

DOCKET NO. 121-SE-0118**(Consolidated with No. 214-SE-0418)**

STUDENT, b/n/f	§	BEFORE A SPECIAL EDUCATION
PARENT and PARENT	§	
	§	HEARING OFFICER
	§	
V.	§	
	§	FOR
AUSTIN INDEPENDENT	§	
SCHOOL DISTRICT	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER

Petitioner Student, b/n/f Parents (Student) filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA") 20 U.S.C. §§ 1401-1482 (IDEA) and its implementing state and federal regulations. The complaint was received by the Texas Education Agency on January 30, 2018. The Respondent in the complaint is Austin Independent School District, (School District), and it has made a general appearance.

LEGAL REPRESENTATIVES

Student was represented by Elizabeth Angelone and Meera Krishnan of the Cuddy Law Firm. The School District was represented by Amy Tucker and Pam Kaminsky of the law firm Rogers Morris & Grover L.L.P.

CASE SUMMARY

The main issue in this case is whether the school district fails to provide Student with a Free Appropriate Public Education (FAPE). Specifically, whether the school district fails to provide and implement an appropriate Individual Education Plan (IEP) and an appropriate Behavior Intervention Plan (BIP) in the least restrictive environment (LRE).

The dispute centers on whether the School District's proposed increase in a special education resource instructional setting is the LRE. Petitioner asserts that the LRE is full-time inclusion in the regular education classroom with supports and services. Petitioner also objects to the proposed Alternative Schedule for permitting ambiguously specified removals from the general education classroom for purposes of ensuring safety of the student, other students, and staff and teachers.

The regulations require that each school district maintain a continuum of alternative placements. A child is not to be removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum. The regulations further provide that in selecting the LRE, consideration be given to potential harmful results.

The Fifth Circuit says the presumption in favor of regular education placement is overcome when a child is not expected to master any of the essential elements taught in the classroom. If the child's behavior interferes with the learning of the other students, inclusion is not required.

Student is unable to understand current grade-level instruction and 100% of the curriculum is modified to at least two grade levels before Student's class level. An ongoing occurrence of potentially dangerous behavior episodes persist despite appropriate services and support. These behaviors have significantly interfered with Student's own learning, as well as that of Student's peers. The School District is proposing that Student be removed for Reading, Math and a portion of Writing and that student otherwise participate in a general education environment. The School District is also proposing an Alternate Schedule to enable instruction to continue in a special education setting when certain events occur during the school day.

The hearing officer concludes the school district provided Student with FAPE and implemented an appropriate IEP and BIP during the 2017-2018 school year. The hearing officer also concludes that School District's proposed placement for 2018-2019 is appropriate and in the least restrictive environment. Each IEP and the BIP was approved or recommended by the Admission, Review, and Dismissal (ARD) Committee during meetings attended by Parents.

The hearing officer finds that the school district's Full Individual Evaluation (FIE) and FBA are appropriate, and therefore, Petitioner is not entitled to the cost of an Individual Educational Evaluation (IEE) at school district expense.

PRELIMINARY MOTIONS

SUFFICIENCY OF COMPLAINT

The School District challenged the sufficiency of Student's initial complaint and an Amended Complaint was filed. There being no objection, the amended complaint was found to be sufficient to meet the requirements of the IDEA.

CONSOLIDATION OF CASES

The School District filed a separate request for a due process hearing 214-SE-0418 which was assigned to this hearing officer on April 17, 2018. These cases share both law and facts. The School District requested the unopposed consolidation of the two matters plus one day be added to the hearing schedule for the School District's additional issues.

A special education hearing officer in Texas has the authority to manage the hearing process and exercise discretion in issuing any orders that justice may require. 19 Tex. Admin. Code § 89.1 170(e). Consolidation is governed by Texas Rule of Civil Procedure 174 and is appropriate when the evidence presented "will be material, relevant, and admissible in each case." In re Gulf Coast Bus. Dev. Corp., 247 S.W.3d 787, 794-95 (Tex. App. Dallas 2008, orig. proceeding).

Finding it will preserve judicial resources and avoid the unnecessary costs of two hearings and two decisions, the two requests for due process hearing were consolidated. The School District's request for due process was consolidated herein for all purposes.

CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

The Amended Complaint asserts claims arising under the IDEA and its implementing federal and state regulations. However, Petitioner also gives notice of intent to secure reimbursement under Section 504 of the Rehabilitation Act of 1973 (Section 504) for the cost of two of Petitioner's experts who prepared reports and testified at the due process hearing.

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 §§ 89.1151 (a), 89.1170.

The hearing officer has no jurisdiction to resolve claims or make an award under any law other than the IDEA. Therefore, to the extent Petitioner seeks an award under Section 504 that request must be dismissed as outside the jurisdiction of the hearing officer.

CONTINUANCES AND EXTENSIONS OF DECISION DUE DATE

The parties waived the Resolution Session and attended mediation. The Texas Education Agency assigned the independent mediator, and the mediation was conducted at no cost to the parties. The parties were unable to resolve their complaints.

Several motions for continuance and extension of deadlines were filed. After consideration of the factors specified in Texas Administrative Code §89.1186, each motion was granted for good cause, it appearing they were not anticipated to adversely affect the student.

DUE PROCESS HEARING

The matter came on for Due Process Hearing in the offices of the School District on May 22 through May 24, 2018. A record was duly made by Mack Lane, TX CSR 3538, a Texas certified court reporter.

A copy of the transcript was delivered to the parties and this hearing officer. Both parties submitted briefs in a timely manner, and this Decision is timely issued by the agreed ordered deadline of August 10, 2018.

ISSUES FOR DECISION

Student alleges these issues for decision:

1. The School District's Procedural Violations Denied Student a FAPE.
2. The 2017-18 IEPs Substantively Denied Student a FAPE.
 - a. Services Were Not Provided in a Coordinated and Collaborative Environment.
 - b. School District Failed to Conduct Appropriate Speech, Assistive Technology, and Occupational Therapy Assessments.
 - c. Student's Educational Programming Failed to Provide Positive Academic and Non-Academic Benefits.
 - d. School District Failed to Give Careful Consideration to Student's Present Levels of Achievement, Disability, and Potential for Growth.
 - e. Student's Academic Goals Are Not Objective or Measurable and Are Not Reasonably Calculated to Enable Student to Make Progress Appropriate in light of Student's Circumstances.
 - f. Student's Behavior Goals Do Not Address Student's Behavioral Needs.
 - g. School District Failed to Appropriately Monitor Student's Progress and Inform the ARDC Regarding Student's Progress.
 - h. School District Failed to Meaningfully Consider the Texas Autism Supplement.
 - i. School District Failed to Develop a Usable BIP for Student.
 - j. Student's 2017 IEP and School District's Proposed Alternate Schedule Do Not List the Frequency, Duration and Location of Services and Gives School District Unlimited Ability to Change Student's Placement on a Whim without Notifying Parents.
 - k. School District's Schedule Does Not and Will Not Educate Student in (LRE).

3. The Student's IEP Alternate Schedule Denies FAPE.
 - a. Procedural Violations Deny a FAPE.
 - b. Substantive Violations Deny a FAPE.
4. Compensatory and Equitable Relief Should be Awarded.

The School District alleges it has provided FAPE to the Student, has initiated and implemented an appropriate IEP, developed an appropriate BIP, and has reviewed the outside provider information provided by Parent, obtained parental input in the Admission Review and Dismissal (ARD) process, and continues to serve the Student in the least restrictive environment. The School District seeks an order pursuant to 34 CFR 300.532(b)(2)(ii), affirming the ARD committee's proposed placement.

The School District also seeks to establish the appropriateness of its Full Individual Evaluation (FIE) and Functional Behavioral Assessment (FBA). If the school district's Full Individual Evaluation (FIE) was appropriate, then Petitioner is not entitled to the cost of an Individual Educational Evaluation (IEE) at school district expense.

BURDEN OF PROOF

There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. Schaffer v. Weast, 546 U.S. 49, 62 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993).

STUDENT'S REQUESTED RELIEF

1. A finding that School District procedurally and substantively denied Student a free appropriate public education during the relevant time periods.
2. Order the School District to reimburse parents for the privately funded evaluation conducted by Petitioner's expert within 10 days of decision.

3. Order the School District to reimburse parents for the weekend and summer social skills classes that Student's parents have enrolled Student in and have paid for.
4. Order the School District to fund an independent Functional Behavioral Assessment of Student by a master's level board-certified behavior analyst (BCBA) or equivalent of the Parent's choosing so as to obtain recommendations related to the programming and services; alternatively, Order the School District to reimburse Parents for Dr. ***'s evaluation.
5. Order the School District to fund an independent Occupational Therapy Evaluation and Assistive Technology Evaluation of Student by an evaluator of the Parent's choosing so as to obtain recommendations related to the programming and services.
6. Order the School District to convene an ARD Committee and develop appropriate frequency, duration and methodologies necessary to address the Student's academic and behavioral needs. In the alternative, order the District to reimburse the Parents for privately funded evaluations.
7. Order the School District to implement appropriate supplemental aids and services with fidelity, before requesting a more restrictive environment.
8. Order the School District to provide Student with a one-on-one dedicated aide who is a master's level BCBA who can appropriately and consistently implement a BIP for Student.
9. Order that upon receipt of the above evaluations, the ARD Committee convene and develop a new IEP that accurately reflects Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) statements and includes: appropriate goals and short-term objectives that address Student's myriad of academic, social, communication, and behavioral needs; appropriate supports and services; identifies appropriate teaching methodologies that will be employed to address Student's

myriad of academic needs; appropriate behavioral methodologies and a plan to implement methodologies; parent training so that Parents have the skills to support the implementation of the IEP; and an identified public or private educational program for the implementation of the IEP to allow for Student to make meaningful progress commensurate with Student's abilities.

10. Order the School District to provide compensatory educational services by a qualified teacher or teachers capable of implementing the teaching methodologies identified as appropriate for Student; that the compensatory services continue on a daily basis after school, weekends, and during the summer as coordinated with Parents; and that such services continue to be provided by the School District until such time as determined by an independent evaluator.
11. Order the School District to review its FIE policies and practices to ensure each child referred to the ARD Committee is comprehensively evaluated in all areas of suspected disability.
12. Order the School District to review its ARD Committee practices and provide notice to all ARD Committee participants of their obligation to consider research-based, peer-reviewed methodologies as a component of the students' IEPs.
13. Order the School District to review its ARD Committee practices and provide notice to all ARD Committee participants of their obligation to make a determination regarding the subject of student's needs for ESY or ESD services, and the standard to apply in making that determination.

SCHOOL DISTRICT'S CONSOLIDATED ISSUE AND REQUESTED RELIEF

The School District has entered a general denial of all claims in Student's complaint and disputes the facts upon which Student's allegations are based. In addition, the School District requests the hearing officer to:

1. Dismiss claims arising outside the one-year statute of limitations rule as applied in Texas;
2. Dismiss all claims arising under laws other than the IDEA;
3. Find in favor of the School District's proposed program and placement; and
4. Find the FBA/BIP developed by the School District appropriate such that Petitioner is not entitled to an IEE at public expense.

FINDINGS OF FACT

Based upon the pleadings, evidence presented, and argument of counsel, the Hearing Officer makes the following findings of fact:

1. Student is a child with a disability residing within the jurisdiction of the School District. Student is ***-grader (2018-2019 school year) with *** who qualifies for special education and related services as a student with Autism (AU) and a Speech Impairment (SI). P's Ex. 54-1. The most recent evaluation of cognitive abilities, conducted at Petitioner's direction in preparation for the hearing, confirmed Student also has an intellectual disability (ID). P's Ex. 54-18.
2. The most recent assessment determined Student has a full-scale score of *** which falls in the "<***;" that is, compared to 100 same age peers, more than *** of them are performing at a higher cognitive level than Student. P's Ex. 54-13. The report documented Student's academic achievement in various areas, which corroborate the School District's data indicating Student is functioning *** years and more below grade level. P's Ex. 54-23. Oral language score which involves a combination of both expressive and receptive language abilities is in the "impaired" range falling at a standard score of *** or *** percentile. P's Ex. 54-23.
3. At Petitioner's request, a non-verbal measure of intelligence (the CTONI-2) was utilized to determine whether removing the impact of Student's receptive and expressive language disability impacted Student's overall intellectual abilities. Tr. at

- p. 633 (lines 17-20), p. 650 (lines 14-25), p. 651 (lines 1-22). However, the assessment confirmed previous determinations of Student's intellectual disability. Tr. at p. 651 (lines 21-22).
4. Student has received special education services from the School District since the 2014-15 school year (***) Grade). Student's IEP addressed Student's academic deficits, detailed the modifications Student requires, and included needed supplemental services, such as a special education inclusion teacher to support Student. In addition to the opportunity to type written responses, the ARD Committee documented extensive classroom accommodations to ensure Student could successfully access the general education curriculum. P's Ex. 12-26 –12-27. Student needed *** during all academic and leisure activities for safety, academic support, behavioral support and social success. P's Ex. 12-24.
 5. The ARD Committee discussed Student's needs in the area of occupational therapy (OT) and assistive technology (AT) in detail. P's Ex. 12-15. ESY was considered and the parents were provided a brochure regarding the services. P's Ex. 12-15.
 6. In *** grade, the ARD Committee approved utilization of an Alternate Schedule to support the need to temporarily remove Student from the general education classroom to protect other students and permit Student to regain emotional control. P's Ex. 12-8; P's Ex. 12-10; P's Ex. 12-15.
 7. An Alternate Schedule permits school staff to meet Student's unique needs while still complying with the IDEA's and State's requirement to document the amount of time a student spends in the regular education classroom versus a special education setting. P's Ex. 12-15.
 8. In response to significant behaviors which included injury to peers (***), the ARD Committee requested an updated functional behavioral assessment (FBA). the ARD meeting ended in consensus. P's Ex. 12-15; P's Ex. 12-29.

9. When the new FBA was completed, another ARD meeting was convened on February ***, 2015, to review the FBA and update the Behavioral Intervention Plan (BIP). P's Ex. 13-15; P's Ex. 13-20 – 13-22. The ARD Committee reviewed data indicating the use of the Alternate Schedule was effective and the data supported its continued use. P's Ex. 13-15; P's Ex. 13-11.
10. The ARD Committee also discussed Student's inability to focus and attend to social skills instruction provided in the general education classroom. P's Ex. 13-9. Staff were redirecting Student an average of 5 times/minute during direct instruction. P's Ex. 13-9. To address some of the concerns, the School District staff recommended a schedule be implemented in a special education setting for 20 minutes/day of services indicating "social/behavioral skills." Student's mother indicated her willingness to agree only if it was implemented on a trial basis and data was collected to determine its effectiveness. P's Ex. 13-15. The ARD meeting ended in agreement. P's Ex. 13-15; P's Ex. 13-30 .
11. The next ARD committee meeting convened on November ***, 2015. (***) Grade – 2015-2016 school year) . P's Ex. 14. The ARD began by planning for the three-year re-evaluation that was due before the end of the school year. P's Ex. 14-14. When asked about their concerns, the family noted that "this is the best school year Student has had." P's Ex. 14-14.
12. The ARD Committee discussed Student's progress in behavior noting there had only been one instance of physical aggression against a peer. P's Ex. 14-10. It was recommended the Alternate Schedule be discontinued. P's Ex. 14-15. However, Student still exhibited 1-3 acts of physical aggression each week against staff and various other disruptive behaviors indicating the BIP needed to continue. P's Ex. 14-10 (BIP); P's Ex. 14-2.

13. Student's PLAAFPs, IEP goals and objectives, assistive technology, schedule of services, BIP, accommodations, the Autism Supplement, and ESY were reviewed and revised. P's Ex. 14-3 – 14-9 (PLAAFPs); P's Ex. 14-9 (ESY and AT); P's Ex. 14-10 – 14-11 (LRE discussion); P's Ex. 14-11 – 14-13 (schedule of services); P's Ex. 14-16 – 14-21 (new IEP goals/objectives); P's Ex. 14-21 – 14-22 (BIP); P's Ex. 14-23 – 14-25 (Autism Supplement); P's Ex. 14-26 – 14-27 (accommodations summary).
14. School District staff recommended 30 minutes a day of pull-out for math and reading to address Student's need for pre-teach and review of the curriculum in order to successfully access the ***-grade curriculum, P's Ex. 14-15. Student's mother rejected the idea noting the research does not support pull-out. P's Ex. 14-15. The school staff acceded to the family and no resource time was implemented. After the deliberations, the ARD meeting ended in agreement. P's Ex. 14-15; P's Ex. 14-32.
15. At the end of Student's *** grade year, on May ***, 2016, the ARD Committee convened to review a new evaluation. Jt. Ex. 6. The School District's Licensed Specialist in School Psychology (LSSP) explained the evaluation to the ARD Committee and recommended further testing for possible intellectual disability. Jt. Ex. 6-14. The family declined. Jt. Ex. 6-14. The ARD Committee reviewed and updated the BIP. Jt. Ex. 6-15.
16. While discussing the schedule of services, the School District staff explained they were observing increased frustration from Student. They recommended that Student needs instruction in a resource setting for Writing and Math for 45 minutes/day, Reading for 60 minutes/day, and Social behavioral skills for 30 minutes/day. Jt. Ex. 6-15. Despite explanations from school staff as to why the resource time was important to Student, Student's family remained adamant that it was inappropriate. Id. The family and school reached a compromise agreeing that beginning the following school year (*** grade), Student would receive resource for Math (45 minutes/day), Reading (45 minutes/day), and Writing (15 minutes/day). Jt. Ex. 6-15. Jt. Ex. 6-34.

17. Student's annual ARD Committee meeting for *** grade (2016-2017) was convened on November ***, 2016. Jt. Ex. 5; Jt. Ex. 5-18. The family's private provider and inclusion advocate attended. Jt. Ex. 5-18. A review of the deliberations captures a thorough and thoughtful discussion of each element of Student's educational programming. Jt. Ex. 5-19. While the parent attributed the increased aggression in *** grade to the increase in transitions, school staff believed it indicated a need for direct social skills instruction, something the family had opposed in the past. Jt. Ex. 5-19. The ARD meeting ended in disagreement. Jt. Ex. 5-19.
18. The ARD Committee reconvened on November ***, 2016, to continue discussion of the four areas of disagreement. Jt. Ex. 5-15 – 5-16. The parents asked to go through each page of the IEP, and the School District staff agreed. Jt. Ex. 5-16. Consequently, adjustments to academic goals, *** services statements, academic PLAAFPs, the Autism Supplement and the social/behavioral pullout minutes in the instructional services schedule." Jt. Ex. 5-16 (deliberations); Jt. Ex. 5-16 – 5-18.
19. Subsequent to the line-by-line review and revision to parents' satisfaction, the ARD Committee again considered the schedule of services. Jt. Ex. 5-16. The proposal was to decrease Math and Reading resource to 30 minutes/day each and add 15 minutes/day of social skills instruction. Jt. Ex. 5-16. The parents agreed, and the meeting ended in consensus. Jt. Ex. 5-16 (deliberations); Jt. Ex. 5-38 (signature page).
20. The ARD Committee convened again on February ***, 2017. Jt. Ex. 4. The School District staff reviewed data reflecting positive results of the resource instruction. Student's time-on task had steadily increased. Jt. Ex. 4-16. The School District staff were excited about Student's engagement with the resource Reading program and improvement in math skills. Jt. Ex. 4-17. The family acknowledged that Student is more positive when discussing school. Jt. Ex. 4-17. An Assistive Technology (AT) evaluation was requested to consider whether any new or different AT was needed to meet Student's communication and OT needs. Jt. Ex. 5-17.

21. The Speech Therapist noted Student's lack of focus during therapy in the classroom. The parents thought Student was showing improvement in speech and they did not want to change those services. Jt. Ex. 4-17. The parents again did not consent to resource class instruction and wanted 100% inclusion. Jt. Ex. 4-1. The ARD meeting ended in agreement with the same level of resource that was agreed to in November 2016. Jt. Ex. 4-37.
22. There is little evidence in the record of Student's use or fluency with sign language. As reported by the Speech Pathologist, Student is primarily a verbal communicator and does not use sign as a preferred mode of communication. Tr. at p. 155 (lines 3-10).
23. An ARD Committee meeting was convened on March ***, 2017, to review the new AT evaluation. Jt. Ex. 3 The speech therapist and OT were part of the evaluation. It was recommended that Student be issued Student's own iPad *** installed so it could be utilized in all subjects. Jt. Ex. 3-16. Student was permitted to take the iPad home. Jt. Ex. 3-16. The meeting ended in agreement with the parent expressing no concerns about AT. Jt. Ex. 3-36; Jt. Ex. 3-1.
24. To prepare for *** grade (2017-2018 school year), the School District sent home an advance draft IEP and requested an ARD meeting be convened on or about May ***, 2017. P's Ex. 23. Based on Student's success with the resource setting, continuing behavioral concerns, and the increased rigor of the ***-grade curriculum, the School District was again recommending increased resource time. Compare P's Ex. 23-13 (noting total of 6 hours 15 minutes in resource for current school year – 2016- 2017) with P's Ex. 23-15 (recommending total of 17 hours and 30 minutes of resource for 2017-2018 school year). All remaining instruction including ***, ***, ***, a portion of Math, Reading, and Writing, along with all of Science, Social Studies and all non-academic times would continue in the general education classroom. P's Ex. 23-14 – 23-15; P's Ex. 23-11. The family refused to convene to discuss the recommendations. Tr. at p. 729 (lines 12-15).

25. The ARD Committee next convened for the annual ARD Committee meeting on October ***, 2017. (***) Grade – 2017-2018 school year) Jt. Ex. 2-18. Student's progress in speech therapy and OT was reviewed. Jt. Ex. 2-18 – 2-19. The OT reported Student was very enthusiastic about ***. Jt. Ex. 2-19. Student's special education case manager and resource teacher reviewed the PLAAFPs. Jt. Ex. 2-19; see also Jt. Ex. 2-3 – 2-10.
26. The AT evaluation noted that Student continues to use the iPad throughout the day. Jt. Ex. 2-19. The Parents agreed and did not raise questions or concerns. See Jt. Ex. 2-19. Jt. Ex. 3-16.
27. During review of the Autism Supplement, it was agreed that in-home training, ESY, and parent training were not needed. The Parents did not raise questions or concerns. Jt. Ex. 2-19. The ARD Committee confirmed that Student requires very close, vigilant *** support, every moment of every day including classroom time, lunch, ***, restroom, and in the hallways during transitions. Jt. Ex. 2-31; see also Tr. at p. 393 (lines 7-18).
28. It was reported that Student engages in physical and verbal aggression. *** were discussed. Attempts to re-direct verbal aggression risked physical aggression. Jt. Ex. 2-3. In addition, Student had started to ***. Jt. Ex. 2-4.
29. A snapshot of the work avoidance data collected the week before the ARD meeting indicated significant levels of work avoidance in the general education classroom. To the contrary, instances of work avoidance were minimal during resource instruction. Jt. Ex. 2-19.
30. During the first nine weeks of school, the recorded data showed *** of physical aggression towards others (***). Student's behaviors caused ***. Jt. Ex. 2-12.

31. The ARD Committee recommended a new FBA be prepared. Jt. Ex. 2-4; Jt. Ex. 2-19. The ARD Committee also recommended an Alternate Schedule to provide staff with the flexibility to respond to Student's more significant behaviors. Jt. Ex. 2-15.
32. The ARD Committee reconvened on November ***, 2017. Completion of the new FBA was expected on December ***, 2017. Jt. Ex. 2-20. The ARD meeting ended in agreement to keep the previous level of resource instruction pending the new FBA. Jt. Ex. 2-43.
33. Petitioner's expert observed Student on December ***, 2017, and acknowledged that overall, Student's educational team is clearly supporting Student to make progress in the general education classroom. P's Ex. 33-9. It was also acknowledged that requiring Student to listen to the whole-group instruction provided in the general education *** classroom is similar to what someone would experience in "a class where everyone was speaking French very quickly." P's Ex. 33-11. Regarding the reports of physical and verbal aggression, the expert too suggested a new FBA be completed. P's Ex. 33-15.
34. On January ***, 2018, *** before the ARD Committee convened to discuss the newly completed FBA, the family filed a request for due process hearing complaining about the School District's recommendation to increase Student's resource time. Id. The "stay-put" was invoked to ensure the agreement in place in November would continue while the dispute was pending.
35. The ARD Committee meeting on January ***, 2018, reviewed the new FBA/BIP and Petitioner's expert report. Jt. Ex. 1. The FBA/BIP results indicated that Student continued to demonstrate several concerning behaviors towards other students and teachers including physical aggression (***) ; verbal aggression (***) ; and other behaviors (***) . The purposes of the behaviors were determined to be to escape activities, to obtain attention, and to obtain tangibles. Jt. Ex. 8-1 (FBA defining behaviors); Jt. Ex. 1-20; Jt. Ex. 1-30 – 1-31 (BIP).

36. Student's mother discussed her concerns with the new FBA, expressing that it was misleading and purposefully negative, and therefore she was not in agreement. Id. The family was provided information on how to request an IEE. Jt. Ex. 1-20. The Parents requested an IEE at the expense of the school district.
37. The School District proposed adding the support of another behavior specialist to provide additional behavior support, assistance with data collection, and help monitoring progress. Jt. Ex. 1-20.
38. The School District staff again proposed increasing Student's resource time. Jt. Ex. 1-20. After much discussion of the appropriate schedule of services, the School District continued to recommend increased resource time and the family continued to disagree. The ARD ended in disagreement. Id.
39. Student struggle to make academic, behavioral and social progress while being served in the general education environment. The Student is educated through the delivery of a modified education program delivered as a "class within a class." Student's need for *** on modified curriculum has created a class-within-a-class, where Student receives a *** in the same space of non-disabled peers. Tr. at p. 1040 (lines 9-15). It distracts the teacher and students who are engaged in a different activity at a much higher level. Tr. at p. 249 (lines 10-15).
40. Although Petitioner's expert testified that a "class within a class" is not a bad thing; Petitioner's inclusion specialist testified to the contrary, that "it is not what we want." Tr. at p. 665 (lines 15- 22); p. 924 (lines 7-9).
41. The School District has provided Student the opportunity to work with some excellent teachers including *** Tr. At 1061 (lines 1-3). Student's case manager is a certified special education teacher and BCBA. See Tr. at p. 419 (lines 11-25).
42. A Board Certified Behavior Analyst (BCBA) must successfully complete a board approved graduate level program. Tr. at p. 518 (lines 8-25). In addition, a BCBA

- completes 1500 supervision hours under a currently certified BCBA before sitting for the BCBA exam. Tr. at p. 519 (lines 6-17) (detailing the selectiveness of the program, which admits only 15 out of roughly 1000 students, and the difficulty with the BCBA exam where 60% of students passed the first administration).
43. All staff involved directly with Student, including the paraprofessionals, are at a minimum, certified regular education teachers or certified special education teachers. Tr. at p. 1061 (lines 3-5); Tr. at p. 1056 (lines 18-25), p. 1057 (lines 1-20); Tr. at p. 480 (lines 1-3); Tr. at p. 1130 (lines 8-25), p. 1131 (lines 1-10); Tr. at p. 1132 (lines 8-10); Tr. at p. 336 (lines 1-14); p. 380 (lines 8-16), Tr. at p. 302 (lines 9-23); Tr. at p. 1005; Tr. at p. 136 (lines 2-21); Tr. at p. 190 (lines 20-25), p. 191 (lines 1-4); Tr. at p. 1111 (lines 16-25), p. 1112 (lines 1-4).
44. The campus rearranges substitutes to ensure Student only interacts with trained teachers at all time. Tr. at p. 441 (lines 16-21) (***). And, of course, Student has several accommodations such as preferential seating, extra time, supplemental aids, individual reminder, ***, etc. See Jt. Ex. 2-34 (ARD accommodation summary).
45. The education professionals who have worked with Student for a minimum of an entire school year, agree that specialized academic and behavioral instruction is required at Student's level and at Student's pace in a small group setting to make meaningful progress in the curriculum. Tr. at p. 240 (lines 14-24); p. 558 (lines 8-11); p. 1021 (lines 10-15); p. 1043 (lines 23-25), p. 1044 (lines 1-4); p. 1076 (lines 21-25); p. 1134 (lines 8-16). The resource setting allows for meaningful access to the entire curriculum as required by the IDEA. Tr. at p. 1012 (line 9-19). The School District special education coordinator, explained, Student has infinite potential; however, the lack of special education instruction has severely hindered Student's progress. Tr. at p. 1126 (2-18).
46. The ***-grade curriculum is 100% modified several grade levels to meet Student's unique needs. Jt. Ex. 2-12 (ARD document); Tr. at p. 542 (lines 13-25), p. 543 (lines

- 1-13) (***) ; p. 546 (lines 1-16) (***) . because of Student’s cognitive limitations, Student is unable to grasp any of the actual grade level curriculum, but instead requires 100% of it to be significantly; p. 1038 (lines 2-7) (***) explaining that Student’s classwork resembles a *** academic level).
47. The School District staff recommended that the LRE appropriate for Student was a combination of general education instruction and increased resource time. Jt. Ex. 2-19. The School District explained that the progress Student was exhibiting was occurring in the resource setting. Jt. Ex. 2-19. The family objected to the proposed schedule and suggested that their inclusion advocate come to observe again. Jt. Ex. 2-19.
48. A 44-page IEP with numerous goals and objectives, modifications, accommodations, behavior intervention plans, ***, speech therapy, occupational therapy, and *** programming is highly individualized to meet Student’s unique needs. Jt. Ex. 1. Each line on each page (with the exception of recently, the schedule of services), has been approved by Student’s parents. *See, e.g.*, Jt. Ex. 5-16 (documenting line-by-line review of ARD document).
49. The School District has clearly made more than mere token gestures to accommodate Student in regular education. Student has *** support from certified teachers, and this year they were trained and supervised by a BCBA. *See, e.g.*, Tr. at p. 214 (lines 14-17), p. 481 (lines 1-14) (“***” strategy used by staff when student becomes violent *i.e.* ***). The BCBA has been collaborating with a second BCBA for the entire school year. R’s Ex. 3; R’s Ex. 5; Tr. at p. 537 (lines 1-6), p. 1140 (lines 11-14).
50. The ARD Committee reviewed the various areas of the Autism Supplement every year, and the deliberations note the parents did not need in-home training. P’s Ex. 12-15; P’s Ex. 12-12 – 12-25.
51. The School District has demonstrated a willingness to listen to parental concerns by making programming changes, conducting additional evaluations, adding and/or changing IEP goals, and adding supports and services. The ARD Committee meetings have lasted 2.5 to 3.5 hours each, where as 90 percent of the other ARDs conclude

within an hour. Jt. Ex. 5-16 – 5-17.

52. Despite Student's intensive needs in the regular education environment, the School District has provided extensive research-based supplementary aids and services in an effort to meet Student's needs in that environment for a significant portion of the school day. See Jt. Ex. 1-36, 1-37 (Accommodation Summary).
53. Student's behavioral issues significantly inhibit Student's ability to receive academic benefits from instruction in the general education environment despite more than reasonable efforts by the School District. Petitioner's expert reported that during their *** lesson while she was instructing, Student *** interrupted the lesson by ***. P's Ex. 55.
54. Understanding the importance, the language and behavioral role models of non-disabled peers provide to Student, school staff have continued to recommend Student be included with Student's non-disabled peers for a significant portion of regular education instruction. Tr. at p. 1134 (lines 8-16).
55. Petitioner's expert and all School District staff who work with Student testified that 100% of the ***-grade general education curriculum is beyond Student's abilities and must be modified significantly *** grade levels below Student's peers in order for Student to be able to understand any of the content. Tr. at p. 905 (lines 13-15), p. 962 (lines 3-14), p. 216 (lines 20-25). No matter the level of modification, accommodation, or strategies tried, Student is not learning in the general education setting. Tr. at p. 542 (lines 16-19). Student is not expected to master any of the concepts Student's classmates are expected to learn. Tr. at p. 384 (lines 11-14).
56. The regular education environments where Student can successfully participate with modified curriculum and accommodations, which include a portion of ***, all of ***, and all ***, *** and ***, are proposed to remain part of Student's program. Id.; Tr. at pp. 1101-1103. Additionally, Student participates with Student's regular education

- peers in ancillary activities, including lunch, ***, special assemblies and other school activities. Id. The ARD Committee has clearly maximized the amount of time Student can appropriately spend in regular education. Tr. at p. 551 (lines 13-20); p. 1043, p. 1044 (lines 1-4); p. 1076 (lines 17-25).
57. There is no persuasive evidence indicating Student is receiving educational benefits that would tip the balance in favor of additional inclusion time. In the general education classroom Student is typically uninterested, disengaged, and disruptive. Tr. at p. 1040 (lines 7-8), p. 1062 (lines 8-20).
58. Student has no interest in being in the general education classroom and will ***. Tr. at p. 388 (lines 18-20). Student will escalate “extreme behavior” until removed. Tr. at p. 389 (lines 1-9). At times the general education classroom instruction ***. Tr. at p. 1026 (lines 16-24), p. 1027 (lines 6-13) Student is not receiving any nonacademic benefits inside the classroom because Student simply does not attend to the instruction or Student’s peers. Tr. at p. 543 (lines 18-24).
59. Although Student’s parents prefer 100 percent inclusion, the School District’s proposed IEP places Student in the general education setting to the maximum extent appropriate. See Jt. Ex. 2-13 (ARD document stating pullout instruction addresses academic, social/behavioral skills and increases Student’s ability to access the modified general education curriculum, gain independence, and increase positive peer interactions. These benefits are expected to outweigh any potential negative effects).
60. Revisions were made to the BIP in order to address the problematic behaviors through specific strategies and interventions. Tr. at p. 1140 (lines 15-19). The FBA/BIP meets the standard procedures established for a Board-Certified Behavior Analyst (BCBA) Tr. at p. 1140 (lines 20-25), p. 1141 (line 1).
61. Petitioner’s experts acknowledge the appropriateness of the IEP services as a whole. P’s Ex. 33-9 (Student’s educational team is *clearly* contributing to Student’s progress); P’s Ex. 54-19 (Student will make meaningful gains, as in previous school years,

- provided appropriate supports).
62. Other classmates have been targeted and injured by Student and to better protect them, School District staff strategically adjust schedules, so those students will not be in class with Student for multiple school years. Tr. at p. 1061. Student's behavior can be so extreme that the *** testified to always having to ***. Tr. at p. 377 (lines 12-13). Furthermore, as explained, it is traumatizing for students to see Student attack the adults that provide daily support. Tr. at p. 1041 (lines 24-25), p. 1042 (line 1).
63. Even with the vigilant *** support Student's teachers and support staff are providing, Student is still a danger to self and to others in the general education classroom. Tr. at p. 245 (lines 11-17). Petitioner's expert testified that Student should never be within arm's reach of another student for everyone's safety. Tr. at p. 702 (lines 5-8).
64. While school staff have successfully anticipated the aggression to protect other students, the staff continues to be harmed in their efforts. *See* P's Ex. 15-5; *see, e.g.*, Tr. at p. 217 (lines 18-21) (testifying to ***); p. 243 (lines 6-16) (describing additional incidences of physical aggression towards staff); p. 392 (lines 7-22) (describing the injuries sustained after being attacked); p. 393 (lines 1-3) (testifying that ***); p. 547 (lines 10-18).
65. Student's behavior cannot be successfully managed in the general education setting at this time. There is a need for a smaller setting to safely implement BIP in a way that will improve the behaviors. Tr. at p. 1133 (lines 6-25), p. 1134 (lines 1-7).
66. Student's presence has a significant detrimental effect on the regular classroom environment due to both the effort required to educate in that environment and to behavior management. Tr. at p. 541 (lines 7-9).
67. It is a fact supported by data collection that Student is more successful academically when instructed in a smaller group setting as recommended by the School District.

- Tr. at p. 483 (lines 19-21); p. 558 (lines 9-11) (data that student is making progress in *** or small group instruction); p. 851 (lines 5-10); Tr. at p. 622 (lines 7-16).
68. The School District's proposed placement is reasonably calculated to allow Student to make academic progress, to receive behavior intervention, and to develop social skills. This proposed program will likely lead to academic and nonacademic benefit for Student. In a special education setting with a smaller student to teacher ratio, Student appears capable of learning, as well as demonstrating greater growth. Student acts "happy," will "laugh," and make "jokes," all while engaged in instruction. Tr. at p. 249 (lines 16-22); p. 539 (lines 1-4). Tr. at p. 1145 (lines 23-25) – 1146 (lines 1-7). Tr. at p. 1070 (lines 8-14).
69. It is undisputed Student is receiving meaningful educational benefits from Student's IEP. In order for Student to make behavioral gains, and thus have more meaningful inclusion with Student's non-disabled peers in a regular education setting, it is important to increase the amount of resource instruction. Tr. at p. 1135 (lines 22-25), p. 1136 (lines 1-5) (***) explaining limitations of general education setting).
70. If Student's behavior improves it will not enable Student to understand the instruction being provided in the general education classroom. That is, even if Student's behavior was perfect, Student would still require a class-within-a class to access the curriculum. Tr. at p. 249 (lines 10-14).

APPLICABLE LAW

To determine whether the educational program is appropriate for Student, it must be determined whether the School District offered and provided a FAPE to Student.

DUTY TO PROVIDE FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and sufficient related support services and specifically designed personalized instruction reasonably calculated to meet the unique needs of

the child in order for them to receive an educational benefit, and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400 (d).

Under IDEA the school district is responsible for providing all children with disabilities residing within its jurisdiction between the ages of 3 and 21, with such instruction and services at public expense and to comport with the child's IEP. 20 U.S.C. § 1401(9); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. vn. Rowley, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

FAPE

The obligation to provide a FAPE requires a school district to have in effect an IEP at the beginning of each school year. The ARD Committee develops the IEP and must consider the student's strengths, the results of the most recent evaluation data, the student's academic, developmental and functional needs, and parental concerns for enhancing the student's education. 34 C.F.R. 300.324(a).

An IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323 (a).

An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. It is not a form document. It is constructed only after careful consideration of the student's present levels of achievement, disability, and potential for growth. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv); Andrew F., 137 S.Ct. at 999.

The IDEA does not require the IEP to guarantee a certain level of accomplishment. It is not required to provide Student with the best possible education. It need not be designed to maximize a student's potential. The issue is not whether the school district could have done more. Houston Ind. Sch. Dist. v. V.P., 582 F. 2d 576 (5th Cir. 2009) cert. denied, 559 U.S. 1007(2010).

Instead, the IDEA guarantees only a "basic floor of opportunity," by requiring that the IEP

must be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. The inquiry is whether Student received an educational benefit. Rowley, 458 U.S. at 188-189.

THE FOUR FACTOR TEST

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

1. The program is individualized on the basis of the student's assessment and performance;
2. The program is administered in the least restrictive environment;
3. The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
4. Positive academic and non-academic benefits are demonstrated.

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

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

INDIVIDUALIZED PROGRAM

To meet its substantive obligation, a school district must offer an IEP that is reasonably calculated to meet the child's needs to enable the student to make progress appropriate in light of the child's unique circumstances. The adequacy of a given IEP turns on the unique circumstances of the student for whom it was created. Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. 137 S. Ct. 988 (2017).

The ARD committee is required to review the student's IEP at least annually, and on the basis of any re-evaluations, information provided by parents, or the student's anticipated needs, to make any revisions needed to address a lack of expected progress. 34 C.F.R. 300.324(b)(1).

LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires that students with disabilities must be educated in general education settings with peers who do not have disabilities to the maximum extent appropriate. This requirement of the IDEA is referred to as a school district's obligation to educate a student in the least restrictive environment (LRE). 34 C.F.R. § 300.114(a)(2)(i).

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs.

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

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

Daniel R.R. v. El Paso Ind. Sch. Dist., 874 F. 2d 1036, 1048 (5th Cir. 1989).

This determination requires an examination of:

1. a school district's efforts to provide the student with supplemental aids and services in the general education setting;
2. a school district's efforts to modify the general education curriculum to meet the student's individual needs;
3. the educational benefit a student is receiving while placed in the general education setting; and
4. the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

Daniel R.R., *supra*.

The facts in Daniel R.R. are directly on point with the facts of this case. However, unlike

Daniel, who was in kindergarten and removed from regular education for everything except lunch and ***, Student is *** and included in regular education for a portion of ***, all of *** (primarily for generalizations of social skills instruction), all ***, and all non-academic times. And, 100% of the curriculum has to be modified beyond recognition for Student. Compare Daniel R.R., 874 F.2d at 1039-40; with Tr. at p. 541 (lines 1-6) (testimony that *everything* in the *** grade curriculum is modified down to a *** to *** grade level).

Here, Student's behavior is a concern. Daniel was not a disruption in the traditional sense of the word, but he did need significant 1:1 support. Daniel R.R., 874 F.2d at 1039. To the contrary, Student not only requires constant *** attention, but is a significant disruption to learning of Student's non-disabled peers and a safety-risk to their well-being. Tr. at p. 1041, 1042 (lines 1-17) (regarding disruption to learning and safety of other students).

If that level of attention is removed, the safety of Student and the other students is jeopardized. Tr. at p. 322 (lines 20-25), p. 323 (lines 1-19) (regarding safety concerns without *** support); the ARD Committee has ensured it erred on the side of maximizing the student's time in the regular education environment. See *** v. Tomball Indep. Sch. Dist., Dkt. No. 332-SE-0816 (TEA Dec. 6, 2016) (finding proposed combination of regular education and special education was LRE for ***).

The IDEA requires ARD committees to consider behavior that impedes the learning of the particular student or the learning of other students as a "special factor." It is not appropriate to educate a student in the general education setting when the student engages in disruptive behavior that significantly impairs the education of the other students in the general education setting.

Removing a student from general education classes 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." 34 C.F.R. § 300.114(a)(2)(ii).

The benefits of mainstreaming may tip the balance in favor of regular education even if the child cannot flourish academically. On the other hand, mainstreaming a child who suffers from

the experience would violate the Act's mandate for a FAPE. Daniel R.R., 874 F.2d at 1049.

When a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place them in special education classes. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.114(a) (1) (2) (i) (ii). *Id.*

Mainstreaming is pointless if instructors are forced to modify the regular education curriculum to the extent the handicapped child is not required to learn any of the skills. Educators are not required to change the curriculum beyond recognition or operate a "classroom within a class."

When the curriculum must be altered such that it no longer resembles the curriculum in the classroom, the presumption in favor of mainstreaming is overcome and such efforts are not required under the IDEA. Daniel R.R., 874 F.2d at 1050. A class-within-a-class is an instructional arrangement the Fifth Circuit does not require in the name of inclusive education. Brillon v. Klein Indep. Sch. Dist., 100 F. App'x 309, 313 (5th Cir. 2004); Daniel R.R., 874 F.2d at 1049.

Here, the behavior significantly interferes with Student's learning and the learning of other classroom peers. The effect the disabled child's presence has on the regular classroom environment, and thus, on the education the other students are receiving, is relevant. In this regard, , the child may engage in disruptive behavior. And, if the disabled child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of special education. Daniel R.R., 874 F.2d at 1049-1050.

The Fifth Circuit has specifically approved of a mixture of special and regular education classes for children whose cognitive limitations and behaviors prevent them from accessing the curriculum in the general education classroom. In this case, Student functions *** grade-levels below Student's same-age, non-disabled peers, and Student's behavior is a safety concern. The binding law in this Circuit compels the conclusion that the School District's proposed schedule of

services with a mixture of special education and regular education is the LRE.

Here, Student's parents, teachers, and service providers have engaged in a multi-year careful and thoughtful discussion regarding the LRE appropriate to meet Student's needs, and the decision ARD Committee decision complies with the IDEA.

COLLABORATIVE MANNER

The school district is required to ensure parental participation in the ARD process, and it must make consistent efforts to reach consensus with over the relevant time period. 19 Tex. Admin. Code § 89.1050 (g). However, the school district is not obligated to implement every parental request or suggestion. See, Lachman v. Illinois St. Bd. of Educ., 952 F. 2d 290, 297 (7th Cir. 988). No one member of an ARD Committee has veto power over the educational decision-making that is the ARD Committee's overall responsibility. 34 C.F.R. §§ 300.321-300.322.

EDUCATIONAL BENEFIT

The student must receive more from the program provided than a de minimus educational benefit given the Student's unique circumstances. Andrew F., *supra*; Rowley, *supra*.

The school district is required to provide the student with a meaningful educational benefit that is likely to produce progress not regression or trivial advancement. The student does not need to improve in every academic and non-academic area to receive an educational benefit. Houston, *supra*, 582 F. 3d at 583.

The determination of whether the student is receiving educational benefit while placed in the general education setting requires an evaluation of both the academic and nonacademic benefits. Id. Daniel R.R., *supra*, 874 F. 2d at 1048.

The fact that it is possible does not mean that it is required, or appropriate, under the IDEA. The student should be able to derive some actual educational benefit from *** placement. Northside Indep. Sch. Dist., Dkt. No. 050-SE-1001 (SEA Tex. Jan. 4, 2002).

Although the additional supports recommended by Student's experts might "enhance" and "improve" the "gains" and "success" Student is already experiencing, the IDEA does not require the School District to implement them. See Zelazny, *supra*, 325 F.3d at 731 (expert's program showed district how to maximize student's potential, but IDEA does not require it be implemented).

DISCUSSION

APPLICATION OF THE FOUR FACTOR TEST

Application of the four factors to the evidence in this case supports the conclusion that the School District's program was appropriate because the IEP and BIP are reasonably calculated to provide the requisite educational benefit given Student's unique circumstances. Rowley, *supra*, 458 U.S. at 206-20; Endrew F., *supra*, 137 S.Ct. at 999-1000 (2017).

Factor 1: The program is individualized on the basis of the student's assessment and performance.

As the Supreme Court noted in Endrew F., a student's "present level of performance" provides the benchmark ... the starting point ... from which to measure the student's progress. The next component of every IEP is measurable annual goals designed to allow the student to make progress, if possible, based upon the student's circumstances, in the general education environment. Meaningful progress is the key regardless of the educational setting.

Petitioner believes Respondent failed to provide the student a FAPE by not providing present levels of performance on which appropriate, measurable goals could be based, and by using goals that cannot be measured due to lack of accurate baselines.

Petitioner raises the issue whether the BIP is adequate. The educational program proposed by the School District was designed and, in part, based on the results of the FBA. In order to determine the appropriateness of the educational program proposed by the School District, the hearing officer must necessarily consider evidence related to the FBA and whether it is

reasonably calculated to meet Student's unique needs.

While it is clear that Student continues to have behavior challenges and ongoing struggles, the educational programming was individualized on the basis of the Student's assessments and performance, and it was reasonably calculated to enable Student to make appropriate progress in light of Student's individual circumstances. Andrew F., *supra*, 137 S.Ct. 988 at 1000.

Petitioner provided evidence to the contrary, including expert testimony showing that reasonable minds can disagree on pragmatic details of the delivery of the educational program. The school district is under a duty to consider the results and recommendations of that evaluation at an ARD committee meeting. The evidence showed the school district did that.

While "more," "different," or "better" services/goals/accommodations might be possible, the relevant question is whether the IEP as written is appropriate. Adam J. v. Keller Indep. Sch. Dist., Civ. No. 4:01-CV- 0797-A, 2002 WL 1906001 at *2 (N.D. Tex. Aug. 15, 2002) (finding fact that another plan "might work as well or even better does not mean that defendant has failed to provide plaintiff a FAPE"), *aff'd*, 328 F.3d 804 (5th Cir. 2003).

The role of the court is not to "second guess" school officials or substitute their own idea of an appropriate IEP for the opinion of the educational professionals. C.G. by & through Keith G. v. Waller Indep. Sch. Dist., 697 F. App'x 816, 820 (5th Cir. 2017), as revised (June 29, 2017) (citing Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T., 91 F.3d 689, 693 (5th Cir. 1996)).

The Supreme Court recently reiterated that "the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." Andrew F., *supra*, 137 S.Ct. at 999 (referencing Rowley, 458 U.S. at 206-07).

This issue is decided in favor of the School District because the District is not required to implement the "best" program designed by an expert to remediate or maximize a child's educational potential. Perhaps the school district could have conducted additional assessments

such as those conducted in the evaluation completed in October 2017. Instead, after deliberative consideration, the ARD committee determined that Student's FIE and FBA/BIP, prepare and reviewed by two BCBA's appropriately identified and defined Student's behaviors, the functions of those behaviors, and the supports sufficiently appropriate to address the behaviors.

Factor 2: The program is administered in the least restrictive environment.

Student's teachers have the most knowledge of Student's learning needs and have made a careful and thoughtful decision based on all the data available. For each and all these reasons, Petitioner failed to meet Petitioner's burden to establish the proposed schedule of services for Student is not the LRE.

The School District strives to offer the Student's educational program in the least restrictive environment. The IEP and BIP are designed and reasonably calculated to meet Student's unique and complex needs to make it possible for student to continue to be educated in the general education environment.

The School District made significant efforts to provide Student with supplemental aids and services and modify the curriculum for Student, but, even with these efforts, Student caused considerable disruption to the education of the other students in the general education setting. In sum, Student cannot be appropriately educated in a general education setting for all classes.

The School District seeks to achieve a balance of the general education environment and the other educational needs of the student. It implemented Student's IEP and BIP during the Fall semester of the 2017-18 school year and now proposes an appropriately modified placement for Student in the least restrictive environment.

Student has challenging and persistent behavior issues at school related to Student's disabilities. Student requires an educational program anticipating the need for frequent and *** individualized behavior interventions.

It was not until the School District's significant efforts to meet Student's needs through an individualized IEP and BIP implemented in the general education setting were unsuccessful that the School District proposed a revised IEP and placement in a self-contained classroom.

The district personnel believed that academic placement in general education classes for core subjects exceeded the student's current levels of educational performance and would be educationally inappropriate. The district believed placement in general education would not allow the student to make appropriate educational progress.

Having determined that Student cannot be satisfactorily educated in the general education setting, the School District seeks to mainstream Student to the maximum extent appropriate. In other words, given the severity of Student's disability, the School District will be providing Student with the maximum amount of appropriate interaction with nondisabled students.

Factor 3: The services are provided in a coordinated, collaborative manner by the "key" stakeholders.

The third prong of the Michael F. analysis requires the "key stakeholders" to provide services in a coordinated and collaborative manner. Michael F., 118 F.3d at 253. To prevail on this prong, Petitioner must prove the school "failed to implement substantial or significant provisions of the IEP." Bobby R., 200 F.3d at 349. Petitioner does not complain that any provision of the IEP was not implemented, but rather that the BIP was not implemented with fidelity.

Student's services have been provided in a coordinated and collaborative manner by the school district. The record is replete with examples of the various ways the School District coordinated and collaborated with Student's Parents. The School District provided Student's Parents with sufficient information, ensured parental involvement, secured parental feedback, discussed Student's education program, and shared information at ARD meetings.

The law allows the school district to take other steps to ensure Student's individualized

needs are considered. The evidence showed the school district did so – by administering the student and parent surveys and getting feedback from Student’s teachers as to how Student was doing in Student’s classes.

Petitioner complains the approach lacked objective and measurable goals. The evidence shows the goals were relatively clear. Even if the goals lacked more detail in describing behavior strategies, the IEP as a whole did not deny Student FAPE when viewed with Student’s assessments.

The IDEA does not require the levels of methodology and specificity Petitioner seeks in formulating an appropriate IEP and BIP. Although the amount of special education consult services seems somewhat arbitrary, Petitioner did not prove it was insufficient for the purpose of monitoring Student’s performance.

The special education teacher, as Student’s case manager, collaborated with Student’s teachers in monitoring Student’s progress and sharing that information with Student’s parents and in ARD meetings. Over time the degree of collaboration and cooperation has been far more than sufficient to permit the Parents to meaningfully participate in Student’s special education.

Recognizing that the needs of the child are not stagnant but evolving, the best educational programming will require continued adaptation based on the attention of the providers of support. The student’s needs will present a life-time challenge for the student’s parents, the district, and the student. This will necessarily require an ongoing team effort. It may require different supports and services and efforts to involve Student in activities. While these are the minimum requirements of concerned parents and dedicated educators, they far exceed the minimum requirements of the IDEA.

Petitioner showed some evidence that some of the “team” were not fully informed at the beginning of the school year. There always could be greater collaboration between school district staff in that regard. Parents, too. It is understandable that some confusion may arise over the course of several months on various aspects of Student’s educational program. Even though

parents declined the invitation for collaborative training between the school and the home, opportunities remain available through the school district and such would benefit the student even if not required by the IDEA.

It is important to acknowledge the extensive experience of Student's teachers, not only as qualified professionals in the field of education, but with Student specifically. The Fifth Circuit has recognized the importance of the opinions of those individuals with the most immediate knowledge of a student's performance – the educators who work with the student on a daily basis. See Michael F., 118 F.3d at 253-54.

Factor 4: Positive academic and non-academic benefits are demonstrated.

The School District's program is reasonably calculated to provide Student with an educational benefit. With extensive supplemental aids and services, Student was able to make measurable progress on Student's IEP. However, the evidence also shows that Student received little, if any, educational benefit from being in the general education classroom, and otherwise was able to be successful in the special education resource instruction setting.

Student made meaningful educational progress. It is important not to overlook the fact that most of the progress occurred in the resource setting and is why the School District continues to recommend implementation of the proposed IEP. See Brillon, 100 F. App'x 309 at 313.

Student's educational program is designed to be delivered in a mix of general and special educational settings. It will be delivered in the least restrictive environment based on Student's assessments and unique abilities. It appears the IEP was appropriate at all relevant times.

The district properly evaluated the student and offered a special education program with related services for Student. It appears from the record that the School District proposal will continue to provide Student a FAPE. The district sought to propose a placement in the least restrictive environment appropriate for the student's needs. If the January 2018 proposal is found after its implementation to be unsuccessful, then the district must find and provide a placement

that can be successful.

The ARD committee has considered a continuum for educational placements for the student. The district determined that the student needed a placement in for some core academic courses and some special education courses based upon available assessment and the student's present level of academic performance.

Until the disagreement over increased resource instruction, the family and the School District had always been able to reach consensus. The fact that the parties were unable to reach agreement this one time is not evidence of a refusal to consider the parents' input, but rather a disagreement over the right path for Student's education. The family's preferred path is supported by the science and philosophy on inclusive education. The School District's path is supported by extensive data collected on Student's individual needs.

ALLEGED PROCEDURAL VIOLATION

To prevail on a claim of a procedural violation of the IDEA, Petitioner must establish that the School District significantly impeded the parent's opportunity to participate in the decision-making process. See Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857-58 (6th Cir. 2003) (analyzing predetermination under procedural prong of Rowley test); Rockwall Indep. Sch. Dist. v. M.C., No. 3:12-CV-4429, 2014 WL 112642573, at *9 (N.D. Tex. 2014), *aff'd*, 816 F.3d 329 (5th Cir. 2016); see also Adam J., 328 F.3d at 811-12. To do so, Petitioner must present "evidence of bad faith exclusion...or refusal to listen to or consider [the parent's] input." Rockwall, supra.

REQUEST FOR IEE

A parent has a right to an Independent Educational Evaluation (IEE) at public expense if the parent disagrees with the school district's evaluation subject to certain regulatory conditions. 34 C.F.R. § 300.502(b)(1). In response to the request for an IEE, the school district must either request a due process hearing to demonstrate that its evaluation is appropriate or ensure the IEE is provided. 34 C.F.R. § 300.502(b)(2).

If the school district provides evidence that its evaluation is appropriate then the parent may still obtain an independent evaluation, but it will not be provided at the school district's expense. 34 C.F.R. § 300.502(b)(3).

On April ***, 2018, Petitioner requested an IEE for a Functional Behavioral Assessment (FBA) conducted by the School District dated January ***, 2018. P's Ex. 42-6. The School District pursued its statutory right to establish the appropriateness of its evaluation in this due process hearing *in lieu* of providing the requested IEE. *See* School District's Request for Due Process Hearing.

The School District seeks an Order finding the FBA conducted by the School District is appropriate, and therefore, it is not required to fund an IEE at public expense. The School District's staff used a systematic process for describing problem behavior and identifying the environmental factors and surrounding events associated with Student's behavior. Jt. Ex. 8. .

The assessment completed by the School District appropriately identified the functions of the problematic behaviors and the ARD Committee developed an appropriate BIP to be implemented by the school's highly-trained staff. As such, the FBA conducted by the School District's is appropriate, and therefore, the School District is not required to fund an IEE at public expense.

CONCLUSIONS OF LAW

1. The student is eligible for a free appropriate special education program under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 CFR §300.301 and 19 T.A.C. §89.1011, and related statutes and regulations.
2. The Texas one-year statute of limitation (SOL) began running one year before the date the Complaint was originally filed on January 30, 2018. 19 Texas Administrative Code § 89.1151(c).

3. The District is a Local Education Agency responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding. The District is required to properly identify, evaluate, and serve the student, and provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. §§ 1400 et seq., 34 CFR §300.301, and 19 T.A.C. §89.1011.
4. Petitioner bears the burden of proof on all issues raised in Petitioner's complaint, including challenges to the proposed IEP, BIP, and LRE placement. Schaffer v. Weast, 546 U.S. 49, 62 (2005) , 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F. 2d 127, 131 (5th Cir. 1993).
5. Petitioner did not meet the burden of proving the School District failed to provide FAPE during the 2017-18 school year. Petitioner did not meet the burden of proving the proposed educational plan for 2018-2019 fails to provide FAPE. Petitioner did not meet the burden of proving the district failed to provide an appropriate educational placement for the student. Schaffer v. Weast, *supra*; Andrew F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017); and Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997); 34 C.F.R. §§ 300.1, 300.17.
6. IDEA creates a presumption under the law favoring a school district's educational plan. Schaeffer v. Weast, *supra*; and Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
7. Petitioner did not prove that the district's proposed educational plan fails to contain the essential components of an IEP including baselines, present levels of performance, and measurable goals. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a); 19 Tex. Admin. Code § 89.1055.
8. The IEP and BIP developed by the ARD Committee to be implemented by the School District are reasonably calculated to enable the student to make meaningful progress and are appropriately individualized to meet Student's needs. Rowley, *supra*.

9. Student's educational program satisfied the standard required at all relevant times. The educational program is individualized on the basis of the student's assessment and performance; the program is administered in the least restrictive environment; the services and supports are provided in a coordinated and collaborative manner by the key stakeholders; and positive academic and non-academic benefits are demonstrated. Rowley, *supra*; 34 C.F.R. §300.552, and 19 T.A.C. §89.1055; Andrew F., *supra*; and Michael F., *supra*; 34 C.F.R. §300.300, 34 C.F.R. §300.530, 19 T.A.C. §89.1055, and Tex. Educ. Code §37.004.
10. Student's IEPs and BIPs during the relevant time period were individualized and appropriately ambitious to ensure Student made meaningful educational progress. The IEPs and BIPs are written to meet Student's unique needs even if it is not in the exact manner an outside expert recommends. The IEPs and BIPs provided Student a FAPE during the relevant time period and were consistent with the requirements. 20 U.S.C. §1414(c)(1)(B)(iii)-(iv); 34 C.F.R. § 300.324(a)(2)(v), (a)(3)(ii), Andrew F., 137 S.Ct. at 999-1000 (2017).
11. Student was not denied a FAPE by the lack of an adequate behavior intervention plan. 34 C.F.R. § 300.324(a)(2)(i).
12. Petitioner did not meet the burden of proving the School District's proposed placement for spring semester 2018 and the 2018-2019 school year violates the LRE requirements. Schaffer v. Weast, *supra*; Daniel R.R., *supra*; Andrew F., *supra*; Michael F., *supra*; 20 U.S.C. § 1412 (a) (5) (A); 34 C.F.R. §300.114(a) (1) (2) (i) (ii).
13. The district's procedures in making decisions about the least restrictive educational placement for the student meet the requirements articulated in Rowley, *supra*, and 19 T.A.C. §89.1055; Andrew F., *supra*; and Michael F., *supra*; 34 C.F.R. §300.300, 34 C.F.R. §300.530, 19 T.A.C. §89.1055, and Tex. Educ. Code §37.004.

14. The Student's placement and schedule of services for the 2017-2018 school year, and the District's proposed placement and schedule of services for the 2018-2019 school year, place the Student in the LRE. 20 U.S.C. § 1412(a)(5)(A), 34 CFR §300.300, and 19 T.A.C. §89.1055. See Daniel R.R., *supra*, and Michael F., *supra*.
15. The combination of regular education and special education instruction complies with the IDEA's mandate that Student be included with Student's non-disabled peers to the maximum extent appropriate. See Daniel R.R., 874 F.2d 1036 at 1050 (5th Cir. 1989) (explaining IDEA's mandate for a continuum of placements may require a combination of regular education and special education instruction).
16. Student was placed in the general education environment to the maximum degree feasible that allowed Student to continue to make academic and non-academic progress. Student's placement meets the statutory preference for educating Student, to the maximum extent appropriate, in general education. 20 U.S.C. § 1412(a)(5)(A). Maintaining the student's current educational placement is likely to result in injury to the student or to others. 34 CFR 300.532(b)(2)(ii).
17. The School District is fulfilling the obligation to notify parents early of upcoming meetings and schedule meetings at an agreeable time and place. 34 C.F.R. 300.322(a). Parent has attended every ARD meeting and been a key participant.
18. The School District did not fail to provide a collaborative and cooperative ARDC process that resulted in denying Parents the meaningful opportunity to participate in the IEP planning process. 20 U.S.C. § 1414(d)(1)(B)(i), 34 C.F.R. § 300.322(a), and 19 Tex. Admin. Code § 89.1050(g).
19. The School District did not refuse to collaborate with Parents. No portion of the proposed 2016-2017 IEP was predetermined by the District. 20 U.S.C. §§ 1414(e), 1415(b)(1); 34 C.F.R. §§ 300.327, 501(b)-(c).

20. The School District's failure to provide all required components of prior written notice explaining its proposed actions or refusals did not result in a loss of educational opportunity or infringe upon Parents' opportunity to participate in the IEP process. The errors were educationally harmless. Adam J. ex rel. Robert J. v. Keller Independent School Dist., 328 F.3d 804, 812 (5th Cir. 2003).
21. The School District has developed an educational program for the student allowing the student an opportunity to make educational and non-educational progress in accordance with the standard of Rowley, supra; 34 CFR §300.552; and 19 T.A.C. §89.1055.
22. The School District's program was reasonably calculated to provide Student with the requisite educational benefits. Student's IEPs are designed to and did provide Student with a "meaningful" educational benefit." Michael F., 118 F. 3d 245, 248, 253 (5th Cir. 1997); Richardson Independent School Dist. v. Michael Z., 561 F.Supp.2d 589, 602 (N.D. Tex. 2007). Rowley, 458 U.S. at 192, 102 S.Ct. 3034.
23. The Student's behavioral plans provide appropriate and adequate interventions and strategies to address behaviors impacting Student's learning or the learning of others. 34 C.F.R. § 300.324(a)(2)(i).
24. Petitioner did not meet Petitioner's burden of demonstrating the District did not timely re-evaluate Student in all areas of suspected need. 34 C.F.R. § 300.303(b)(2).
25. There is no data supporting the regression/recoupment concerns necessary to support Student's eligibility for ESY under State law. See 19 T.A.C. § 89.1065 (providing ESY is only appropriate when it is reasonably expected the student will suffer severe and substantial regression on critical goals (goals established by the ARD Committee) over the summer that cannot be recouped within a reasonable time).
26. Petitioner failed to provide evidence justifying reimbursement for private evaluations.

27. Respondent's June 2016 FIE was appropriate under the IDEA and, therefore, Petitioner is not entitled to reimbursement for the cost of the independent educational evaluation secured at parental expense. 34 C.F.R. § 300.502(b) (3).
28. Petitioner's request for an award of attorneys' fees and litigation costs, including expert witness 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).

ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. The FBA/BIP developed by the School District is sufficiently appropriate such that Petitioner is not entitled to an IEE at public expense.
2. The School District's request to implement the School District/ARD Committee proposed educational program, schedule, and placement for Student for the 2018-2019 is GRANTED. The School District may remove Student from general education classes in Reading, Math and a portion of Writing as proposed, and student shall otherwise participate in a general education environment. The School District may establish an Alternate Schedule as proposed to enable instruction to continue in a special education instructional setting when certain events occur during the school day.
3. All claims arising before January 30, 2017 are DISMISSED.
4. All claims arising under any law other than the Individuals with Disabilities Education Act (IDEA) are DISMISSED as outside the jurisdiction of the hearing officer including Petitioner's requests for attorneys' fees, expert witness costs, and other litigation costs.
5. Petitioner's requests for relief are DENIED.

6. All other relief requested by either party not specifically granted in these Orders is hereby DENIED.

SIGNED on August 10, 2018.

RAY E. GREEN

Special Education Hearing Officer
For the State of Texas

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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).
