

DOCKET NO. 388-SE-0819

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, STUDENT, by next friend PARENT (“Petitioner” or “Student”), brings this action against the Round Rock Independent School District (“Respondent” or “School District”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400-1482 (IDEA) and its implementing state and federal regulations. The main issue in this case is whether the School District failed to provide Student with a Free Appropriate Public Education (FAPE) during the 2018-2019 school year and whether the School District continues to fail to provide Student with a FAPE this current 2019-2020 school year.

The Hearing Officer concludes the School District denied Student a FAPE during the 2018-2019 school year through the most recent IEP scheduled to end in March 2020; therefore, Student is entitled to reimbursement of private placement at ***.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Student’s legal counsel, Elizabeth Angelone and Meera Krishnan with the Cuddy Law Firm. The School District was represented

throughout this litigation by its legal counsel, Stacy Ferguson with the law firm of Escamilla & Poneck.

B. Preliminary Motions

In its response to the complaint, Respondent asserted the Hearing Officer lacks jurisdiction over Petitioner's non-IDEA claims of discrimination under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). In Order No. 2, the Hearing Officer reminded Petitioner Petitioner has no jurisdiction over 504 or ADA claims.

III. DUE PROCESS HEARING

The due process hearing was conducted in the School District on December 16 - 18, 2019. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's legal counsel, Elizabeth Angelone and Meera Krishnan. In addition, ***, Student's Parent ("Parent"), attended the due process hearing.

Respondent continued to be represented by its legal counsel, Stacy Ferguson. In addition, ***, Director of Special Education for the School District, attended the hearing as the party representative. Both parties filed written closing briefs in a timely manner. The Decision in this case is due February 14, 2020.

IV. ISSUES

A. Petitioner's Issues

Petitioner confirmed the following IDEA issue for decision in this case:

FAPE: Whether the School District failed to provide Student with a FAPE during the 2018-2019 school year and whether the school district continues to fail to provide Student with a FAPE this current 2019-2020 school year.

B. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations stated in the Complaint. The School District contends it provided Student with a FAPE and Petitioner is not entitled to any of the requested relief. Respondent also raises this additional legal issue:

JURISDICTION: Whether the Hearing Officer has jurisdiction over Petitioner's claims arising under 504 of the Rehabilitation Act and the Americans with Disabilities Act and its amendments.

V. REQUESTED RELIEF**A. Petitioner's Requested Relief**

Petitioner confirmed the following items of requested relief:

1. The school district fund private placement for Student at *** for the 2019-2020 school year, fund transportation to *** for the 2019-2020 school year, and fund Student's related services at ***.
2. In the alternative, the School District provide an appropriate program for Student that meets Student's unique educational and behavioral needs, provides academic instruction, and related services to Student in the Least Restrictive Environment (LRE) with an Individual Education Program (IEP) reasonably calculated to allow Student to make progress appropriate to Student's unique circumstances.¹
3. Any other relief deemed just and appropriate by the Hearing Officer.

B. Respondent's Requested Relief

Dismiss all claims arising under laws other than the IDEA.

¹ Petitioner's Complaint p. 8-9, paragraph d.

VI. FINDINGS OF FACT

1. Student was enrolled in the School District in 2014 as *** grader at ***.² Student is eligible for special education services as a student with *** (***) and Other Health Impairment (OHI)-***.³ Student transferred from *** where Student was receiving special education services for a Specific Learning Disability.⁴
2. In July 2013, Student ***.⁵ Student is a “bright” young *** with a “hunger” for education and a “passion” for helping others.⁶
3. *** can have the following effects on a student’s behavior: medical appointments or recovery-related fatigue may result in intermittent or unexpected absences; positive and rapid variation in school performance from day to day or morning to afternoon; more time to process directions and complete tasks; a distractible or inattentive behaviors; academic performance may be different from before ***; irritability with increased stimulation; difficulty organizing large tasks and comprehending large reading assignments; higher-level subjects or cumulative learning may challenge the student; relationships with friends may change; new behaviors, including impulsivity and/or excessive moodiness; disrespectful/inappropriate comments, aggressive behavior, decreased frustration tolerance or depression; ***; side effects from medication that result in fatigue, impaired memory and organization, or unexpected behaviors; transitions from one class or activity to another may take extra time or preparation; and difficulty attending to two tasks simultaneously.⁷
4. Student’s March ***, 2014 Annual IEP in *** indicted Student is most alert in the mornings. Student experiences ongoing *** and typically *** due to Student’s significant mental and physical fatigue from ***. Student’s physician recommended consideration be given to homebound services or home-schooling.⁸ Student was on a modified school day and attended school ***. Student was working on IEP goals and objectives as Student was able to tolerate the work.⁹
5. The School District conducted a Full and Individual Evaluation (FIE) on Student in October 2014, after Student arrived from ***. Student was in the average range on the

² Joint Exhibit 43 p. 9 (referred to hereafter as JE ___ or JE ___ at ___).

³ JE 33 at 5, JE 5 at 26.

⁴ JE 36 at 3.

⁵ JE 36 at 3.

⁶ Transcript Volume II at 110 (referred to hereafter as T ___ at ___).

⁷ JE 25 at 4-5.

⁸ JE 36 at 4.

⁹ JE 36 at 4.

- cognitive functioning test and the academic achievement tests.¹⁰ The only area Student tested below average was ***.¹¹ Student's weakness in visualization testing may affect Student's ability to ***.¹² Student's prior testing from *** indicated Student had difficulties with visual perceptual skills.¹³
6. The FIE recommended that school staff: repeat instructions/provide more detailed directions; give instructions through several channels (written, oral, demonstration); allow more time for completion of assignments and tests; shorten assignments as needed; break assignments into smaller steps; provide study aids (outlines, study guides, spelling lists, cue cards); reinforce the use of memory aids; review/reinforce frequently; and provide breaks as needed, if Student becomes fatigued or overwhelmed.¹⁴
 7. A private psychologist evaluated Student in October 2016 and diagnosed Student with *** (***) and ***.¹⁵ Student's full scale Intelligence Quotient (IQ) was ***, which is low average.¹⁶ The psychologist recommended social skills training as well as continued individual therapy.¹⁷ The testing results indicated Student had difficulty with the visual spatial index, fluid reasoning, working memory, and processing speed.¹⁸
 8. Student's annual Admission, Review and Dismissal (ARD) Committee meeting in the 2016-17 school year was held on February ***, 2017. The IEP developed in the meeting contained a Present Level of Academic Achievement and Functional Performance (PLAAFP) for Student in math problem solving, transition planning, addressed Student's Assistive Technology (AT) needs, and had a measureable annual goal for math problem solving. Student needed *** in order to make progress due to Student's inability to ***, ***.¹⁹
 9. Student's accommodations from the February ***, 2017 IEP included: oral administration of math tests/quizzes; small group testing for math; graphing calculator; word processing device for writing assignments with spell check allowed; graphic organizers for writing; check for understanding; preferential seating near instructor frequent breaks; and positive reinforcement.²⁰ Student was allowed frequent breaks due to Student's *** as an

¹⁰ JE 34 at 12, 14-15

¹¹ JE 34 at 17.

¹² JE 34 at 17.

¹³ JE 38 at 5.

¹⁴ JE 34-18.

¹⁵ JE 26 at 1.

¹⁶ JE 26 at 1.

¹⁷ JE 26 at 1.

¹⁸ JE 26 at 2.

¹⁹ JE 24.

²⁰ JE 24 at 18.

accommodation for State of Texas Assessments of Academic Readiness (STAAR) testing in reading, writing, and math.²¹ Student received all of Student's services in the general education setting with inclusion support provided in math.²²

10. During the February 2017 ARD Committee meeting, Parent notified the ARD Committee Student suffers from *** in the afternoon and wears down as Student goes through the day.
11. Student has a hard time with loud noises or lots of stimuli and occasionally has ***. Student will need to attend Occupational Therapy (OT) twice a week. Student's Parent requested Student receive a "waiver" of attendance to attend OT on Tuesdays.²³
12. The School District conducted a Review of Existing Evaluation Data (REED) on February ***, 2017, and it concluded Student continued to meet the eligibility criteria to receive special education services as a student with ***.²⁴ The REED indicated an additional evaluation was needed in the area of emotional well-being.²⁵ In conducting the REED, the School District relied on the FIE from October ***, 2014.²⁶
13. The School District completed a Behavior Assessment System for Children (BASC-3) evaluation on March ***, 2017, to assess Student's behavioral and emotional problems. Student told the evaluator Student experiences school-related anxiety because Student likes to perform well in school.²⁷
14. At a revision ARD Committee meeting on March ***, 2017, the School District informed Parent it could not provide a 4-day week. If Student has absences due to outside appointments, then Parent must provide a doctor's note so Student can be excused. The School District indicated Student would not be retained in *** due to Student's absences.²⁸ In Student's *** year, Student missed *** days of the fall semester 2016 and *** days of the spring semester 2017.²⁹
15. Student's *** annual ARD Committee meeting was held on January ***, 2018. Student continued to qualify for special education services as a student with ***. Student's accommodations added extra time for completing assignments/tests as needed based on Student's medical condition, 2 days to complete missed assignments per day of missed

²¹ JE 24 at 20.

²² JE 24 at 23.

²³ JE 24 at 26.

²⁴ JE 25 at 2.

²⁵ JE 25 at 12.

²⁶ JE 23 at 19.

²⁷ JE 23 at 16-17.

²⁸ JE 22 at 8.

²⁹ JE 44.

- school, and the opportunity to leave class for individualized assistance.³⁰ The ARD committee removed Student's AT needs, because all students have access to a calculator or word processing device.³¹ In Student's *** year, Student missed *** days of the fall semester 2017 and *** days of the spring semester 2018.³²
16. Student attended *** on July ***, 2018. Student was unable to *** because it was too loud. Parent emailed the School District to inform them of this issue and Student's condition. Parent recommended *** reach out to Student's *** case manager to discuss Student's needs. Parent left her phone number if the School District had any questions.³³
 17. Student's neurologist completed a 504 Services OHI form on September ***, 2018. She indicated Student had ***/***, *****. She recommended Student have a reduced workload when symptomatic, other modifications as needed, and reduced homework by 50 percent.³⁴
 18. *** for Student.³⁵ Student functioned every day starting with ***. By the end of a regular school week, Student was ***. Overstimulation may leave Student with ***.³⁶ Starting in September 2018, Student started the day *** with Student's *** protocol not working.³⁷
 19. In early September of 2018, Parent began emailing various School District employees notifying them of Student's absences due to *** and Student's possible ***.³⁸ On September ***, 2018, Parent notified School District of Student's *** ***, which was not responding to the normal protocol ***.³⁹ Student was ***.⁴⁰
 20. Parent emailed Student's case manager on September ***, 2018, regarding Student's absences *** and notifying her of Student's current pain level, which was too great for Student to tolerate school. Parent also requested any make-up work from teachers for Student to complete. The case manager notified Parent of *** work because she was

³⁰ JE 21 at 13.

³¹ JE 21 at 10.

³² JE 44.

³³ Petitioner's Exhibit 16 p. 1 (referred to hereafter as PE ____ or PE ____ at ____).

³⁴ JE 20.

³⁵ JE 30 at 26.

³⁶ RE 16 at 1.

³⁷ JE 43 at 63.

³⁸ PE 16 at 6.

³⁹ PE 16 at 4.

⁴⁰ JE 41 at 77.

Student's teacher for that class. The case manager stated she would email Student's teachers for other assignments.⁴¹

21. On September ***, 2018, Student's case manager sent Parent a detailed email regarding make-up work for several of Student's classes.⁴² The case manager also suggested removing Student from *** to *** class to allow Student to catch up on missing assignments due to absences.⁴³
22. The School District held a revision ARD Committee meeting on October ***, 2018. The ARD committee added a PLAAFP for *** due to Student's medical needs. *** was added to Student's schedule to allow Student to catch up on missed assignments and remediate failing grades caused by Student's absences due to illness and ***.⁴⁴ Student's *** class was held in the special education setting.⁴⁵ Student's accommodations added access to quiet area/designated classroom for *** or other loud events, access to water bottle/fountain and protein snack, noise cancelling headphones, special projects in lieu of assignments or alternate assignments due to absences related to medical conditions, and extra time for completing assignments/tests as needed based on medical conditions. The IEP scheduled Student for *** minutes of instruction per day or a full school day.⁴⁶
23. On October *** 2018, Parent mentioned "home tutoring" in an email to Student's case manager to help Student with classes due to Student's continued absences.⁴⁷ The School District began the process of explaining homebound services to Parent and obtaining consent for Student's doctors to speak to the School District.⁴⁸
24. During the fall of 2018, Student's therapist recommended Student return to school to help improve Student's mental health when Student was medically able to do so.⁴⁹ Student had frequent discussions about Student's school related anxiety with therapists.⁵⁰
25. Student's neurologist provided a homebound needs assessment to the School District on December ***, 2018. The neurologist indicated Student would be confined in the home from ***. The form included a handwritten note from the doctor requesting the School District allow "homebound" instruction in the school library and allow Student to transition

⁴¹ PE 16 at 13-14.

⁴² PE 16 at 25.

⁴³ Respondent's Exhibit 7 p. 11 (referred to hereafter as RE ___ or RE ___ at ___).

⁴⁴ JE 18 at 1.

⁴⁵ JE 18 at 6.

⁴⁶ JE 18 at 3, 5.

⁴⁷ PE 16 at 36.

⁴⁸ PE 16 at 39.

⁴⁹ T IV at 542-43.

⁵⁰ RE 1, RE 5.

- from partial to full days as tolerated.⁵¹ On a special education OHI form, the neurologist noted Student has a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.⁵²
26. Student's psychiatrist sent a letter to the School District on December ***, 2018, stating she recommended Student reintegrate into the school environment via "homebound services" administered in the school library. The recommendation was based on Student's need to get out of the house and have normalcy, while allowing Student's needs to be addressed in a personalized manner with a flexible schedule for Student's difficult days. The goal was for Student to work Student's way back to participating in "standard" classes as Student felt able.⁵³
27. Student's neurologist sent a letter to the School District on January ***, 2019, explaining Student had experienced increased symptoms including *** interfered with daytime and classroom functioning as well as ***. Student had been unable to attend school regularly since October ***, 2018. The neurologist explained Student may take months to years to return to "normal, age-appropriate" functioning. Student required continued absences from school for medical office visits and therapy appointments.⁵⁴
28. The School District held an annual ARD Committee meeting on January ***, 2019, and completed it on March ***, 2019. The ARD Committee added a PLAAFP to Student's IEP for physical/health and removed the PLAAFP for math. The ARD committee's physical/health PLAAFP indicated Student was missing long periods of school/instruction. The ARD committee indicated, due to the absences, Student required specialized instructional support to allow Student to catch up on missed assignments and remediate failing grades cause by Student's absences.⁵⁵ The ARD Committee added the following accommodations to Student's IEP: unrestricted access to nurse for medical condition and a directive to staff not to ask Student or peers about absences or medical conditions to respect privacy.⁵⁶
29. The January/March 2019 ARD Committee added OHI-*** to Student's eligibility criteria. The IEP indicated Student has physical limitations that may affect access or involvement and progress in general education. During the March ARD, Parent asked for a shortened school day.⁵⁷ The IEP scheduled Student for *** minutes of instruction per day or a full

⁵¹ JE 14 at 1.

⁵² JE 13.

⁵³ JE 12 at 2.

⁵⁴ JE 10.

⁵⁵ JE 5 at 2-3.

⁵⁶ JE 5 at 15.

⁵⁷ JE 5 at 26.

- school day.⁵⁸ The ARD Committee's plan was for Student to transition back to school by providing *** morning tutorials before school.⁵⁹
30. Student needed to build up Student's endurance on being able to process sensory input without Student's body shutting down. Due to Student's ***, too much stimulation can increase Student's *** while too little activity can cause a decline in health.⁶⁰ Student was encouraged by Student's physicians to do at least an hour of an "engaged" activity every day to expose Student to some stimulation. Parent advocated for the Monday, Wednesday, and Friday tutorials for Student's "engaged" activity.⁶¹
31. On February ***, 2019, Student's therapist provided her diagnostic recommendations to the School District where she stated Student would benefit from homebound, a shortened school day, or self-paced courses because there is no "ideal" environment for Student to work in. A self-paced program would allow Student to work as slowly or quickly as needed.⁶²
32. On February ***, 2019, the School District's attendance officer filed truancy charges against Parent, which stated Parent was criminally negligent and failed to require Student to attend school as required by law.⁶³ The attendance officer stated Parent did not turn in documentation for Student's absences in a timely manner.⁶⁴ The attendance officer recommended Parent homeschool Student so Student would be exempt from compulsory attendance.⁶⁵ Parent stated she turned in absence documentation to the School District in October and was unaware until the January ARD the School District did not have any documentation.⁶⁶
33. On March ***, 2019, Student's neurologist wrote a letter to the School District. The letter informed the School District that Student continues to struggle with *** that prevent regular school attendance. The letter noted Student's *** were not responding to medication and Student was only able to continue schoolwork at home.⁶⁷

⁵⁸ JE 5 at 22.

⁵⁹ JE 5 at 29.

⁶⁰ T III at 392-93, 419.

⁶¹ T III at 392-93.

⁶² JE 6.

⁶³ JE 42 at 3.

⁶⁴ T I at 80.

⁶⁵ JE 42 at 4, T I at 77.

⁶⁶ T III at 434.

⁶⁷ JE 4.

34. In the spring 2019 semester, Student attended one-on-one tutorials *** with Student's special education case manager.⁶⁸ Parent wanted Student educated in the library because she felt it was an area where Student could work on being desensitized to stimulation while still in a quiet environment.⁶⁹
35. The School District's purpose of the tutorials was for Student to start recovering the fall 2018 semester's work.⁷⁰ The plan was, once Student could attend a full day schedule, Student would *** for the remainder of the semester and the following school year to *** if necessary.⁷¹ Student never attended regular school day classes after these tutorials.⁷²
36. The assistant principal sent an email to Parent on April ***, 2019, which indicated the tutoring was offered to give Student some academic instruction, but it would not count as ***. The email stated the ARD committee set up a "full school day" of classes for Student.⁷³
37. Between February ***, 2019, and April ***, 2019, Student worked at home on ***. Student earned A's on all of the unit assessments except for one B.⁷⁴ ***, ***.⁷⁵
38. Student attended a couple of weeks of school at the beginning of the 2018-19 school year and a few other days of class during the fall semester.⁷⁶ Student missed *** days of the semester.⁷⁷ Student missed the entire Spring Semester of 2019.⁷⁸ Student attended various therapies to help Student with Student's *** during the spring of 2019. On ***, Student attended ***. On ***, Student attended ***. On ***, Student had an hour of counseling. On ***, Student ***. Student attended *** and stopped *** in April 2019. ***.⁷⁹ The School District did not pay for any of Student's therapies.⁸⁰

⁶⁸ JE 8.

⁶⁹ T III at 397.

⁷⁰ JE 43 at 56.

⁷¹ JE 43 at 56.

⁷² T II at 174.

⁷³ JE 42 at 31.

⁷⁴ RE 8.

⁷⁵ RE 12.

⁷⁶ JE 39 at 1-6.

⁷⁷ JE 39 at 1-7.

⁷⁸ JE 39 at 7-13.

⁷⁹ T III at 422-27.

⁸⁰ T III at 475.

39. By the end of the 2018-2019 school year in May 2019, Student had ***.⁸¹ Student did not *** ** tutorials, because they only made it through ***.⁸²
40. On June ***, 2019, Parent provided her 10 day notice to the School District of her intent to unilaterally place Student in private school at *** (***)⁸³ In September 2019, Student began Student's treatment at *** and completed the program in late October 2019.⁸⁴ Parent continued to discuss Student's plan at the School District even after she notified them of her intent to enroll Student in ***.⁸⁵
41. Student's neurologist wrote a letter in July 2019, which indicated Student was unable to attend school on a regular basis and needed a modified, flexible, home-based schedule to meet Student's needs. The letter requested the School District continue to send packets of school work to Student for Student to complete before and during Student's stay in ***. In August of 2019, Student was completing outpatient physical and occupational therapy in preparation for Student's *** *** and was unable to attend school regularly due to the prescribed program of ***.⁸⁶
42. On August ***, 2019, the School District's Executive Director of Special Education emailed Parent and proposed Parent and Student tour ***. *** is the School District's *** where Student could receive a limited schedule of classes. The School District proposed conducting an ARD to discuss intermittent homebound services as well as evening classes for Student.⁸⁷
43. In September 2019, Parent and the principal of *** emailed and discussed ways for Student to work on ***. Parent did not utilize the options *** and again indicated her intent to enroll Student in ***.⁸⁸
44. On November ***, 2019, Student began attending ***.⁸⁹ *** is a private, accredited school.⁹⁰ Every student is taught in a closed classroom in a one-on-one setting.⁹¹ *** uses its own curriculum that is aligned with the Texas Essential Knowledge and Skills (TEKS).

⁸¹ T II at 175-76.

⁸² T II at 170.

⁸³ JE 43 at 14.

⁸⁴ Joint Stipulations 20-21.

⁸⁵ RE 9, 13, 14.

⁸⁶ RE 9 at 4.

⁸⁷ RE 14 at 4.

⁸⁸ RE 13.

⁸⁹ PE 14.

⁹⁰ T III at 329.

⁹¹ *Id.*

Teachers at *** are not required to have teaching certificates; however, they are required to have degrees in the subject they are teaching.⁹²

45. At ***, Student is enrolled in *** ***. Student's classes are on ***. Student starts school at *** and attends for ***. This includes an hour of one-on-one instruction in each of the classes plus two hours of "****."⁹³
46. *** is a social space staffed by teachers where all the students who are not in class during that one hour can do homework or socialize or both.⁹⁴ In addition to the social ***, there is a silent ***.⁹⁵ When Student is able, Student will take more classes during a semester.⁹⁶ The purpose of *** is to allow students to complete homework at school so when they go home they can focus on family, mental health, or any other needs.⁹⁷
47. *** is open year round and does not count absences like a traditional school does. If a student is absent, the curriculum cannot move forward. Student is allowed to take two, three, or four classes at a time to avoid too much stress or strain. The plan is for Student to ***, ***. While attending ***, Student has missed one class two times and the other class one time.⁹⁸

VII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and 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 school district has a duty to provide a FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a) (3).

⁹² T III at 330-31.

⁹³ T III at 335-36.

⁹⁴ *Id.*

⁹⁵ T III at 357.

⁹⁶ T III at 335.

⁹⁷ T III at 336.

⁹⁸ T III at 333-334.

The School 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).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁹⁹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). In this case, the School District was obligated to provide Student with a FAPE during the 2018-2019 school year *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for the 2019-2020 school year. The burden of proof in this case is on Petitioner to show the School District did not do so. *Id.*

C. FAPE

The Four Factors Test

The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program provides a student a FAPE. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and
- Positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

⁹⁹ 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).

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).

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.*, 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 evidence showed the School District developed IEPs based on assessments performed in 2014 with a new emotional assessment completed in 2017. The IEPs included PLAAFPs, accommodations, measureable annual goals, and transition plans. Student's math PLAAFP was removed in the January/March 2019 IEP. There is no evidence to suggest Student mastered Student's annual goal, nor did Student ***. Student's IEP did not include counseling as a related service. Student attended various therapies outside of school, which Parent paid for out-of-pocket. The School District was aware of Student's *** based on notes from multiple physicians.

The School District did add a PLAAFP for *** and ***, which acknowledged Student's disability caused Student to miss large amounts of school in an unpredictable manner; however, it

did not address what placement was appropriate for Student or the length of Student's school day due to Student's ***. The most recent IEP in place was from January/March 2019 and was scheduled to continue through March 2020.

The School District was aware in 2014, when Student first enrolled, that Student suffered from ***, which became progressively worse throughout the day. Student missed several days in Student's *** year due to Student's ***. In the fall of Student's *** year, Student missed more days than the prior year. In September 2018, Parent emailed the School District to inform them of Student's pain levels and Student's *** due to a refractory headache. The School District held an ARD in October 2018 to remove Student from Student's *** class and add *** due to Student's excessive absences; however, the School District did not offer a shortened school day due to Student's disability or needs.

The first mention of "homebound" services of any type was in October 2018. In December 2018, Student's psychiatrist recommended "homebound" services for Student in the school library and to allow Student a flexible schedule. The School District focused on "homebound" services being necessary when a Student is confined to the home and because Student was not confined to the home, Student did not qualify for homebound services. In January 2019, Student's neurologist sent a letter to the School District explaining Student's inability to tolerate a full day of school due to Student's increased ***. The School District did not reach out to the physicians to have a conversation about what "homebound" meant or what type of environment Student should have for Student's education. The School District also did not perform any type of evaluation or assessment for Student's daily learning environment needs.

Student needed a flexible school day or a shortened school day and the School District never offered that to Student. Instead, the School District allowed Student to attend *** tutorials in the spring of 2019 and then attend class as Student could. Attending school as Student could and then being able to leave if Student was ill is not an individualized program. Rather, it is the program offered to any student. The School District should have realized by late fall 2018 that Student's *** was causing increased absences and addressed the issue with an appropriate IEP. The School District specifically told Parent it developed a "full day" of school for Student,

knowing Student could not tolerate a “full day” based on multiple physician letters. In Student’s January/March 2019 IEP, the School District acknowledged Student had physical limitations that may affect Student’s access to general education and Student needed specialized instructional support; however, the School District did not follow through with individualizing Student’s educational program. The School District continued to offer a full day of school without any specialized instruction to meet Student’s unique needs. Student needed to work Student’s way back to a full class schedule, which means the School District should have provided a shortened day until Student was able to handle a full day. The School District focused on the timeliness of Student’s medical excuses instead of determining what Student needed in Student’s IEP or following their own PLAAFPs for Student. The School District should have recognized Student missed more school in the fall of 2018 than in the fall of Student’s *** year and some type of assessment was needed to address Student’s increasing needs. The IEP was not individualized based on Student’s well-documented needs.

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. 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).

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

Student's IEP placement was in general education. On the continuum of educational settings, general education is the least restrictive environment. While this allowed Student to be educated with Student's non-disabled peers, it was not the appropriate environment for Student. Student required dim lighting and a quiet environment for school work, which is why Student was given tutorials in the school library with one-on-one teaching. Overstimulation triggered Student's ***. Student's physicians recommended slowly integrating Student back into classes, yet the School District did not offer one-on-one instruction or a quiet room for Student's placement. The School District proposed placement at *** before school started in August 2019 so Student could receive intermittent homebound services as well as evening classes. The School District has been aware since 2014 that Student declines as the day goes on so evening classes are not appropriate. The evidence showed Student's educational placement did not meet Student's needs.

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

The evidence showed Parent was an active participant in Student's education from the beginning of Student's time in the School District. She attended ARD meetings and communicated with the teachers, administrators, and staff via emails. The evidence showed Parent and Student's case manager emailed frequently to discuss Student's absences and how Student could make up work while absent. While the Parent did not agree with Student *** tutorials or Student attending ***, the School District did collaborate with the Parent. Parent argues the School District filing truancy charges indicates the process was not collaborative. While I understand Parent's

frustration with the truancy charges being filed, the absences are separate from the IDEA issues. The evidence showed services were provided in a coordinated, collaborative manner.

4. Academic and Non-Academic Benefits

The evidence showed Student did not make academic or non-academic progress during the 2018-2019 school year. Student ended the 2018-2019 school year with ***. It was not until December 2019 that Student ***. Student did not interact with many peers in Student's *** year and in the spring only attended tutoring ***. Student may have made progress if Student were provided appropriate IEP with of a shortened school day or a flexible schedule in Student's LRE; however, without those in place to address Student's needs progress was not made.

The evidence showed that Student was denied a FAPE by the School District. The courts have never specified the four factors must be considered or weighed in any particular way. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293 (5th Cir. 2009). The whole educational experience, and its adaptation to confer "benefits" on the child, is the ultimate statutory goal. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012). Student's IEP did not address Student's individual needs because it did not provide Student with a shortened school day or a flexible schedule until Student was able to return to a full day of school. Student's *** prevented Student from attending a full day of school and the School District was aware of that once they removed Student from *** class in October 2018 and as stated in the PLAAFPs from the January/March 2019 IEP. Additionally, Student was not educated in Student's LRE. Student was expected to attend a full day of school in the general education setting when Student had sensitivity to light and sound. Student needed a placement that met Student's individual needs due to Student's ***. Services were provided in a collaborative manner. The final part of the analysis is the most important, Student did not make progress academically or non-academically. Student only *** and had minimal interaction with peers.

D. Private Placement at School District Expense

1. Two-part Test

Student must meet a two-part test in order to secure continued 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 continued 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 County Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7 (1993).

2. Test Applied to the Facts

A Parent is entitled to reimbursement for the unilateral private placement of a child with a disability if the public school's program does not provide the student with a free, appropriate public education and the private school's program is appropriate. *Burlington*, 471 U.S. 359, 370 (1985).

In this case, the first issue is whether the school district's program was appropriate. If not, the second issue is whether Student's unilateral private placement at *** is appropriate. *Burlington*, 471 U.S. at 370. The private placement need not meet all State requirements for reimbursement purposes so long as the private placement meets Student's individualized needs and is therefore appropriate. *Florence*, 510 U.S. 7, 13, 15 (1993). If both prongs of the *Burlington* test are met, the hearing officer may also consider whether reimbursement should nevertheless be reduced or denied. 34 C.F.R. § 300.148(d).

As detailed above, the School District's program did not offer Student a FAPE in accordance with the IDEA and the four-factor test laid out by the Fifth Circuit. Thus, the Hearing Officer must examine the second *Burlington* prong to determine if placement at *** was appropriate. *** is providing Student an appropriate education. *** provides academic instruction in a 1:1 ratio by teachers who implement a curriculum aligned with the TEKS. The evidence showed Student making academic progress in Student's two classes. Student is also making friends and socializing with peers in the ***. Part of Student's success could be attributed to Student's work at ***; however, *** has provided Student with a program individualized for Student's needs based on doctor's recommendations and Student's abilities, with a plan of ***.

Student will take more classes as Student is able and does not receive punishment for absences. The evidence showed that Student is thriving at ***.

VIII. CONCLUSIONS OF LAW

1. Student was denied a FAPE during the relevant time period and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988. *Michael F.*, 118 F.3d 245 (5th Cir. 1997).
2. The unilateral private placement made by Petitioner's Parents is appropriate. *Florence*, 510 U.S. 7 (1993).
3. Petitioner is entitled to reimbursement for the out-of-pocket cost to Student's Parents of private school placement. *Burlington*, 471 U.S. 359 (1973); 34 C.F.R. § 300.148(c).
4. 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).

IX. ORDERS

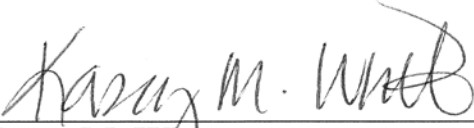
Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **GRANTED IN PART and DENIED IN PART**.

1. The School District shall reimburse Petitioner for Petitioner's out-of-pocket costs of the unilateral private placement provided by *** as follows:
 - a. The School District shall be responsible for tuition for the fall semester 2019 (November *** to the end of the semester); tuition for the spring semester 2020 and summer school 2020 (if Student attends), payable within 30 school days from the date of this Decision.
 - b. The School District shall be responsible for reimbursement for mileage to and from *** for the above-listed time frames at a rate of .575 cents per mile. Parent shall provide the School District with Student's attendance records during the semesters to receive reimbursement. The School District shall reimburse Parent within 30 school days of receiving attendance records from each semester.

- c. The School District shall reimburse for counseling services Student received during the 2018-2019 school year. Parent shall provide the School District with the bills within 30 days of this Decision. The School District shall pay Parent within 30 days of receipt of the bill.
2. The School District shall convene an ARD Committee meeting at least 10 days before the start of the 2020-2021 school year to discuss Student's proposed IEP for that school year.
3. Petitioner's claims arising under any law other than the IDEA are dismissed as outside the jurisdiction of the hearing officer.

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

SIGNED February 14, 2020.



Kasey M. White
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).