

DOCKET NO. 380-SE-0719

STUDENT b/n/f PARENT & PARENT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	
	§	HEARING OFFICER FOR
	§	
SCHERTZ-CIBOLO-UNIVERSAL CITY	§	
INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioners, Student b/n/f Parent & Parent (collectively, Petitioner) bring this action against Respondent, Schertz-Cibolo-Universal City Independent School District (herein after Respondent or District) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. §1402 et.seq. (hereinafter IDEA) and its implementing state and federal regulations.

There are two primary issues in this case. First, whether the District provided the Student with a free, appropriate public education (hereinafter FAPE), and specifically, whether the program and placement proposed for the Student for the past as well as current school year is reasonably calculated to provide the Student with the requisite educational and non-educational benefit, or whether, the Student requires a private placement in order to receive educational benefit. And second, if a private placement is warranted, then whether the proposed placement is appropriate.

The hearing officer finds that the District was, and is able, to provide the Student FAPE and therefore consideration of the appropriateness of the unilateral placements is not addressed, and Petitioner is not entitled to reimbursement for the placements.

II. Procedural History

Petitioner filed a request for an impartial due process hearing (Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). As noted, the Respondent is the Schertz-Cibolo-Universal City Independent School District. The Complaint was received by the Texas Education Agency (TEA or Agency) on the 30th day of July, 2019, and Order No. 1, an Initial Scheduling Order was issued August 1, 2019 by then Hearing Officer, Lucius Bunton. The Order set forth the dates for the Pre-Hearing Conference (PHC), Disclosures, and the Due Process Hearing and Decision Due Date.

Thereafter, In February of 2020, after Leave to File was granted, Petitioner filed a First Amended Request for Due Process Hearing, and the District filed its Response on February 17, 2020. Since the time of the original filing of the Complaint, a number of agreed scheduling changes were made, as set forth below. On May 15, 2020, Counsel for Petitioner Ms. Krishnan withdrew, and on May 26, 2020, Petitioner filed a Notice of Appearance of Counsel and the Parents' Opposed Motion to Alter the Setting of the Hearing.

On June 11, 2020, this matter was reassigned to the undersigned hearing officer. After reassignment, the parties provided suggested dates for the four-day hearing, and the Revised Scheduling Order was issued on June 20, 2020. Thereafter, numerous continuances were granted, as well as Motions and Orders relating to the issuance of Subpoenas Duces Tecum and Protective Orders, as set forth below. After consolidation, as noted, the final hearing was then set for December, 2020.

A. Representatives

Petitioner was originally represented by Meera Krishnan and Elizabeth Angelone of the Cuddy Law Firm. Upon Ms. Krishnan's withdrawal, Mr. Devin Fletcher appeared for Petitioner, along with Ms. Angelone. The Respondent District was represented by Cynthia Buechler of Buechler and Associates.

B. Resolution and Mediation

The parties apparently did participate in a resolution session on March 4, 2020, as well as during the timeline for the subsequent Complaint that was filed October 22, 2020, which, as set forth below, was consolidated with this matter. Further, the parties participated in mediation in an attempt to settle the matter, but were unable to do so.

C. Continuances

There were several continuances granted in this matter of both the Pre-Hearing Conferences (PHC)s, and the Due Process Hearing (DPH) dates. With regard to the date

for the due process hearing, the first was set for October 1, 2019. An Order issued on October 2019 set the hearing for mid-February, 2020. Upon the filing of the Amended Complaint, the Revised Scheduling Order set the hearing for April, 2020. In March, the hearing was rescheduled to accommodate the parties participating in mediation, and was reset to the end of June, 2020. As noted, the case was reassigned to this hearing officer on June 11, 2020. The parties then submitted additional dates for a four-day hearing, and the Revised Scheduling Order was issued on June 20, 2020. The Order set the next PHC for September 4, 2020, with the Due Process Hearing (DPH) set for September 29-October 2, 2020.

During the next PHC, the parties noted that some discovery issues remained outstanding, and together requested a continuance of less than a month. Order No. 15, issued September 11, 2020 then set the DPH, with the agreement of the parties, for October 26-29, 2020. On October 22, 2020, Petitioner filed a new Complaint, and eventually, the parties agreed to a consolidation of the cases, and requested a continuance of the due process hearing. In the Order of Consolidation and for Continuance, issued October 26, 2020, the final continuance was granted, setting the Due Process Hearing for December 2, 3, 4, 14 & 17, 2020.

D. Preliminary Motions - Discovery

A first set of Subpoenas Duces Tecum were submitted to the hearing officer, and Qualified Protective Orders were issued in February 2020. Thereafter, another set of Subpoenas Duces Tecum were submitted on July 8, 2020, and on July 17, 2020 Petitioner filed a Motion in Opposition. Order No. 12, issued August 17, 2020 ordered Respondent to revise the Subpoenas to narrow the requests, and upon parties' subsequent agreement a qualified Protective Order, Order No. 13 was issued on September 8, 2020.

E. Consolidation of Cases

On October 22, 2020, Petitioner filed a new Complaint, based, at least in part, upon the most recent documents of the District that were submitted as evidence in the matter. Upon the receipt, Respondent filed its Motion to Dismiss, or, in the Alternative, Motion to Consolidate Due Process Hearing Requests. Respondent also requested an Emergency PHC for the same day, to discuss matters, in light of the Due Process Hearing set for the following Monday. Petitioner then filed a Response to Respondent's Motion, and agreed to the PHC. During the PHC, the parties were able to reach agreement on the issue of consolidation, as well as new hearing dates, and Order on Consolidation and for Continuance, consolidating the cases under this cause number, and setting the DPH for December 2020 was then issued on October 26, 2020.

F. Due Process Hearing

The due process hearing was conducted on December 2, 3, & 4, 2020; and on the 14th and 17th of December, 2020 on the Zoom platform. The Petitioner continued to be represented by Elizabeth Angelone of the Cuddy Law Firm. In addition, the Student's parents, Mr. *** and Dr. *** attended the hearing. The Respondent continued to be represented by its legal counsel, Cynthia Buechler, and ***, Director of Special Education for the District, attended the hearing as the District representative.

G. Further Continuances

At the close of the hearing, the parties agreed to a scheduling order for the submission of the post-hearing briefs, and the decision due date. Due to unforeseen circumstances, Petitioner then filed, and Respondent agreed with two additional continuances for the filing of the Briefs, as well as corresponding extensions of the Decision Due Date. The decision is due April 12, 2021.

III. Issues

A. Petitioner's Issues

Petitioner alleges that the District has denied Student a free, appropriate public education (FAPE), and remains unable to provide a FAPE. Petitioner's numerous allegations broadly fall into several primary categories:

The first primary issue is whether the District failed to provide the Student a FAPE, and whether the District remains unable to do so. As components of the denial of FAPE claim, Petitioner includes whether procedural rights were denied, and as such denied parental participation.

The second issue is whether the Individual Education Plans (IEP) as well as the Behavior Intervention Plans (BIP) crafted by the Student's Admission, Dismissal and Review (ARD) Committee, and in place for the 2019-2020 and 2020-2021 school years failed to provide a FAPE. Petitioner contends that the IEP was not reasonable calculated for the Student to make academic and non-academic progress in light of Student's particular circumstances, and further the IEP failed to provide appropriate supports and services for the Student to make academic and non-academic progress. As a result, Petitioner claims that as the District is unable to provide a FAPE, that residential placement is appropriate and necessary.

B. Petitioner's Requested Relief

The Petitioner's primary requested relief is that of reimbursement from the District for the parents' prior unilateral placement at *****, and then subsequent unilateral residential placement at *****. It appears that Petitioner also requests the placement of Student at ***** in ***, Texas at District or public expense, along with the reimbursement of prior and future expenses, such as travel expenses, associated with such placements.

C. Respondent's Issues and Legal Position

Respondent District generally denies all allegations, and contends that all services, including not limited to the Student's IEPs, and BIPs, and related services were, and are, appropriate and reasonably calculated to provide Student a FAPE. Respondent District also contends that the parents were afforded all opportunities to participate and that there has been no denial of FAPE.

D. Statue of Limitations

The parties were clear that at issue in this due process proceeding were the school years, 2019-2020 and 2020-2021. While some of the testimony and exhibits related to the students attendance, education and services prior to that time, they were provided, and the parties agreed are discussed, only in the context of background and basis for understanding the events preceding this matter.

IV. Findings of Fact*

1. Student is *** year-old *** grader, whose permanent residence with Student's parents is within the jurisdictional boundaries of the Schertz-Cibolo-Universal City Independent School District (District).¹

* References to the Due Process Hearing Record throughout this section are as follows: Citations to Petitioner's Exhibits and Respondent's Exhibits are designated with a notation of "P" or "R" respectively, followed by the exhibit number or letter and page number. Citations to Joint Exhibits are designated with a notation of "J", and followed by the exhibit number and page number. Citations to the transcript are designated with a notation of "T" followed by the page number.

¹ T. 32; P.

2. Student is currently residing in ***, in accordance with the unilateral placement by the parents at ***, where Student has been since November 2020. The residential arrival was on November ***, 2020,² and Student was to begin educational classes there on December ***, 2020.³
3. Student qualifies for special education services under the eligibility categories of Autism, Intellectual Disability, Other Health Impairment (OHI), and Speech Impairment.⁴ Student been medically diagnosed with a number of conditions including ***, Attention Deficit Hyperactivity Disorder (ADHD), ***and ***.⁵
4. Student attended school in the District at various times beginning in 2009, and prior to Student's enrollment, the District conducted a Full Individual Evaluation (FIE) of the Student in December 2008.⁶ During the several years, the District continued to evaluate the Student, and provide special education services.⁷
5. During the 2014-2015 school year, Student was having greater difficulty with behavior at school, and Student's parents often had to pick Student up early from school.⁸ On April ***, 2015, the ARD committee, placed Student on Homebound for at least *** hours per week of instruction, as with the Student's physician provided the medical basis, including increased ***.⁹ Student was also received related services of speech and occupational therapy.¹⁰
6. For Student's *** grade year, 2015-2016, Student remained in Homebound during the fall semester, and returned to in-person classes in January 2016. At that time, Student attended school, with Dr. ***'s recommendation of *** hours per day. Student was placed in the *** (***) classroom and also received related services.¹¹
7. At the parents' request, Student repeated the *** grade, for the 2016-2017 school year, and attended until December when the parents withdrew Student from the District as they were leaving the state.¹²

² T.1011

³ T. 904

⁴ J. 5:1.

⁵ P.3; R.6.

⁶ P.39

⁷ P.8; P.9; P.12; P.13; P.16; T.509-511.

⁸ T. 48-49.

⁹ J. P.15:2; P.10

¹⁰ P.15:3.

¹¹ P.16:51

¹² T.52

8. The District held an annual ARD on December ***, 2016 and at that time, the record demonstrated that Student's Present Levels of Academic Achievement and Functional Performance (PLAAFS) included being able to read at the *** grade level, and ***. Further, Student was able to ***.¹³
9. In December 2016, Student left the District and, with Student's family, ***. During Student's time there, Student did not attend school or have any formal education.¹⁴
10. The Student was to return to school at the beginning of the 2017-2018 school year. Dr. *** provided a letter, dated June ***, 2017 recommending that Student attend school *** hours a day, due to ***. Student reenrolled in the District in August, 2017, and began attending school on an abbreviated school day, pursuant to Dr. ***' letter.¹⁵ During this time, Student was having increased difficulties with *** and behavior and qualified for Homebound services as well with a letter from Dr. ***.¹⁶ A reevaluation was held on October ***, 2017, and the IEP noted the Homebound placement.¹⁷
11. During the Homebound placement, Student received services of *** hours of instruction per week, sometimes less, and it was noted that some difficulties arose with Student's behavior.¹⁸
12. Parents then withdrew the Student from the District on October ***, 2017,¹⁹ and unilaterally, with notice to the District, enrolled student in *****, located in ***, Texas beginning in October, 2017. Student attended ***** regularly from October 2017 until October 2019, when Student was pulled out due to severe behavior episodes.²⁰
13. On April ***, 2018, a settlement between Petitioner and the District was reached, by which the District reimbursed parents for Student's placement at ***** from November ***, 2017 until June ***, 2019.²¹

¹³ J.2,3-4; T. 1193-1194.

¹⁴ T. 53-54.

¹⁵ J.2:42; R. 15:4; T.59.

¹⁶ P. 21; T. 54,58.

¹⁷ P. 30.

¹⁸ T. 59.

¹⁹ J.3:2; T.473.

²⁰ R.6:12; T.616.

²¹ J. 1; T. 983-985.

14. During Student's time at ***, Student received educational and other services, including Speech and Occupational Therapy (OT) from ***.²² Services were eventually discontinued due to behavior issues.²³
15. During Student's time at *** beginning in October, 2017, it was noted that February 2018 was Student's first good month,²⁴ and in August 2018 Student's behavior escalated. At times, Student had to be restrained while attending ***.²⁵
16. On April ***, 2019, Student's parents requested that the District continue to provide reimbursement for the Student's attendance at *** for the next school year. Parents also requested the Student attend Extended School Year (ESY) at *** at the District's expense. The District responded with a request for consent to conduct an evaluation, as well as a request for the Student's records at ***.²⁶
17. The District convened an Admission, Review and Dismissal (hereinafter ARD) committee meeting, to discuss ESY services. Parents again requested both ESY and the next academic year placement at *** at District expense. Because the District had just received information from ***, the ARD was adjourned for a time to review data and propose an IEP.²⁷
18. The District continued to request information from ***, in order to assess Student's current academic performance as well as behavior.²⁸
19. The District had also invited Ms. ***, the Executive Director of ***, to attend the ARD committee meeting. She participated in the May ***, 2019 ARD, and at that time had provided a document, consisting of a one-page summary of the Student's current abilities, as noted earlier, along with some work product.²⁹ She also testified that she had agreed to help with the Student's transition back to the District.³⁰
20. With regard to Student's academics, in May 2019 student was able to ***. Student was also able to ***.³¹ Student continued to have behavioral difficulties,

²² P.39:72-309.

²³ T. 615-616.

²⁴ R.14; T. 103.

²⁵ R.6:6; R.7:3.T.109-110.

²⁶ P.36; R.14; T.153

²⁷ J.4.

²⁸ R.5:2

²⁹ R.7.

³⁰ J.4; T. 617.

³¹ P.39:252 R.7:3; T.108-109.

and Student's OT and services were eventually discontinued at *** due to behaviors, specifically on March ***, 2019.³²

21. At the ARD reconvene, held May ***, 2019, it was determined by the ARD committee (with the parent in disagreement) that the District would provide ESY services for the Student. The parent again requested placement at *** at the District's expense.³³ Another ARD was held on June ***, 2019, and the Student's father, Mr. ***, participated by telephone. It appears that this meeting was focused more on the placement and the IEP for the 2019-2020 school year. The placement was the *** (***) classroom, which was determined by the committee to be the most appropriate for the Student at that time. Parent disagreed with the placement.³⁴
22. Parent did not enroll Student in the District's ESY program that had been set out, and Student *** during the summer of 2019.³⁵ Student also continued to attend ***. As behaviors continued to escalate, the parent communicated with the physician that the Student was not going to return to ***, and requested other options.³⁶
23. The District then began to conduct a Full Individual Evaluation (FIE) (or sometimes referred to as a REED or re-evaluation) in May 2019.³⁷ As part of the process, staff went to *** in order to observe and complete an evaluation of the Student. During the observation, the Student had a 'meltdown' .***³⁸ On another occasion, the District's second attempt to observe the Student, difficulties arose again ***.³⁹ Despite several requests for more time and to observe the student in the classroom, the District staff were not permitted to do so.⁴⁰
24. The IEP (including the BIP) for the Student for the 2019-2020 school year was a placement within the District, and specifically the (***) classroom.⁴¹
25. At one point, in October of 2019, Student had left ***, and the Student's father, Mr. *** contacted the District on a Friday afternoon, and had planned to bring

³² T.153; R. ??

³³ J. 4: 29.

³⁴ R. 39.

³⁵ T.111.

³⁶ R. 6.

³⁷ R.5:1.

³⁸ T.618, 1045, 1126-1128, 1159.

³⁹ T. 1135.

⁴⁰ T.1136.

⁴¹ J. 4.

Student to school the following Monday. The District planned for the transition. However, Student did not attend, and was *** for severe aggressive behaviors.⁴²

26. In September and October, 2019, Student was *** as a result of behavior on three occasions, *****.⁴³
27. During Student's time at ***, Dr. *** was consulted, and assisted the parents in locating a residential placement. At parents request, on October ***, 2019, Dr. *** sent a letter to the parents' insurer stating that due to Student's behaviors, the Student needed full-time or 40 hours a week of Applied Behavioral Analysis (ABA) therapy or alternatively a residential placement.⁴⁴ Dr. *** also testified that the activity in the home is a basis for the recommendation of residential placement.⁴⁵
28. Parents were able to find a placement for the Student at ***** (*****). Initially, there was no availability, but parents then learned that space had become available.⁴⁶
29. Parents took Student to ***** located in ***, and Student was ***. An initial evaluation was completed, and while residing at *****, Student's treatment was overseen by Dr. ***, a psychiatrist. ***** records, and other testimony indicate that it was considered ***.⁴⁷ The Student remained at *** until Student's ***.
30. During Student's time at ***, the Student received educational services from ***, an apparent affiliate of ***, as well as additional services including OT, Speech, Counseling and Recreational Therapy from staff members. Most services were provided in a group setting.⁴⁸
31. Records show that Student did not attend educational classes consistently. Report cards were from ***, rather than ***, as is also the case with the records of attendance.⁴⁹
32. Additionally, records demonstrate that the Student's participation in the related services was relatively minimal. For example, with regard to occupational therapy services, the records show that Student attended group services initially, and in

⁴² T. 260-261, 301.

⁴³ T. 978.

⁴⁴ R.6:18; T.350.

⁴⁵ T.370.

⁴⁶ T. 978.

⁴⁷ P.55; R.12; T.330.

⁴⁸ P.52, 55.

⁴⁹ P.52,55.

- the last few months Student rarely attended.⁵⁰ Evidence also shows that the Student attended the speech therapy sessions about one third of the time. It was noted that often Student refused to attend.⁵¹
33. During Student's time at ***, the Student's parents visited periodically, and the Covid pandemic made visiting more difficult. Telephone visits with the Student occurred often, and when they were able, the parents *** and had successful visits with Student.⁵² Student's father was able to visit more often.⁵³
34. Testimony noted that the Student made friends while at ***.⁵⁴ Records, however, also indicate that Student also had altercations with other students. Some were initiated by student while at other times, Student was attacked.⁵⁵ On a few occasions, *** was necessary as a result, and was ***.⁵⁶
35. The District was never provided a BIP for the Student from ***, even though it was requested. Mr. ***, the *** BCBA, testified that Student did not have one in place until April 2020, more than six months after the Student was placed at ***. He also noted that it takes time to design a BIP, weeks, and even months as it is important to gather data, and moreover it is always subject to modification and revision as more information and data become available.⁵⁷
36. Mr. *** also testified that he had no set schedule with the Student, but would see Student on the unit or he was called in the event of an emergency. He noted that he generally saw the student several times a week.⁵⁸
37. Testimony established that the Student, while at ***, received counseling services, and had weekly sessions, including the family. Student was also provided private individual counseling for ninety minutes a week. The therapist also worked with the Student in anticipation of family visits. However, while records of the group counseling sessions were provided, no records relating to the individual counseling sessions were produced.⁵⁹

⁵⁰ R.12.

⁵¹ P.52.

⁵² T. 782, 946-947.

⁵³ T.1005-1010.

⁵⁴ T.72, 945-949.

⁵⁵ T. 137-138, 755,767.

⁵⁶ P.33:92; P.52:42

⁵⁷ T.868.

⁵⁸ T.817.

⁵⁹ T. 725-726, 791.

38. At the May 2019 ARD, which was continued in May and then again in June, the Committee discussed the Student's summer services and placement, and Student's parents were afforded an opportunity for input as to the ESY services as well as the proposed IEP for the 2019-2020 school year. The parents declined the districts recommendations as well as the parent and in-home services offered by the District.⁶⁰
39. While Ms. *** came to the May ***, 2019 ARD, she only provided limited information and the District requested additional information, and while additional information was promised, the District never received any further information from ***.⁶¹
40. The ARD committee made a recommendation of ESY at the District, with a specially designed program for transition between *** and the District. A number of accommodations were made and the District offered to work with Student's prior placement. The ARD committee recommended ESY at *** days a week, at *** hours per day for *** weeks. The Student would be in a self-contained classroom and work with *** in the transition, with the District compensating the *** staff for the assistance. At this June 2019 ARD, goals were reviewed as well as services, accommodations, and the Student's BIP. It was also noted that revisions are likely once the evaluation is done.⁶² Requests from the District for consent to talk with the Student's *** were declined by the parent.⁶³
41. For the 2019-2020 school year, the Student's IEP provided for placement in the *** (***) classroom for the core classes, with two classes to take place in the general education curriculum with one-to-one support for the Student. It also included one to one support for all transitions and skill acquisition, and one to three support for other classes.⁶⁴ Also in the 2019-2020 IEP, the following services were included: structured teaching, de-escalation strategies, and ABA principles and strategies.
42. The District initiated a FIE or REED for the Student in May, 2019, and the District staff made attempts to observe the Student at *** for the evaluation.⁶⁵ Although they requested, District staff were not permitted to observe the Student in a classroom setting.⁶⁶

⁶⁰ J.4

⁶¹ T. 1118-1119.

⁶² J.4:29-33

⁶³ R.1.

⁶⁴ J.4: 24,31,42,43.

⁶⁵ R. 3; T. 208.

⁶⁶ T.238.

43. In addition to observing the Student at ***, and attempts to gather information from the facility, the District also made several attempts to conduct an evaluation in the areas of speech, Occupational Therapy (OT), and Physical Therapy (PT). The first attempt was fairly successful and the speech evaluation was completed. Issues arose, however with some other attempts.⁶⁷
44. Further efforts to complete the evaluation were met with some difficulty, although differences were apparent in the evidence concerning the degree to which the Student's behaviors may have impeded or interfered with the evaluation.⁶⁸
45. The reevaluation of the Student by the District's eight-member multidisciplinary team was completed on November ***, 2019, and an ARD was convened on November ***, 2019 to review the newly obtained information and determine if any modifications were to be recommended for the Student's IEP. Parents were notified of the results of the re-evaluation in advance of the meeting.⁶⁹
46. The November ***, 2019 ARD meeting was held, and Student's father attended by telephone. At that time, he notified the District of the *** placement. During the meeting, the District made the recommendation of adding Intellectual Disability (ID) as an eligibility, and the father objected. Later it was added. At that time, the District also requested consent to observe the Student at ***, and the parents consented.
47. At the November 2019 ARD, recommendations were made for placement in the District, as noted.⁷⁰ Additional recommendations were made to be added to the IEP as follows; direct OT for ***; indirect OT for ***; speech was offered for ***; indirect speech; and the Student did not qualify for physical therapy.
48. Parent and in-home training is an important component of a student's program, as it assures that those dealing with a student's behavior in a variety of settings is consistent across those different settings, resulting in some generalization for the student and improvement in behavior.⁷¹ Testimony also established that in-home parent training was always offered by the District to the Student's parents, and always declined.⁷²

⁶⁷ T. 1120.

⁶⁸ R.3: 24-25; T. 964-971

⁶⁹ J. 5:29; T. 246.

⁷⁰ J.5:29.

⁷¹ T. 1156-1157, 1441-1442.

⁷² T.1295, 1311-1312.

49. At the November meeting, the Functional Behavior Assessment (FBA) was also discussed. It was based on the short observation at ***, along with staff and parental input. Due to the limited information, it was noted that it would be updated once the Student is attending classes in the District. Parent in-home training was offered to the parents.⁷³
50. On January ***, 2020, two of the District's staff members, Ms. ***, the Director of Special Education, and Ms. ***, the Autism Specialist for the District, traveled to *** to observe the Student at ***, and gather additional, and more current, information. They had requested two days to observe the student and meet with Student's providers. ***, however, permitted only one hour of observation and they were escorted around the facility. The observation consisted of watching a *** activity. Further, a conference with providers occurred in a group setting and lasted only thirty minutes. They were also told that academics were not the focus of the facility, even though the District staff specifically requested to observe the Student in the educational setting.⁷⁴
51. The District then scheduled the March ***, 2020 ARD to update the information based upon the visit, observation and meeting at ***. The Student's father participated by telephone. Some recommendations were made for the Student. In particular, since the Student would be transitioning to the District from a residential *** facility, the necessary staff and supports were increased. Parents were also informed of *** where some additional resources might be available.⁷⁵
52. A September 2020 ARD was scheduled, as it was to be the annual ARD. Parents were invited and were notified of the meeting. Mr. *** however, requested postponement, with the stated reason being that he wanted to wait until the hearing was complete.⁷⁶ While the request was noted to be for a month, the hearing did not occur until December, 2020. The District proceeded with the annual ARD committee meeting as the annual ARD was due.
53. Contents of the IEP were based upon the current data that the District was able to obtain. While many of the PLAAFPs and goals remained unchanged, this was due to the fact that there was no change in the information or data that the District had available.⁷⁷ However, specific goals and objectives were set out. Further. Student would have several opportunities for interaction with non-disabled peers.⁷⁸ The placement in the *** classroom noted that Mrs. ***, an

⁷³ J.5:30.

⁷⁴ T. 442,447-449, 1136.

⁷⁵ R.1:29; T. 1310-1311.

⁷⁶ P. 54.

⁷⁷ T.1229.

⁷⁸ T. 1250;

experienced teacher, would be the teacher. Also it was noted that the BIP was to be an interim plan, due to the limited data available to the District, and the initial staffing increase.⁷⁹

54. Testimony noted the appropriateness of the BIP, as based upon the available information that the District was able to obtain. It was also noted that teachers, staff, including even cafeteria workers and bus drivers are all responsible for the implementation of the BIP.⁸⁰ Further when some concerns were expressed, it was also noted that the guidelines and classroom strategies look good, and that what is needed is to 'know who the student is'.⁸¹

55. Several District teachers and staff testified that they have had significant experience dealing with behaviors such as those exhibited by the Student, including ***. As a result, they are able to address the Student's behaviors. They have also received a variety of training to assist in dealing with behaviors. They also stressed that they remain confident of the ability to provide the Student education and related services in the school District.⁸²

56. Teachers also testified as to the *** classroom and the specific configuration for Student as Student will be making a transition and so the District would be sure to have sufficient supports in place. Details also include ***.⁸³ The class also includes ***⁸⁴ and programs where general education students come into the *** classroom.⁸⁵

57. For many of the ARDs prior to those in question in this matter, as well as the ones at issue here, the Student's father participated by telephone in all but the September 2020 ARD. Student's mother did participate in one ARD in-person, but was rarely present otherwise.⁸⁶

58. Credible testimony established that the goals as set forth in the IEP, and based upon the PLAAFPs, to the extent the District could obtain information, are appropriate for this Student. Further that the BIP is based upon the current levels of the Student as far as the District has information. The services are also based

⁷⁹ T. 1173-1174, 1353-1354.

⁸⁰ T.1074-1075.

⁸¹ T. 851, 862.

⁸² T. 1114-1115, 1129, 1149, 1180, 1190, 1201, 1208, 1211-1212, 1276, 1281.

⁸³ T. 1144.

⁸⁴ T.1249.

⁸⁵ T. 1250

⁸⁶ T.941.

upon the District information and the District's own evaluation, to the extent it was complete. The IEP also addresses the student's regression.⁸⁷

59. Currently the IEPs have a BIP in place, although it is noted, as many testified to, the plan is a living document and is always subject to modification as a result of a student's behavior. It is anticipated by the District that it will be modified once the Student is enrolled and attending school in the District.⁸⁸

60. At the time of the due process hearing, student was unilaterally placed by Student's parents at ***, a residential placement in *** Texas.⁸⁹

V. Discussion

There are two primary issues to be addressed in this matter. The first is whether the school district was able to provide the student with a free, appropriate public education for the time at issue in this case, being the 2019-2020 and 2020-2021 school years. The second is whether the Student should have been placed, and should be placed, in a residential setting for educational and non-educational reasons at the District's or public expense.

A. Burden of Proof

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. Tood L.*, 999 F.2d 127, 131 (5th Cir. 1993). No distinction has been established 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).

In terms of then applying this approach, the Fifth Circuit went on to note that a presumption exists "in favor of a school systems education plan, placing the burden of proof on the party challenging it". *White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5th Cir. 2003). As a result, the burden of proof is clearly placed on the student to prove that the IEP at issue was not reasonably calculated to enable the student to make an educational progress given the student's unique, individual circumstances.

⁸⁷ T.508,511,534.

⁸⁸ R.2

⁸⁹ T. 37.

B. Duty to Provide FAPE

The primary purpose of the IDEA is to ensure that all children with disabilities have available a free, appropriate public education (FAPE) that emphasizes special education as well as related services, and that the services are designed to meet the unique needs of that student. Under the IDEA, school districts have a duty to provide a FAPE to all children with disabilities residing in the jurisdictional boundaries of the district between the ages of three and twenty-one. 34 C.F.R. §300.101(a).

More specifically, a free, appropriate public education is special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order that students receive an educational benefit. The instruction and services must be provided at public expense and comply with the child's IEP. 20 USC 1401(9); *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, (1982).

In order to meet its substantive obligation under the IDEA, the school district must offer an individualized education plan (IEP) that is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. The adequacy or sufficiency of a given IEP turns on the unique circumstances of the student for whom it was created. *Andrew F v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).

The Fifth Circuit has developed the elements or benchmark for the determination of FAPE. These four factors must be assessed in order to determine whether the IEP in issue and as developed and implemented was reasonably calculated to provide a student with necessary educational benefit under the IDEA. These factors are as follows:

- 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 (LRE);
- Whether the services are provided in a coordinated and collaborative manner by key stakeholders; and
- Whether positive academic and nonacademic benefits are demonstrated as a result.

Cyprus – Fairbanks IND. Sch. Dist. v. Michael F., 118 F3d 245,253 (5th Cir. 1997). There is no requirement that these four factors are considered in any particular order or as to the weight given each in any way. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293 (5th Cir. 2009).

Petitioner also raised issues regarding the failure to provide FAPE as a result of procedural violations of the IDEA. Law holds that if procedural violations rise to the level of denying parents the opportunity or ability to participate in the child's education, then it could be considered a denial of FAPE. *Rowley*.

C. Private Placement

A student is entitled to reimbursement for a unilateral private placement or to be placed in a private placement in those instances where it is demonstrated that the school district's program does not provide the student with FAPE. Where tuition reimbursement is sought after a parent's unilateral placement, case law provides that at least three factors are to be considered, in what is often referred to as the three prongs of the Burlington-Carter test. See *Sch. Comm. of Burlington v. Mass. Dept. of Educ.*, 471 U.S. 359 (1985); *Florence Cnty Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). These factors are as follows: whether the district provided a student a FAPE; if the district failed to provide FAPE, then whether the private placement chosen by the parent is appropriate; and, finally a consideration of the equities in requiring a school district to pay for a unilateral placement for the student. *Id.* The private placement must meet a student's individualized needs and therefore be deemed appropriate. *Id.* at.13,15.

Alternatively, if a student's IEP in the local public school district is determined to be appropriate, then there is no need to inquire further as to the appropriateness of any other program or placement.

VI. Analysis

In this case, the first issue is whether the school district's program provided the Student FAPE, and If not, the second issue turns on whether the Student's prior placements at *** and *** for which reimbursement is sought are appropriate; and further if the current placement at *** is an appropriate placement. The issue of the provision of substantive FAPE is considered first.

A. The IEPs

The first consideration then is whether the District was able to provide the Student a FAPE. Controlling in this matter is the four-prong analysis set forth by the Fifth Circuit, often referred to as the *Michael F.* test. *Cyprus-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118

F.3d 245 (5th Cir. 1997). In examining whether the IEPs in question provide a program that provides the Student FAPE, the components should be reviewed.

in conducting the *Michael F.* analysis, it is clear that the IEPs and BIPs developed by the District for school years 2019-2020 and 2020-2021 along with any amendments, were reasonably calculated to provide Student a meaningful, educational benefit under the IDEA. As noted, there are four discreet issues in determining whether the school district's program meets the requirements for FAPE.

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

The Student had not been enrolled in the District since October of 2017, and therefore its own data was limited. The District, did on numerous occasions attempt to obtain information and data from the two placements where Student had been since Student left the District. However, very little information was received by the District. The District also made efforts to observe the Student in both placements, and was afforded minimal opportunity to do so. As a result, the District, understanding the limitations on the information on which to complete an IEP, did what they could under the circumstances.

The subject IEPs were developed in May-June of 2019, November 2019, and March and September, 2020. Since the Student was not in the District at that time, and had been gone since 2017, the District had little of its own current data available. While the District did conduct an FIE or REED of the Student in the summer-fall of 2019, its ability to do so was also limited. Thus, the record demonstrates that the District staff made numerous attempts to gather information from Student's two placements during the time in question, conduct its own FIE, and observe the Student at the placements, specifically requesting to do so in a classroom setting. Further, the District made attempts to gather additional information from the Student's parents, and specialty physician.

The first attempt was met with difficulty on several levels. As part of the FIE or REED, the District requested to observe Student at Student's then placement, ***. Difficulties arose, including limitations by the facility on what the observer and evaluator had access to, as well as problems with the Student's behavior. The District also requested records from the placement, and was provided only a one-page summary at the time of the May ***, 2019 ARD. Upon additional requests, the *** staff agreed to provide additional data, but the District never received it. When the District attempted its own assessments, evidence showed that the Student's father terminated a session. The District also travelled to *** to observe the student and obtain information from Student's residential placement there. Although a request was made for a two-day

observation and consultation, and specifically some time in a classroom setting, *** limited the District to one-hour, non-educational observation, and a thirty-minute consult with some of the Student's providers. A request to consult with the Student's ***** was denied by the parents. The District also consistently requested input from the Student's father before and during the ARD committee meetings.

The IEP for the 2019-2020 school year provided a placement in the ***, with access to the general education curriculum for two classes. Services to be provided included those deemed to be appropriate for the Student based on the available information. The Student's BIP was also necessarily based upon limited observation and information. To the extent possible, however, the program was individualized for this Student based upon the information and data that the District was able to obtain.

Not surprisingly then, the data upon which to design the IEP at the March 2020 (and subsequent September, 2020) was limited. However, as noted, since the IEP is always subject to modification, once the student returns to the District, additional information and data will be available. While a transition plan was not included in the IEP, its absence does not rise to the level of diminishing the IEP's sufficiency, and the IEP does address life skills and functional needs.

The evidence demonstrated that the IEPs at issue include the Student's current levels, goals, education services, opportunities for access to general education students, and objective methods to evaluate whether the objectives are being met.

1. Academics

The goals set forth in the IEP were based upon the Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP)s. Evidence demonstrated regression from the time Student was last enrolled in the District, and the testimony established that the District's program will meet the student at Student's current level. Additionally, teachers and staff were also clear that once the student actually attends school in the District, that they will gather additional data and make the appropriate and necessary modifications and revisions to the IEP.

2. Related Services

The District had been providing and the IEP includes the related services of speech, OT, and . An IEP need not provide every service that the student had been receiving elsewhere, where the district's own evaluation does not demonstrate a need for those services. The services offered in the IEPs are sufficient related services, based again on the information they had available and the FIE conducted in 2019, and are designed to provide the Student with both educational and non-educational benefit.

3. Behavioral Progress

The record is clear that this Student has behavioral challenges, and the BIP is a vital component in the IEP. The BIP was based upon the data available to the District at the time of the ARD meetings. As noted in the testimony, it takes time to develop a BIP. In fact, at Student's second placement, it took over six months. Testimony also established that a BIP is a living document, with changes and modifications to be completed as the teachers and staff become more familiar with the Student. Certainly, the evidence demonstrated the appropriateness of the BIP at the current time.

In summary, the District crafted the IEP based on available information and knowledge, and as such, the IEPs were reasonably calculated to provide the Student an educational benefit, and make non-educational progress, in light of the particular circumstances and the Student's unique needs. *Andrew F.*

Factor II: Was the Program Delivered in the Least Restrictive Environment

Certainly, the law is clear that a student's IEP must be administered in the least restrictive environment (LRE). This means that the District is required to educate Student with others who are nondisabled to the maximum extent that is appropriate. 34 C.F.R. §300.114 (a)(2). This has been emphasized by the courts, noting that students be integrated into the regular classroom. *Andrew F.* at 1000. The LRE requirement is a key component of an appropriate placement under the IDEA. The evidence showed that the District is committed to ensuring that the Student has access to interaction with nondisabled peers. The placement for the Student was the *** classroom, a self-contained classroom, and while restrictive in nature, the IEP also provided for access to typically developing peers. Specifically, the Student would attend two classes in the general education curriculum, as well as a program where the peers come into the Student's classroom.

Factor III: Were the Services Developed and Provided in a Coordinated and Collaborative Manner by Key Stakeholders.

This factor requires that the educational program be developed by the key stakeholders, and done so in a coordinated and collaborative fashion. The District made significant effort to involve the parents and *** in the ARD process, and obtain feedback. Additionally, the District attempted to work with the other placements and sought input. The District even went so far as to work with Student's *** placement in the proposed

transition back to the District. Staff proposed to first participate with Student's program prior to the transition, and then have the *** staff at the District for the initial transition back. The District also had an*** multi-disciplinary team for the assessments.

Students parent participated in all but one ARD, and the evidence shows that he was asked open-ended questions in an effort to gather input. The District also requested information from the parents regarding Student's private placements. Moreover, the record demonstrated that on numerous occasions the District offered parent training to the Student's parents. The goal was to provide assistance and also coordinate strategies so that there would be consistency across environments with regard to addressing student's behavior. On every occasion, however, the parents declined any parent training.

Factor IV. Did the Student Demonstrate Positive Academic and Non-academic Benefits

This factor is difficult as the IEP has yet to be implemented. No ability currently exists to assess if any benefit has been demonstrated as the student remains unilaterally placed, and so the IEP has not be implemented.

In consideration of the foregoing factors, the weight of the evidence clearly demonstrates that the District did all that it could in terms of designing an IEP that would provide the Student with a program that is designed to provide education and related services so that the Student will make progress in light of the circumstances and the Student's unique needs.

In this case, the Petitioners did not meet their burden to establish that the program developed by the District did not provide FAPE.

B. Procedural Violations

The second consideration is the allegation of a denial of FAPE based upon procedural violations of the IDEA. Specifically, Petitioner has contended that the parents were not provided the opportunity to actively participate in the decision-making during the ARD, and that the IEPs were predetermined. Moreover, the petitioner complains of the District conducting of the September 2020 ARD without the parent participation. However, the record is clear that parents were provided information in advance of all of the ARD meetings, and participated in all but the September 2020 meeting. The record also demonstrates that the issue was not that the parent was unable to attend, but that he wanted to wait until the hearing was over. Petitioners have not established that any procedural violation of the IDEA exists in this matter.

C. Appropriateness of the Private Placement and Residential Placements

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

Considerable testimony, and other evidence was provided regarding the appropriateness or lack of such with regard to both of the placements for which the parents are seeking reimbursements, as well as evidence regarding the current placement, for which it appears that the Petitioner is seeking placement.

When applying the *Burlington-Carter* test however, a consideration of the appropriateness of the placement is brought into question only after a finding is made that the school district failed to provide FAPE. In this case, since the finding is that the Schertz-Cibolo-Universal City Independent School District did in fact provide the Student FAPE, the next inquiry need not be made.

Therefore, considering the presumption in favor of the District's IEP, the burden on Petitioners to demonstrate the failure to provide FAPE, and the evidence in this case, including the record, documents and the foregoing Findings of Fact and Discussion, it is established that the District did not fail to provide Student FAPE. Accordingly, consideration of the appropriateness of any of the parents' unilateral placements is not necessary or warranted. Petitioners are not entitled to reimbursement for the unilateral placements at ***, ***, or ***.

VII. Conclusions of Law

1. Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C.F.R. §300.301 and 19 TEX. ADMIN. CODE §89.1011.
2. The Schertz-Cibolo-Universal City ISD is responsible for properly identifying, evaluating, and serving Student under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
3. The District, Schertz-Cibolo-Universal City ISD did not deny Student a FAPE. Student's 2019- 2020 BIP and IEP were appropriate and provided FAPE. Student's 2020-2021 IEP and BIP were appropriate and provided FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). Both were designed and reasonable calculated to meet the Student's needs in light of Student's unique circumstances. *Andrew F. v.*

Douglas County Sch. Dist. RE-1, 137 S.Ct. 988, 998 (2017); *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

3. The District did not violate parental procedural rights under the IDEA as to participation. 34 C.F.R. §300.513 (2).

4. Student failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).

5. Residential placement is not appropriate for Student at this time. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286,299 (5th Cir. 2009).

ORDERS

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and all claims of Petitioner are DISMISSED WITH PREJUDICE.

Signed this the 12th day of April 2021.

Kimberlee Kovach

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, § 2001.144(a)-(b); 20 U.S.C.