Provided in a Coordinated, Collaborative Manner

a. The Beginning

Since before the day Student began classes *** in August 2018, District staff began working collaboratively with the family. Four ARD committee meetings were convened during the fall semester of 2018. The ARD committee authorized an FBA and considered Student's BIP and Student's IEP goals. Evaluations and assessments consistently emphasized the significance of communication skills for this student.

b. The Middle

The warning signs were missed or ignored, and it cannot be said the IEP was appropriately implemented. There was significant failure to appropriately implement the BIP. There was insufficient collaboration among district staff contributing to a systemic failure to educate this student.

Teachers and staff do not appear to work together on a regular basis, constructively discussing Student's behaviors and how to address them. The expertise provided by various assessments and discussed during ARD meetings was missing in the classroom delivery.

Recommendations for communication strategies, including communication boards and visual schedules, were either not implemented, not implemented appropriately, or not implemented with fidelity. Staff simply did not consistently demonstrate understanding or the proper use of communication tools. This produced a pattern of missed opportunities to appropriately implement the already identified clear strategies.

A substitute paraprofessional (***) testified convincingly that he discussed his concerns about the "*** demeanor" of one of the*** teachers (***) with campus administrators on a "regular weekly" basis. Tr. at p. 521 (line 12) (weekly report); p. 526 (lines 21-25).

Student is also correct that District violated Parent's procedural rights and significantly impeded parent's opportunity to participate in the decision-making process. See, 34 C.F.R. § 300.513 (a)(2)(ii). Periodic reports to a parent on the progress a student is making on the

student's goals are required under IDEA. 34 C.F.R. § 300.320(a)(3)(ii). Here, Parent's repeated requests for frequent meaningful progress reports were ignored.

It is fortunate that parent is trained and certified in special education. She is a teacher with many years' experience on the job plus at home. She created ABC charts and other tools for teachers to help improve non-verbal fundamental communication of ideas and feelings with her ***. But communication is a two-way street and no one *** would send and receive the messages. In the lack of process, parent was systematically denied information about Student's progress or lack thereof.

This is especially significant here because this individual student lacks ***. This student requires direct assistance from teachers and family to enable the education process.

The lack of systematic daily reporting between school and home for this particular student's well-known individual needs falls to the level of a denial of a FAPE. Parent's meaningful participation in the decision-making process regarding the provision of FAPE to her *** was significantly impeded. Student met the burden to prove the school district violated procedural rights under the IDEA.

Under the IDEA, a denial of FAPE can be found if the procedural violations impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i-iii).

c. The Trust is Broken

The chronology above describes the events. Imagine the parent's feelings of betrayal, the deep questioning of fundamental abilities to trust people, the people who care for your child, ***as others do. On January ***, 2019 there could be no reasonable doubt that District had been less than forthright in disclosing the contents of the videos before Parent returned Student to their custody and control. Big mistake. District offered no explanation.

District acknowledges it discovered that certain school personnel did not interact with the student in an appropriate manner during the fall semester of 2018. District took immediate action with respect to most of the employees, who are no longer employed with the school district. Others were provided re-training. P's Ex. Disclosures p. 23.

The ARD committee has convened to address the student's needs on several occasions, and with an extraordinary amount of coordination and collaboration, it appears that consensus continues regarding the student's current educational programming.

d. The End

As the parties worked to re-establish trust, the district worked hard to use the flexibility provided by the IDEA for the benefit of the student to ensure that any harm suffered, or any harm Parent believed to have been caused was remedied. The efforts are commendable. So are the efforts of Parent. The very difficult situation was recognized by all the key stakeholders.

The ARD committee agreed to every request made by Parent and in some cases exceeded the requests. Parent chose to reject some of the services offered, e.g. private schooling and ESY, and did not ask District to continue other efforts, e.g., counseling. See e.g., Tr. at p. 203 (lines 3-5) (parent conceding district has agreed to provide everything she asked for).

Every ARD meeting convened after the parent had knowledge of the videos has ended in agreement. Spring 2019 services were provided in a coordinated, collaborative manner. Parent was in regular communication with teachers and administrators and the ARD committee because the placement was homebound. Student's right to a FAPE was not impeded during this time. Parent received procedural safeguards and prior written notices at all appropriate times. 34 C.F.R. §300.513 (a)(2).

e. Starting Over

Parent acknowledges that services have been provided in a coordinated and collaborative manner after placement was changed to homebound services. Student has shown good progress. Parent is understandably cautious and there are concerns about achieving the LRE as the parties

work to rebuild their relationship. The ARD committee continues to be the appropriate venue for these discussions if there continues to be consensus. The question of placement is not for a hearing officer unless the parties irreconcilably disagree about the FAPE.

4. Academic and Non-Academic Benefits

a. Meaningful Benefits

The Fifth Circuit explains that the ultimate statutory goal of the IDEA, and thus the focus, is on the child's whole educational experience, and its adaptation to confer 'benefits' on the child." *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012).

A school district is not tasked with attempting to cure a student's disability or to maximize Student's educational performance, but rather its duty is to adapt the educational program in such a way that permits the student to achieve meaningful educational benefits. See *id.* The benefits received must be meaningful "in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 999.

To be clear, the school district is not required to provide Student with the best possible education. Student does not need to improve in every academic and non-academic area to receive an educational benefit. The issue is not whether the school district could have done more. Instead, the inquiry is limited to whether student received an educational benefit. *V.P.*, 582 F. 2d at 590.

Considering this student's particular needs, the preponderance of the evidence shows that Student received little more than a *de minimus* educational benefit from the program as provided during the Fall 2018 semester. See, *Andrew F.*, *supra*. As administered, the Fall 2018 program cannot be said to be individualized on the basis of assessment and performance. It was not provided in a coordinated, collaborative manner by the key stakeholders, and did not demonstrate positive academic and non-academic benefits. Student was denied FAPE during this time.

b. Academic Benefits

Except for classroom grading of questionable value, there is a lack of evidence that Student received more than minimal academic benefits during the relevant time period. The District's failure to properly address behavior and communication needs significantly impeded the student's learning in various ways.

Developing less maladaptive behavior is essential for Student to learn and succeed with some degree of independence. Given the student's continued and significant behaviors and Parent's repeated requests for help in communication, the District's failure to implement the expertise of experienced evaluators deprived Student of the benefit of their recommendations and impeded the parental decision-making process.

Although Student was not making appropriate progress in the fall of 2018 due to the actions of *** and other systemic shortcomings, District continues its efforts to repair the effects by offering compensatory services through the ARD committee. See e.g., Tr. at p. 171 (lines 1-9) (parent agreeing that she has not shared any concerns about Student's educational programming with District since Student started homebound services). As the ARD determines after ongoing consideration that additional services are necessary, it is positioned to implement them.

c. Non-Academic Benefits (Behavioral)

A need for special education and related services is not limited strictly to academics. It also includes behavioral progress and the acquisition of appropriate social skills. *Venus Ind. Sch. Dist. V. Daniel S.*, 36 IDELR 185 (2002). Appropriate behavioral interventions are an important component of FAPE.

Here, although Student's behavioral progress is difficult to determine since progress reports were not routinely completed, there is at least a preponderance of evidence that Student received little more than minimal non-academic benefits during Fall 2018. The evidence and testimony confirm Student made no behavioral progress and even regressed.

Although Student behaved in many ways as anticipated, Student's behavior worsened. The failure to coordinate and develop and implement an appropriate BIP for Student with meaningful directives to classroom staff on appropriate interventions resulted in denial of non-academic benefits. The school district could have provided social skills and pragmatics training to teachers and staff who may come in contact with Student to help Student learn the necessary skills for how to interact with peers more appropriately.

B. FAILURE TO IMPLEMENT

This case turns on the failure to implement necessary provisions of an otherwise appropriate IEP. See *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) cert. denied, 531 U.S. 817, 121 S.Ct. 55, 148 L.Ed.2d 23 (2000) (setting forth the analysis that a party who is challenging the implementation of an IEP must demonstrate that the school authorities failed to implement a substantial or significant provision of the IEP. The court noted that this analysis affords schools some flexibility in implementing IEPs but still holds them accountable for material failures and for providing a meaningful educational benefit).

An IEP is not reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit. *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

Here, Student's IEP's were reasonable and calculated to provide an educational benefit, but District failed to implement them, "consistently or appropriately." These failures to implement deprived Student of a FAPE.

1. Data Not Collected Impedes Evaluation

Evaluation drives the instructional process. Instructional staff did not systematically collect behavioral data as parent requested or as required by the IEP. Without current evaluation data, including an accurate understanding of Student's present levels of performance, the ARD

committee cannot design an appropriate set of goals and objectives. Establishing and revising Student's present levels of performance is critical to educationally sound decision-making.

The failure of the school district to collect data and provide these progress reports for the Fall 2018 semester, helped camouflage the interactions between *** and other staff and Student. Parent, who was in regular contact with the school, suspected it but could not see it. Emails to teachers and administrators and participation in all ARD meetings was not enough because the system was not working collaboratively to implement this aspect of the IEP.

2. Bullying Can Constitute Denial of FAPE

*** was new to *** for the Fall 2018 semester. She was the subject of complaints and concerns expressed by other staff to campus leadership. There were reports she did not interact appropriately with this student. Student was picked on at times by ***. There is no suggestion bullying was otherwise an issue with other staff or during other classes.

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004) (unabated harassment and bullying of high school student made it impossible for student to receive FAPE); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013) (bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied).

Here, the school district failed to take reasonable steps to prevent or protect Student from bullying or harassment by *** that adversely affected or resulted in the regression of educational benefit or substantially restricted the student from accessing educational opportunities. *T.K. and S.K. ex rel K.K. v. New York City Dept. of Educ.*, 779 F. Supp. 2d 289, 316 (S.D. N.Y. 2011).

The bullying need not be outrageous, but it was. It was sufficiently severe, persistent, and pervasive that it created a hostile environment for the student especially with Student's communications disability. It is not necessary that Student show the bullying prevented all

opportunity for an appropriate education but only that it is likely to affect the opportunity of the student for an appropriate education. *T.K.*, 779 F. Supp. 2d at 317.

At least one *** incident was also reported to Child Protective Services (CPS). (Tr. Vol. II, pp. 369, 389). The principal was advised of the CPS report. (Tr. Vol. III, p. 717)(P. Ex. 26, p. 53). CPS conducted an investigation. (R. Ex. 57A, 58A). See Page 19 – March 1, 2019.

It is not Student's burden to establish more than a *de minimis* failure to implement all aspects of the IEP. It is sufficient for Student to show that District failed to implement substantial or significant provisions. *Bobby R.*, 200 F.3d at 348-49.

The law provides District with flexibility in implementing IEPs and when necessary, to provide compensatory services. *Id.* Here, District's prompt response brought compliance with the student's IEP to ensure Student received a FAPE after January 2019.

3. Homebound Placement

a. Spring 2019

The evidence showed Student received more than a *de minimus* educational benefit from the homebound program provided. *Andrew F.*, 137 S. Ct at 999. Parent acknowledges Student's receipt of meaningful educational benefits after Student's placement in homebound services in Spring 2019. Parent testified that because Student was receiving services at home, she had first-hand knowledge of Student's success on those goals. Tr. at p. 240 (lines 11-15). On STAAR *** testing, Student *** *** ***. Tr. at p. 464 (lines 12-24). It is clear Student was successful academically.

b. Notes from *** – Spring 2019

Parent described Student's progress with individualized instruction as significant while questioning how Student is being affected by the lack of peer interaction.

Parents described feelings of anger that the ideas and strategies they provided to school staff to address Student in the classroom were not used and staff *** Student instead. ***

observed Student's open affection towards Student's Parents. *** and Student worked on Student's ***. R's Ex. 29 p. 4.

Parent talked about the chronic back pain she has been suffering from as a result of the physical demands of caring for her ***. Parent describes the pain as "so severe" that her doctors reports that it will only improve with continued rest and surgical intervention. Parent also talked about how difficult it is to find time to rest with her *** home with her full time and in need of constant supervision. R's Ex. 29 p. 5.

Student is becoming too comfortable with the homebound services which may complicate Student's transition back to a tradition school environment. Parent continues to have difficulties to locate age appropriate peer activities for Student now that Student is not attending a school campus. Parent talked about the activities Student participates in ***. R's Ex. 29 pgs. 6-7.

Parent discussed her continued concerns about the response of district staff who will be tasked with providing classroom instruction to Student. Parent reported various school district staff have visited the home to conduct/complete additional testing and assessments, which will aid district staff in program planning for Student.

Parent verbalized her desire to assist Student's transition back to school and discussed the varied schedule options to allow Student to better familiarize ***self to the school based environment and staff. *** continue to observe Student respond willingly to prompts to complete tasks, respond to redirection by ***, verbally identify feelings, clarify *** reflections verbally and through gestures. Student continues to exhibit appropriate behaviors and interactions throughout session. See R's Ex. 29 p. 10.

c. The 2019-2020 School Year

Multiple incidents of inappropriate behavior were reported during the Fall 2018 semester. There were no such incidents reported during the period of homebound placement in Spring 2019. And no teacher or administrator testimony of behavior performance during the Fall

2019 semester was offered. It is undisputed that Student was receiving a FAPE since early February 2019. For these reasons, Student failed to establish an ongoing denial of a FAPE or that a private school could and was necessary to meet Student's needs.

C. Request for Residential Placement at District Expense

In Student's Closing Brief, Student requests compensatory services in the form of private school tuition to attend classes at a facility named "***" plus transportation expenses, lunch and uniform costs, and counseling services. There is no evidence in the record as to what services *** offers, that *** can meet Student's needs, or that it will even permit Student to enroll. P's Closing Brief at pp. 13-14.

District objects because neither Student's pleadings nor evidence support the requested relief. District complains that it was denied any opportunity to challenge or offer evidence.

The IDEA permits the hearing officer to award private school expenses if the school did not make a FAPE available to the child in a timely manner prior to the child's enrollment in the private school. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c). Student failed to establish a denial of a FAPE since February 2019 or that any private school could meet Student's needs, and so did not meet the two-part test.

1. The Two-Part Test

Student must meet a two-part test in order to secure placement at a private school at district expense. The evidence must support the conclusions that 1) an IEP recommending placement in a public school is inappropriate under the IDEA, and 2) the private placement is appropriate under the IDEA. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009). 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c).

The first part essentially requires proof of the inability of the District to provide a FAPE to Student. Here, Petitioner repeatedly conceded Petitioner is not contending the District is failing to provide a FAPE at any time since February 2019 when it began providing homebound services. Even though Student did not receive a FAPE during Fall 2018, Student was receiving a FAPE after

February 2019, and so the hearing officer cannot award relief of a private placement on this record.

The second part requires Student to establish that a private school exists that could provide Student with appropriate educational benefits. *See Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005) (regarding burden); *see also White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003). The private placement “must be reasonably calculated to enable the child to receive educational benefits.” *W.C. v. Cobb County Sch. Dist.*, 47 F. Supp. 2d 1351, 1362 (N.D. Ga. 2005) (citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993)).

A hearing officer’s authority to award relief is limited to the issues raised in the complaint and the evidence presented at the hearing. *See Tex. Educ. Code § 89.1185(l)*; *see also* TEA Resolution Handbook (explaining only issues raised in the hearing request and as clarified in prehearing conferences can be considered by the hearing officer).

When the record does not support a finding that a private school can meet the student’s needs, an award for private placement is not available. *See e.g., W.C.*, 47 F. Supp. 2d at 1362 (reversing hearing officer’s award for private placement where evidence offered at hearing did not support the conclusion the private school had the programming and resources to meet the student’s needs); *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1350 (N.D. Ga. 2007) (reversing hearing officer’s award of privately obtained special education services where record evidence was insufficient to support finding that methodology and services were appropriate to meet student’s needs), *aff’d*, 518 F.3d 1275 (11th Cir. 2008).

While hearing officers do have broad discretion to award relief, the evidence must support the conclusion that the relief is appropriate and will remedy a denial of FAPE. *See, D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603, 617 (S.D. Tex. 2009), *aff’d on appeal*, 629 F.3d 450 (5th Cir. 2010) (declining to award relief which was not specifically included in the claim for relief and for which no evidence of its appropriateness was offered)

Here, Student did not offer credible evidence that a particular private school could provide Student a FAPE, had the resources to meet Student’s individual needs, or that it would

even permit Student to enroll. Tr. at p. 204 (lines 1-8); *see also* Tr. at p. 271 (lines 15-21) (parent testimony she has not had time to research a private school that would be a good fit). As District points out, Student is requesting tuition for a private school that was not mentioned by name during the hearing. P's Closing Brief at p. 14.

Student has the burden to prove that a particular private placement is appropriate. Because Student failed to meet Student's burden to establish that any private school is appropriate for Student, Student's request for such relief, including the related transportation services, uniform and lunch expenses, are denied. *See Michael Z.*, 580 F.3d at 293.

2. Notice and Opportunity to Cure

The IDEA requires parents to give the school "a good faith opportunity to meet its obligations" before requesting private school reimbursement. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 72 (3d Cir. 2010). The IDEA also provides that the cost of reimbursement for a private school placement can be reduced or denied if: (1) at the most recent ARD meeting before the child's removal from school the parents did not inform the ARD Committee that they were rejecting the school's proposed placement, including stating their concerns, and their intent to privately place the child at public expense; or (2) at least 10 days prior to the removal of the child, the parents did not give written notice to the school of their intent and their concerns. 34 C.F.R. § 300.148(d).

On the record here, District has been denied fair notice and an opportunity to address the new concerns Parent is raising for the first time in Student's Closing Brief.

D. Private Counseling at School District Expense

Student, in Student's Closing Brief, seeks counseling for Parent "twice a month for two years" with "Dr. ***." P's Closing Brief at p. 14. In January 2019, Parent requested and received six-months of private counseling at District's expense. R's Ex. 5-7.

1. District objects to Student's request for counseling services.

Student did not plead for counseling services for Parent as relief in Student's complaint or provide any evidence in support of such services in Student's case in chief. In fact, Student's counsel conceded during a prehearing conference that Student was not challenging the appropriateness of the counseling services as an issue in the hearing. PHC Tr. 1/8/2020 at p. 37 (lines 7-17) (conceding "we don't have any issue with the counseling that was provided to (Student) we're not bringing the counseling up as an issue at all in this case").

The ARD committee provided the family with private counseling services early in Spring 2019. R's Ex. 5-7. Student and Parent accessed those services until mid-May when the family sought additional counseling at their own expense. No request for payment or reimbursement for the additional counseling was discussed with the ARD committee. Tr. at p. 223 (lines 16-22).

Regardless, Student offered no evidence that any counseling services were necessary to ensure receipt of a FAPE. See Tr. at p. 169 (lines 19-25) (testimony of Parent that she does not know what, if any, impact *** actions had on Student and never will).

Because District has been denied fair notice and an opportunity to address the new request for relief raised for the first time in Student's Closing Brief, District's objection is sustained, and Student's request for such counseling services should be presented to the District.

E. The Issues of Private School and Counseling Were Not Tried by Consent

Student suggests that District tried the issue of the appropriateness of a private placement and counseling by consent. More specifically, that District agreed that Student could "seek" relief outside of Student's complaint and "plead for relief" that was not in the initial complaint. P's Supp'l Br. at pp. 2-3.

The suggestion made by District's counsel at the end of the hearing was that Student's attorney could continue to make Student's "arguments" about relief in Student's closing brief. What an attorney can *argue*, either orally or in writing, is completely unrelated to the evidence that was adduced at hearing and what is contained in the pleadings. Argument of counsel is not

evidence. *See e.g., PHI, Inc. v. Apical Indus.*, No. 6:13-CV-00015, 2018 WL 4215012, at *4 (W.D. La. Aug. 27, 2018) (stating it is “axiomatic that the arguments of counsel are not evidence”).

Such a statement does not open the door to trial by consent. While the hearing officer is mindful that prohibiting Student from raising these new issues could result in additional complaints or protracted conflict and litigation, it is the law and the hearing officer is unaware of any choice in the matter. Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46747 (August 14, 2006).

And as previously discussed, the evidence raises another question of whether a homebound placement provides the student with FAPE in the LRE under the standard of *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989). The Parent and the ARD committee must review student’s educational needs, both academic and non-academic, to determine whether Student’s needs can be met on a campus in the district with appropriate structure, supports, and supplemental services.

X. CONCLUSIONS OF LAW

1. Student resides within the Lamar Consolidated Independent School District in Texas and is eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. District is responsible for providing FAPE for the student under the standards of *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); and *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997) 20 U.S.C. §1400, et seq., and related statutes and regulations, and 34 C.F.R. § 300.552.
3. Student’s claims arising outside the one-year statute of limitations in Texas are barred. 19 Tex. Admin. Code § 89.1151(c).

4. Student bears the burden of proof on all issues raised in the complaint. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.), cert. denied, 531 U.S. 817 (2000).
5. Student was denied FAPE during the relevant time period. 20 U.S.C. § 1414(d)(1)(A), (d)(2)(A), (d)(6); 34 C.F.R. §§ 300.320, .323(a); *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).
6. Student met the burden of proof to show that District's provision of special education to Student was inappropriate under the standards of *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); and *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 20 U.S.C. §1400, et seq., and related statutes and regulations; and 34 C.F.R. § 300.552; *C.G. v. Waller Ind. Sch. Dist.*, 2017 U.S. App. LEXIS 11139* (5th Cir. 2017); 34 C.F.R. §§ 300.22, 300.323 (a); 19 Tex. Admin. Code § 89.1055 (e).
7. Student was not provided with the requisite educational benefit. *Andrew F. ex rel. Student F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); and *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).
8. District significantly impeded parent's opportunity to participate in decision-making causing a deprivation of educational benefit. 34 C.F.R. §§ 300.503 (a)(c); 300.504(a)(d); 300.513 (a)(2).
9. Although District took action to limit any damage to Student, additional services are necessary to meet the requirements for providing FAPE during Fall 2018. The law provides District with flexibility when necessary to provide compensatory services. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir.), cert. denied, 531 U.S. 817 (2000).

10. Student's claims arising under any laws other than the Individuals with Disabilities Education Act are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503 (a); 300.507; 19 Tex. Admin. Code § 89.1151 (a).
11. Student's requests for an award of attorneys' fees and litigation costs are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.516, 300.517; 19 Tex. Admin. Code § 89.1185 (n).

XI. ORDERS

Based upon the foregoing findings of fact and conclusions of law, **IT IS THEREFORE ORDERED** as follows:

1. At least once per each school semester for the Spring 2020, Fall 2020, and Spring 2021 semesters, District shall utilize an independent Individualized Education Program Facilitator under Texas Education Code Sec. 29.020 to:
 - a. facilitate an Admission Review and Dismissal committee meeting for Student,
 - b. provide guidance on appropriate data, frequency of collection, and manner of reporting for Parent and the ARD committee to review, and
 - c. ensure full participation of appropriate staff in the decision-making processes regarding the provision of a Free Appropriate Public Education for Student.
2. District shall arrange for an independent behavior specialist chosen by the school district and at District's expense to:
 - a. review the way behavioral data is currently being collected for Student;
 - b. assist teachers and instructional staff who provide services to student to improve the collection of behavioral data, to establish baseline behavioral data, and to include identification of antecedent and consequence behaviors;
 - c. make recommendations to the ARD committee on the design and implementation of the Behavior Intervention Plan for Student's educational program; and,

- d. provide training to all instructional staff, related service personnel, and campus administrators who interact with Student on the data collection system and the BIP within 10 school days of each ARD meeting.
3. The initial consultation by the independent behavioral specialist shall occur no later than 20 days after from the date of this Decision.
4. The design of the Behavior Intervention Plan (BIP) shall be reviewed and updated to include Student's behaviors since August 2019 at an ARD meeting to be conducted within 10 days after the independent behavioral specialist certifies to the District and Parent that the proposed BIP is ready for ARD consideration, or by any other date mutually agreed upon by the parties.
5. District shall provide training on implementation of Student's then most recent IEP, including a review of the BIP and the IEP goals and objectives and, to all teachers, staff, and administrators who work directly with Student within 5 school days of the beginning of the Fall 2020 and Spring 2021 semesters.
6. District shall provide updated training to all teachers, staff, and administrators who work directly with Student to include discussion of changes, revisions or additional components made to Student's IEP or BIP within 5 school days after each ARD committee approval.
7. District and Parent shall consider the alternatives for Student's placement, including at a private school at District expense, including all associated costs, at an ARD meeting to be held withing 30 days from this Decision.
8. District and Parent shall attend an ARD meeting no later than 30 calendar days from the date of this Decision, or on a date agreed to by the parties, and consider Student's needs for ESY for the summer of 2020.

9. District and Parent shall attend an ARD meeting no later than 30 calendar days from the date of this Decision, or on a date agreed to by the parties, for the purpose of designing in-home parent training services, and consideration of additional parent and family counseling at District expense, and to review available social services.
10. District shall not be held accountable for any parent and/or in-home training sessions that are cancelled by Parent and not rescheduled within seven school days or as otherwise agreed by the parties.
11. District and Parent shall attend an ARD meeting no later than 30 calendar days from the date of this Decision, or on a date agreed to by the parties, for the purpose of discussing modification and implementation of Student's IEP and BIP in compliance with 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f); and in accordance with this Decision.
12. District and Parent shall attend an ARD meeting no later than 30 calendar days from the date of this Decision, or on a date agreed to by the parties, for the purpose of collaboratively discussing the current placement for student to determine whether homebound services are necessary to provide FAPE in the LRE under the standard of Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). there is some question as to why homebound services continue.
13. District and Parent shall attend an ARD meeting no later than 30 calendar days from the date of this Decision, or on a date agreed to by the parties, for the purpose of collaboratively discussing whether Student's educational needs, both academic and non-academic, can be met at *** or another campus in the district with appropriate structure, supports, and supplemental services appropriate to providing a FAPE.
14. Student's equitable request for compensatory education of Student is GRANTED, in an amount equal to 675 hours (determined as being the total of 7.5 hours per day for 18 weeks, or one full semester) to make up for Districts previous implementation

failure during the Fall 2018 for education Student was not provided, to be delivered on or before such time as Student has either reached the age of 21 or acquired a high school diploma while remaining eligible under the IDEA, whichever occurs first.

15. Student's equitable request for compensatory family counseling services for Parent to assist with the education of Student is GRANTED, in an amount up to \$1000.00 reimbursable by District within 30 days upon Parent's presentment of a receipt for services received and paid in whole or in part with a counselor of Parent's choice for services rendered on or before August 15, 2020.
16. Student's request for private placement of Student until Student is no longer eligible for special education services in the District due to age is DENIED.
17. Student's claims arising under any law other than the Individuals with Disabilities Education Act (IDEA) are DISMISSED.
18. Student's request for attorneys' fees and litigation costs are DISMISSED.
19. All other requested relief not specifically granted herein is DENIED.

SIGNED on April 17, 2020.

RAY E. GREEN
Special Education Hearing Officer
For the Texas Education Agency
Fax: 214-303-0111
Ray@RayGreenLawFirm.com

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, Sec. 2001.144(a) (b).