

SOAH DOCKET NO. 701-21-3251.IDEA
TEA DOCKET NO. 243-SE-0821

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

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

The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) during the relevant period. The Hearing Officer concludes the District provided Student a FAPE. Petitioner’s requested relief is therefore denied.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Student’s legal counsel, Michael P. O’Dell. The District was represented throughout this litigation by its legal counsel Amy Tucker with Rogers, Morris & Grover.

III. DUE PROCESS HEARING

The due process hearing was conducted September 29-30, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel, Michael P. O'Dell. In addition, ***, Student's parent, also attended the due process hearing.

Respondent continued to be represented by its legal counsel, Amy Tucker. In addition, ***, the Director of Special Education for the District, attended the hearing as the party representative. Both parties filed timely written closing briefs. The Decision in this case is due December 3, 2021.

IV. ISSUES

A. Petitioner's Issues

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

1. Whether the District failed to provide Student with a free, appropriate public education (FAPE) within the meaning of the IDEA, specifically: From August 16, 2020 – current.
 - a. Whether the District denied Student a FAPE by failing to fully and appropriately implement an Individual Education Plan (IEP) to meet Student's needs.
 - b. Whether the District denied Student a FAPE because Student's IEP was insufficient and failed to provide meaningful benefit.
 - c. Whether the District denied Student a FAPE by failing to conduct a Functional Behavior Assessment (FBA) as part of Student's Full Individual Evaluation (FIE).
 - d. Whether the District denied Student a FAPE by offering an inadequate Behavior Intervention Plan (BIP) to meet Student's unique needs.

- e. Whether the District denied Student a FAPE by using restraint and isolation on Student and failing to report its use.
 - f. Whether the District denied Student a FAPE by failing to implement appropriate accommodations, supports, and goals related to Student's dyslexia and autism.
 - g. Whether the District provided the Student with a FAPE in the least restrictive environment (LRE).
2. Parental Participation
- a. Whether the District failed to allow the parents to meaningfully participate in the decision-making process.

B. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations in Student's Complaint and denies responsibility for providing any requested relief. The School District raises the following additional issues:

1. STATUTE OF LIMITATIONS: Objections to all claims arising outside the one-year statute of limitations.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requested the following items of relief:

1. Determination that the District denied Student a FAPE.
2. The District to provide compensatory educational services.
3. An order that placement at *** in a self-contained behavior class is inappropriate.
4. The District to make an appropriate placement in a non-public TEA approved school for Student, and then contract for such placement for the upcoming school

year. The placement shall include all appropriate related services and transportation. Student shall be provided transportation to and from this non-public school placement and be provided speech and OT related services.

5. The District to provide a reading assessment for Student from the ***, and then pay for a reading program for dyslexia as advised by their evaluation and report.

B. Respondent’s Requested Relief

1. Dismiss all claims arising outside the statute of limitations.

VI. FINDINGS OF FACT

1. Student is ***year-old *** grader who lives with Student’s mother, ***. Student has been enrolled in the District since ***. Student’s interests outside of school include ***. Student cares about others, can be very helpful, and is eager to complete Student’s chores to earn screen time.¹
2. Student is currently eligible for special education under the categories of autism, Specific Learning Disability (SLD) in the area of math calculation, basic reading and written expression, and an Other Health Impairment (ADHD).²
3. Student was referred for a Full Individual Evaluation (FIE) when Student was in *** grade by Student’s teachers, reading interventionist, and Parent in February 2018 due to concerns regarding academic progress, refusal to complete classwork and follow directions, and difficulty regulating Student’s frustration tolerance. The FIE was completed on May ***, 2018.³
4. An initial ARD Committee convened on May ***, 2018, and found Student eligible for special education as a student with a primary disability of autism, a secondary disability of SLD in basic reading skills and written expression, and a tertiary disability of a speech impairment due to articulation and pragmatics. Student also met the District’s criteria for dyslexia. The ARD Committee developed an IEP with academic goals, a BIP, a *** group, occupational therapy, and speech therapy.⁴

¹ Joint Exhibit (JE) 13 at p. 16-17; JE 12 at p. 10; Transcript (Tr.) at p. 145.

² JE 5 at p. 1-2.

³ JE 13 at p. 2; JE 11.

⁴ JE 11 at p. 1, 7-12; JE 10 at p. 2.

5. Student has difficulty with Student's behavior in school. Student struggles with reading social situations, peers, and changes in routine/schedule. Student has ***, limited coping skills and strategies to handle difficult social and academic challenges. This will often lead Student to ***, demand excessive attention, and refuse to work. Student's behaviors are often triggered by less-preferred activities such as ***.⁵
6. Student has been receiving support from the *** (***) program since the *** grade. The *** Program is for students who struggle with social/emotional behaviors. They are in the general education setting but receive *** behavioral support throughout the day when needed from *** staff. Student received direct *** instruction, redirection, behavioral monitoring, and crisis intervention through the *** program. If Student is not able to stay in the general education setting without disrupting the learning of ***self or others, Student is allowed to go to the *** classroom for a reset through coping and *** strategies in the ***. The *** is located within the *** classroom where Student can engage in *** strategies in order to reset before returning to the general education setting.⁶
7. On December ***, 2019, a revision ARD meeting was convened to review Student's behavioral and academic progress. Schedule of services were reviewed, the ARD Committee increased Student's *** time for reading and writing from 15 minutes per day to 30 minutes per day. Student's teacher reported seeing a major improvement in Student's aggressive behaviors. Student's mother reported a little increase in Student's ***.⁷
8. Following the December ***, 2019 ARD Committee meeting, the intensity and duration of Student behaviors greatly increased to the point that Student needed *** reorientation. Student began demonstrating aggressive behaviors such as ***.⁸
9. Student's ARD Committee convened on January ***, 2020 to discuss behavioral concerns, propose new behavior goals, and conduct a Review of Existing Evaluation Data (REED). The ARD Committee recommended a new behavioral goal that targeted *** behavior and re-evaluation in all areas, including a Functional Behavioral Assessment (FBA), parent training assessment, counseling as a related service, and assistive technology.⁹
10. Due to the Covid-19 global pandemic, face-to-face instruction was terminated for the remainder of the 2019-2020 school year, and Student completed *** grade through virtual instruction.¹⁰

⁵ JE 11 at p. 29; TR at 119, 121.

⁶ JE 9 at p. 2; JE 8 at p. 6; JE 11 at p. 19; TR at 25-26.

⁷ JE 8 at p. 1-2, 6.

⁸ JE 7 at p. 1-4.

⁹ *Id.*, at p. 2,11.

¹⁰ *Id.*, at p. 1.

11. On April ***, 2020, Student’s annual ARD Committee meeting was held via the Zoom platform before Student advanced to *** grade for the 2020-2021 school year. Student continued to qualify for special education as a student with autism; SLD in basic reading skills, reading fluency, written expression; and a speech impairment in the areas of articulation and pragmatics.¹¹
12. At the April 2020 meeting, the ARD Committee considered Student’s Present Levels of Academic Achievement and Functional Performance (PLAAFPs). For academic performance, the Committee reviewed progress toward achieving goals in reading, ***, and mathematics. For ***, new goals were proposed for Student to work on ***. It was reported that Student has friends in Student’s grade and social group. The ARD Committee reviewed Student’s behaviors, particularly the increase in intensity and duration. Student often gets frustrated with work, demands given, refusals to participate, ***. In speech therapy, Student does well with peer interactions but struggles with maintaining appropriate ***.¹²
13. In April 2020, Student’s IEP had academic goals and objectives in *** and mathematics. There were three behavioral goals. The first goal targeted strategies for managing unexpected events, conflict, or interruptions in routine. Student’s second behavioral goal targeted completion of assignments without displaying refusal behaviors. The third goal targeted coping strategies to avoid ***. A mastery level of 80% was set for the first two goals, while a mastery level of five out of nine weeks was set for the third goal. Two goals each were set for *** and speech therapy. The State Assessments of Academic Readiness (STAAR) testing was waived for Student due to the Covid-19 global pandemic.¹³
14. The April 2020 ARD Committee included special education support for forty minutes per day through the *** program for *** instruction, redirection, behavioral monitoring, and crisis intervention. Student also received speech therapy for thirty minutes seven times each *****-week period and academic readiness for one hundred-fifty minutes per week in the special education setting. Inclusion support was included in the general education setting for *** and math. Additionally, Student received OT for thirty minutes six times each ***-week period in the special education setting.¹⁴

The 2020-2021 School Year

15. Student began the 2020-2021 school year with inconsistent behaviors. Student had multiple days when Student would act in compliance and then other days when Student became upset or frustrated with work demands, usually writing. Student would ***. Student’s behaviors decreased toward the end of the first semester, but Student then began showing

¹¹ JE 6 at p. 1

¹² JE 6 at p. 2-4.

¹³ JE 6 at p. 9-14, 26.

¹⁴ Tr. Vol. I, p. 92; JE 6 at p. 22-23.

- physical aggression ***. The physical aggression included: ***. Student would be sent to the *** room to reset, which would often take over an hour in September but was eventually reduced to fifteen minutes on average towards the end of the school year before Student returned to the general education class.¹⁵
16. An FIE, including an FBA, was due for completion on March ***, 2020. Due to interruptions from the Covid-19 global pandemic, the FIE was not completed until February ***, 2021.¹⁶
 17. The District’s FIE of Student featured oral language testing, occupational therapy (OT) testing, *** processing measurement, a motivation assessment scale, and social, emotional, and behavioral information gathered from Student’s parents, teachers, and observations of Student in various settings over several days by a District Licensed Specialist in School Psychology (LSSP) as part of the evaluation process.¹⁷
 18. As part of the FIE, the District conducted the Comprehensive Assessment of Spoken Language, Second Edition, which assesses Student’s ability to judge the appropriateness of language used by a person in a presented example or to supply the appropriate language for a situation. Student obtained a standard score of *** in the *** percentile, which is in the above average range of performance. The Social Language Development Test ***: Normative Update assesses language-based skills of social interpretation and interaction with friends. This test was not completed due to Student not wanting to complete the third subtest. An informal language sample was obtained through conversations about home and school with the examiner. Student’s language skills are adequate for functional communication.¹⁸
 19. On the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition (VMI), which assess the extent to which individuals can integrate their visual and motor abilities, Student received a standard score of *** which placed Student’s visual-motor skills in the “Below Average” range compared to Student’s peers.¹⁹
 20. The *** accesses children in *** through *** for a wide range of behaviors and characteristics related to *** processing, social participation, and praxis. Student received typical scores (***) for vision, hearing, balance and motion, planning and ideas, with Student’s teacher and parent reporting more elevated scores (***) in the areas of social

¹⁵ JE 5 at p. 3.

¹⁶ JE 12 at p. 2.

¹⁷ *Id.* at p. 3-10.

¹⁸ *Id.* at p. 2-3.

¹⁹ *Id.* at p. 6.

participation, touch, and body awareness. The test further indicated that there is no difference between behaviors observed at home and school.²⁰

21. The Motivation Assessment Scale II asks questions about the likelihood of a behavior problem occurring in a variety of situations. It consists of sixteen items presented in a checklist/questionnaire format. The items identify the function of behavior based on four categories: ***, escape, attention, and tangible. Student's behaviors are motivated by a desire to escape non-preferred activities, gain access to tangible reinforcers, the removal of tangible items, and escape from people/activities. Student almost always has a behavioral incident when a preferred activity is taken away or Student is told Student cannot do something Student prefers to do.²¹
22. The Behavioral Assessment System for Children, Third Edition (BASC-3), which measures behavior, ***, and emotional development, showed Student exhibits a significant level of maladjustment and a pattern of behavioral difficulties. Student's parents and teachers indicated elevated ratings indicating that Student quickly becomes irritable, has difficulty maintaining self-control when faced with adversity, and has low resiliency.²²
23. The FBA, which was based on data, interviews, behavior rating scales, and observations of Student over several days in various structured and unstructured settings at various times of day by a District LSSP. Student was observed to be fidgety, impulsive, and inattentive. The FBA identified three target behaviors: Student is frequently off task (***) across settings and instructional activities, is often verbally inappropriate, and engages in physically aggressive behaviors.²³
24. The FBA laid out the antecedent, current consequences, frequency of the behavior, and hypothesis for each particular behavior. The FBA then proposed methods for addressing the behavior. The consequences of Student's off-task behaviors are redirection, warnings, loss of instruction, incomplete assignments, and low or failing grades. The consequences for inappropriate verbal and physical contact are negative attention from peers and/or staff, removal from environment, loss of privilege, parental/office contact, or re-orientation in ***. Student continues to require a high level of teacher/staff support to maintain appropriate school wide behavioral expectations and tasks in the classroom setting.²⁴
25. Student's cognitive functioning was assessed using the Cattell-Horn-Carol (CHC) theory of cognitive abilities in seven areas, including: Comprehension Knowledge, Fluid Reasoning, Long-Term Storage and Retrieval, Visual Processing, Processing Speed, Auditory Processing, and Short-Term Memory. Student scored in the overall average range

²⁰ JE 12 at p. 8.

²¹ *Id.* at p. 10.

²² *Id.* at p.12-14.

²³ *Id.* at p. 15-16, 22; TR at 34.

²⁴ TR at p. 22, 35; JE 12 at p. 11.

for cognitive ability but scored in the very low range in auditory processing and in the low average range for short-term memory.²⁵

26. On the Kaufman Test of Educational Achievement, Third Edition (KTEA-III), which measures a broad range of academic skills, Student received scores in the average range in basic reading skills, reading fluency, and reading comprehension. These results indicate Student has the ability to read sentences and paragraphs and answer questions about what was read using a whole word approach. However, Student still demonstrates difficulty with ***. Student performed in the low average range in math calculation and math problem solving, indicating difficulty with ***. In written expression, Student scored in the very low range, indicating a significant weakness in ***.²⁶
27. The March 2020 FIE cognitive and academic assessments revealed Student continued to qualify as a student with an SLD in the areas of basic reading skills and written expression, with the condition of Dyslexia. Additionally, Student showed a significant deficit in math calculation. Student's emotional and behavioral assessments indicate that Student's behavior impacts Student's functioning and the functioning of Student's peers in the classroom setting. Student has performance deficits in the areas of visual motor integration and coordination, so Student will require OT. In the area of pragmatic/social communication, Student qualifies as a student with a speech impairment.²⁷
28. Student's ARD Committee convened on April ***, 2021 for Student's annual meeting and to consider the FIE and FBA, and design an IEP addressing identified problems with behavior, ***, math, and writing. Student continued to qualify for special education services as a student with autism, a learning disability in basic reading, written expression, math calculation, and OHI-ADHD was added as a tertiary disability in place of speech impairment. Student's reading fluency is now strong and, therefore, was removed as an area of need.²⁸
29. The ARD Committee considered Student's PLAAFPs. In the area of communication, Student mastered Student's speech goals, using appropriate volume and adjusting Student's language style. The ARD committee determined Student no longer needed direct speech services but continued Student with social instruction through other educational settings. In the area of written expression, Student mastered Student's goal of ***, but continued to struggle with ***. In the area of mathematics, Student continued to struggle with solving word problems and showing Student's work, which is a non-preferred activity. In the area of reading, Student began the school year at an instructional level *** and ended the year on an instructional level *** on the Benchmark Assessment System (BAS) with a

²⁵ JE 12 at p. 15-19.

²⁶ *Id.* at p. 20-21.

²⁷ *Id.* at p. 22.

²⁸ JE 12; JE 5 at p.2-4, 26.

fluency rate of ***, Student was reading on grade level and exceeded fluency expectations.²⁹

30. The ARD Committee developed seven annual goals for the 2021-2022 school year. In ***, Student had two goals targeting Student's ability to ***. In Mathematics, the ARD Committee developed two goals targeting Student's ability to ***.³⁰
31. The April 2021 IEP included three behavioral goals based on Student's BIP. The first goal targeted Student's self-regulating abilities when faced with an event that produces frustration or anxiety. A mastery level was set at 70%. Student's second behavioral goal targeted being on task, with a goal for remaining on task without task avoidance until the assignment is complete. A third goal targeted ***. The ARD Committee set a mastery level of 70% for three cumulative weeks in a ***-week grading period for the second and third behavioral goal. Student's advocate wanted the behavior goals pared down. The District agreed to consider amendments at a later ARD. Student's parent was in agreement with the committee decisions.³¹
32. The April 2021 ARD Committee considered Student's behavior which was interfering with Student's academic progress in the areas of writing and math. The 2021 FBA formed the basis of Student's BIP. The BIP targeted behaviors such as self-regulation, work refusal, and arguing with a teacher or authority. Each identified behavior was coupled with classroom strategies, reward systems, *** training, and a consequence/response plan. Student's parent wanted more to be done to help Student with the meltdowns that Student was having in front of peers.³²
33. The April 2021 IEP called for extensive accommodations that were carried over from Student's April 2020 IEP to assist Student academically and behaviorally. ***support were utilized to help maintain Student in the general education environment during Student's *** grade year. Additionally, Student had accommodations for STAAR and District-wide assessments.³³
34. The April 2021 ARD Committee included a schedule of services and supports to help implement Student's IEP for the remainder of Student's *** grade year: Academic Readiness for one hundred minutes per week and *** Support for thirty minutes per day in the special education setting. Student also received inclusion supports in mathematics for one hundred fifty minutes per week and *** for one hundred minutes in the general education setting. The IEP also called for OT for fifteen minutes, five times each ***, Psychological Services for twenty minutes, three times each ***, and transportation

²⁹ JE 5 at p. 2-4; JE 14 p. 2.

³⁰ *Id.* at p. 9-10.

³¹ *Id.* at p. 12-13, 27.

³² *Id.* at p. 27, 35, 61.

³³ JE 5 at p. 14-17; Tr. at 160.

services. Additionally, an autism supplement was included as part of Student's IEP that included strategies to assist in implementation of the IEP.³⁴

35. The ARD Committee proposed that Student receive instruction in a smaller, self-contained group setting with a behavior-trained teacher at the *** (***) on a different campus for the 2021-2022 school year. Student will have the opportunity to gradually earn time away from the *** with the show of consistent behaviors. The *** setting has a highly structured setting, with fewer transitions for Student where Applied Behavior Analysis (ABA) strategies will be utilized. Student's transition to the *** initially included summer services to aid in transitioning to the new campus. The District's BCBA made a recommendation to change the Student's transition plan to work directly with the teacher in the *** classroom prior to the new school year to begin developing a relationship using the pairing process. The pairing process involves giving Student lots of choices for shared control beginning with lesser demands and using that behavior momentum in the *** to work up to higher demands that can be tolerated. Student's parent toured the *** campus prior to the April 2021 ARD meeting and verbally agreed with the smaller setting.³⁵
36. Student's parent did not waive the five-day waiting period following the April 2021 ARD Committee meeting but was in agreement with all components of the ARD. Student's April 2021 IEP was amended on May ***, 2021 to add supplemental aids to STAAR assessments in mathematics. Student's parent agreed to the changes via email.³⁶
37. Following the annual ARD Committee meeting in April 2021, Student had multiple behavioral incidents, involving *** towards staff and peers. On May ***, 2021, in a total of *** separate occasions, a one-man restraint technique was used on Student to prevent Student from ***. A written notice was sent to Student's parent for each incident.³⁷
38. On May ***, 2021, Student ***. After school ended for the day, Student ***. The School District informed ***. Student was taken into the *** and Student's parent was notified.³⁸
39. On May ***, 2021, Student was in the *** classroom for reorientation. Student became upset, because Student wanted to return to the general education classroom. Student ***. Student ***. Student eventually calmed down and stated Student was ready to go to the ***, but instead Student ***. Student was eventually ***to the ***, where Student continued being physically aggressive toward staff members, ***. Student was sent home for the remainder of the day.³⁹

³⁴ *Id.* at p. 21, 33-37, 38-40.

³⁵ *Id.* at p. 30, 62-63; Tr. at 62, 90-91, 162.

³⁶ JE 16 at p. 1; JE 4 at p. 4.

³⁷ JE 15 at p. 1-7.

³⁸ JE 18 at p. 2; Petitioner's Exhibit (PE) 1.

³⁹ JE 18 at p. 2-5.

40. Student received passing grades on Student's *** grade year report card, with ***. Student did not meet grade level on the STAAR testing in ***.⁴⁰
41. On May ***, 2021, an ARD Committee meeting was held at the request of Student's parent and advocate to discuss the ARD Committee's decision at the April 2021 meeting to place Student at the ***. Student's parent was no longer in agreement with the *** as Student's placement, she felt that an out of district placement was needed to meet Student's behavioral needs. The meeting ended in disagreement regarding the *** placement and supports, the parties agreed to reconvene at a later date to discuss a tour of private schools, review of student information, and *** support information.⁴¹
42. On July ***, 2021, the School District's Executive Director of Special Education accompanied Student's parent and a family-designated advocate on a tour of three private day placement schools that were under consideration for Student. The tour consisted of the following schools: ***.⁴²
43. On July ***, 2021, the ARD Committee received a letter from Student's private psychologist who has worked with Student on individual cognitive behavior therapy since 2020. Student has responded well in therapy to structured activities, clear expectations, specific and direct verbal feedback, visual schedules, use of scripts for communicating, having fidgets available, and being provided choices when possible. The private psychologist recommended an educational setting which can provide a high degree of structure, individualized attention, small/group class sizes, and therapeutic support provided by people who are trained to work with Student's with complex needs.⁴³
44. On August ***, 2021, the ARD Committee met for a revision ARD via the Zoom teleconference platform at the request of Student's parent and advocate to discuss information they gathered from tours of private schools during the summer. Student's parent made a request that Student be placed at ***, a non-public day school for the 2021-2022 school year. The ARD Committee reiterated that the *** was the appropriate placement to meet the needs of Student.⁴⁴
45. The District shared with Student's parent and advocate some of the embedded supports provided through the *** including: flexible instructional arrangements for individualized support and small group; daily *** instruction; a classroom management system that is research-based and focuses on positive behavioral supports, implementation of the BIP; consistent data collection and record-keeping to inform next-steps; visible evidence of

⁴⁰ JE 17

⁴¹ JE 3 at p. 1-4.

⁴² JE 2 at p. 2.

⁴³ JE 2 at p. 13.

⁴⁴ Id. at p. 3.

procedures, schedules, and other positive behavior supports; and regular contact with parents to keep them involved in Student's education. The ARD meeting ended without a mutual agreement on Student's placement, however, the ARD members agreed to reconvene to get further input from doctors.⁴⁵

46. The ARD Committee reconvened on August ***, 2021, the District proposed adding the following supports based upon parental concern and input, as well as feedback provided by Student's parent from the private school tours: psychological services bi-weekly for fifteen minutes for support; BCBA consultation with staff for thirty minutes per month; consultation with Student's parents two times per month for twenty minutes for feedback, progress updates, etc.; adding instructional goals for *** based on instruction in the special education setting; and consideration of a zoom session with Student's private psychologist with Student while in class. Student's parent expressed continued disagreement with the *** recommendation for Student. The meeting ended without consensus.⁴⁶
47. Petitioner filed a due process complaint on August 16, 2021.⁴⁷

VII. DISCUSSION

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁴⁸ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

B. Duty to Provide a FAPE

⁴⁵ *Id.* at p. 5.

⁴⁶ JE 1 at p. 4-6.

⁴⁷ Petitioner's Notice of Filing

⁴⁸ 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 purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The district has a duty to provide FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

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

C. FAPE

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. Those factors are:

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

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

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). *See also, Klein Indep. Sch. Dist. v. Per Hovem*, 690 F. 3d 390, 397 (5th Cir. 2012).

1. Individualized on the Basis of Assessment and Performance

In meeting 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 more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student’s potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the school district “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 at 999 (2017).

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

The District based Student’s program on the 2020 FIE that was completed in February 2021. Student’s IEP goals were developed to address deficits in behavior, ***, mathematics, and writing. The April 2021 ARD Committee considered Student’s PLAAFPs; used them as the basis for Student’s IEP goals and objectives; and relied on assessments, progress reports, service providers, teacher input, as well as observations and parental input in developing Student’s IEP.

Student's IEP included two writing goals, two math goals, and three behavioral goals that are part of Student's BIP. The IEP incorporated suggestions of the FIE and provided the recommended accommodations and services to meet Student's individual needs, including visual and calculation aids, shortened or chunked assignments, oral instruction, no penalty for spelling errors, cool down time, frequent breaks, and following the BIP. The April 2021 ARD Committee removed reading fluency as a learning disability because Student was reading on-grade level and exceeded fluency expectations.

To address Student's increased physical aggression during the 2019-2020 school year, the District conducted an FBA in December 2020 to determine the nature, frequency, and impact of Student's behavior. The ARD Committee utilized the FBA to develop a BIP targeting self-regulation, work refusal, and arguing with a teacher or authority. The BIP contained goals for improving targeted behaviors, and positive strategies for staff to utilize, including reward systems, *** training, and a consequence/response plan. The ARD Committee recognized that Student's behaviors were interfering with Student's academic progress, specifically in writing and math, so a more restrictive placement for Student was recommended for the 2021-2022 school year. A transition plan to the new campus was included in the IEP so Student could start working directly with the *** teacher prior to school starting.

The ARD Committee appropriately considered the information provided by Student's outside providers, as well as additional information obtained after the various tours of private schools by Student's parent and the District's Special Education Director. On August ***, 2021, the ARD Committee proposed adding psychological services bi-weekly for fifteen minutes for support; BCBA consultation with staff for thirty minutes per month; consultation with Student's parents two times per month for twenty minutes for feedback, progress updates, etc.; adding instructional goals for *** based on instruction in the special education setting; and consideration of a zoom session with Student's private psychologist with Student while in class.

2. Least Restrictive Environment

The IDEA requires that a student with a disability shall 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 occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “LRE requirement.” 34 C.F.R. § 300.114(a)(2)(i-ii). State regulations require a school district’s continuum of instructional arrangements be based on students’ individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

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

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

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

The 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. *Id.* This determination requires an examination of:

- a school district’s efforts to provide the student with supplemental aids and services in the general education setting;
- a school district’s efforts to modify the general education curriculum to meet the student’s individual needs;

- the educational benefit a student is receiving while placed in the general education setting; and
- 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., 874 F. 2d at 1048.

Student is unable to be educated solely in general education classes, because of Student's behavioral challenges, need for fewer transitions, and need for a smaller student to teacher ratio where more frequent reinforcement can take place. Student is frequently off-task, noncompliant, physically aggressive, and prone to leave Student's assigned area without permission. Student requires a setting with structured activities, clear expectations, specific & direct verbal feedback, and being provided with choices when possible.

The *** is an in-District placement that is on a campus with peers without disabilities, in which Student is given the opportunity to earn time away from the *** setting with consistent behaviors. The opportunity to earn time away from the *** setting will provide access to the general education setting. Additionally, the setting has a smaller student to teacher ratio, fewer transitions, a greater flexibility in instruction, and a more proactive approach to behaviors than in the general education setting. The District's program addressed Student's identified need for high levels of structure, individualized attention in a smaller setting, and with staff trained to work with Student's behavioral needs in an educational setting. In sum, the District developed an IEP, BIP, and placement to address Student's needs in Student's LRE and provided a program reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Andrew F.*, 137 S. Ct. at 999; *Daniel R.R.*, 874 F. 2d at 1048.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch.*

Dist., 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence showed Student's services were provided in a coordinated, collaborative manner by key stakeholders. Student's parent attended all ARD Committee meetings, including via the Zoom platform when it became necessary to do so, and her concerns were addressed by the District in revisions to the proposed IEP. When Student's parent changed her mind about the *** as Student's LRE, the District held three ARD meetings to consider Student's parent and advocates concerns and new information presented from tours of several private schools. For example, when Student's parent and advocate presented a letter from Student's private psychologist with recommendations for Student in the education setting, the District added some of those as support services to Student's proposed IEP. The *** teacher, The District's BCBA, and Student's parent were in frequent communication regarding Student's behavior during the 2020-2021 school year, which was part of Student's BIP response plan. The District also notified Student's parent each time that Student had to be ***.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012).

The evidence showed Student received academic and non-academic benefit. Student was able to successfully complete Student's *** grade year with all *** with Student's accommodations, despite escalating behaviors during the Spring semester. Although Student did not meet grade level on the STAAR test for ***, it doesn't negate the overall academic progress made by Student during

the 2020-2021 school year. Student began the *** grade reading at instructional level *** and by the end of the year Student was reading at an instructional level *** with a fluency rate of ***. Student was reading on-grade level and exceeded fluency expectations. Student also mastered Student's writing goals but did not meet Student's mathematics goal of showing Student's work, which is a non-preferred activity for Student.

Student received non-academic benefits as well. Student mastered all of Student's speech therapy goals. Student made so much progress in speech therapy, the need for continued service was proposed to be eliminated during the 2021-2022 school year. Student also participated in a daily *** class where Student has friends. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit).

5. Conclusion

The basic floor of opportunity standard set forth in *Rowley* does not require a district to remediate a student's disability. When the four requirements set forth in *Cypress-Fairbanks v. Michael F.*, are met, a District satisfies its FAPE obligation. The weight of the credible evidence shows Student's program was individualized on the basis of assessment and performance, was delivered in the least restrictive environment, services were provided in a coordinated, collaborative manner by the key stakeholders, and Student made academic and non-academic progress. When Student's program is considered as a whole, Student was provided a FAPE by the District. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

D. IEP Implementation

Petitioner argues that the District failed to implement Student's IEP. When determining whether a school district failed to adequately implement a student's IEP, a hearing officer must determine whether a FAPE was denied by considering under the third Michael F. Factor whether there was a significant or substantial failure to implement the IEP and whether, under the fourth Michael F. factor, there have been demonstrable academic and nonacademic benefits from the IEP.

Spring Branch Independent School District v. O.W. by Hannah W., 961 F.3d 781, 796 (5th Cir. 2020). To prevail on Student's claim under IDEA, Petitioner must show more than a *de minimis* failure to implement all elements of Student's IEP, and, instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

Petitioner did not present sufficient evidence that the District failed to implement Student's IEP during the relevant time period. Student therefore did not meet Student's burden on this claim.

E. Private Placement Test

1. Two-part Test

Student must meet a two-part test in order to secure placement at *** at school district expense. First, Student must prove the school district's proposed program was not appropriate under the IDEA. Second, Student must prove placement at *** is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

2. Test Applied to the Facts

The District's program was appropriate, and Student received a FAPE; therefore, the Hearing Officer need not address whether placement at *** is appropriate.

Petitioner failed to meet Student's burden in proving the School District's program was not appropriate under the IDEA. Therefore, the Hearing Officer will not address private placement at District expense.

VIII. CONCLUSIONS OF LAW

1. Student was provided a FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Endrew F.*, 137 S. Ct. 988.
2. All of Petitioner's claims arising under any laws other than IDEA 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).
3. Petitioner is not entitled to private placement at School District expense. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cty. v. Carter*, 510 U.S. 7 (1993).

IX. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**.
2. Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are **DISMISSED** as outside the jurisdiction of the hearing officer.
3. Petitioner's request for attorneys' fees and litigation costs are **DISMISSED** as outside the jurisdiction of the hearing officer

All other relief not specifically stated herein is **DENIED**.

SIGNED December 3, 2021.



Yvonne Patton
Special Education Hearing Officer
For the State of Texas

X. 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).