

SOAH DOCKET NO. 701-16-0953.IDEA
TEA DOCKET NO. 068-SE-1015

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

DECISION ON REMAND

I. ORIGINAL DUE PROCESS HEARING

*** (Student), by next friend *** (Parent and, collectively, Petitioner), filed a request for an impartial due process hearing (Complaint) against Spring Branch Independent School District (Respondent or the School District) under the Individuals with Disabilities Education Act (IDEA) on October 28, 2015. Petitioner filed an amended complaint on February 23, 2016. The complaint sought reimbursement for private school tuition, private placement, and other equitable relief.

A Special Education Hearing Officer (SEHO) conducted a due process hearing on Petitioner’s complaint May 24-26, 2016. The SEHO issued a decision on August 5, 2016, finding that the School District (1) violated its child find duty by unreasonably delaying its referral of Student for a special education evaluation; (2) failed to implement Student’s individualized education program (IEP); and (3) denied Student a free appropriate public education (FAPE) during the 2014–15 school year. The SEHO ordered the School District to reimburse Student’s tuition at *** for the 2015-16 school year and ordered the School District to provide a compensatory education award of tuition at *** for the 2016-17 school year.

II. FEDERAL COURT APPEALS

The School District appealed the SEHO's decision to federal district court. On March 29, 2018, the U.S. District Court for the Southern District of Texas, Houston Division, granted summary judgment in favor of Student and affirmed the SEHO's decision. *Spring Branch Indep. Sch. Dist. v. ****, No. 4:16-CV-2643, 2018 WL 2335341 (S.D. Tex. Mar. 29, 2018). The School District then appealed the District Court's decision to the Fifth Circuit Court of Appeals.

On June 12, 2020, the Fifth Circuit affirmed that the School District violated its child find duty by unreasonably waiting 99 days from October ***, 2014, to January ***, 2015, to refer Student for a special education evaluation. *Spring Branch Indep. Sch. Dist. v. ****, by next friend ***, 961 F.3d 781, 793 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1389, 209 L. Ed. 2d 129 (2021). The court also affirmed that the School District failed to implement Student's IEP by using timeouts and shortening Student's school day to three hours per day. *Id.* at 797, 799.

The Fifth Circuit reversed the SEHO and the District Court's findings that the use of physical restraints, police interventions, and a delayed start of Student's school day violated Student's IEP. *Id.* at 797–99. In light of these findings, the Fifth Circuit remanded the case to the District Court to determine the appropriate remedies. *Id.* at 800.

III. DISTRICT COURT DECISION ON REMAND

On August 9, 2021, after receiving the Fifth Circuit's opinion and considering additional briefing from the parties, the District Court remanded the case to this SEHO for the purpose of determining an appropriate compensatory award consistent with the Fifth Circuit's opinion.¹ *Spring*

¹ The original SEHO for this proceeding, Sharon Cloninger, is no longer employed by the State Office of Administrative Hearings (SOAH).

*Branch Indep. Sch. Dist. v. ****, No. 4:16-CV-2643, 2021 WL 3493151 (S.D. Tex. Sep. 9, 2021). The District Court found that the School District's child find violation deprived Student of educational benefits and therefore amounted to an actionable IDEA violation. Additionally, the School District's multiple failures to implement Student's IEP similarly amounted to actionable IDEA violations.

The District Court found that Student is entitled to an equitable remedy for the School District's IDEA violations. The District Court determined the original SEHO's decision did not address what, if any, specific educational deficits resulted from Student's denial of a FAPE during the 2014-15 school year, nor did they explain how one year of private school was necessary to best correct those deficits. Thus, the District Court remanded this case to the SEHO to determine:

1. Whether the School District's failure to provide a FAPE during these periods resulted in specific educational deficits for Student; and
2. If so, what specific compensatory measures were needed to correct those deficits.

IV. FACTUAL DETERMINATIONS REACHED BY FEDERAL COURTS

Both the Fifth Circuit and the District Court thoroughly reviewed the original due process decision and administrative record, making determinations as to the relevant facts from the original due process hearing. This SEHO is bound by these factual determinations.² The factual determinations made by the courts are as follows:

1. In 2009, Student enrolled in the School District to attend ***. Student experienced behavioral difficulties during ***, including aggression toward other students. Student then attended private schools for the subsequent four school years, including two school

² An issue of law or fact decided on appeal may not be reexamined on remand. *Lindquist v. City of Pasadena, Tex.*, 656 F.Supp. 2d 662, 677 (S.D. Tex. 2009), *aff'd*, 669 F.3d 225 (5th Cir. 2012).

- years at ***, a private school for children with social and emotional challenges. ***, 961 F.3d at 786.
2. In 2014, Parent registered Student to attend school in the School District at *** for Student's ***-grade school year. Parent provided *** officials with a letter from Student's psychiatrist, informing the School District that Student was diagnosed with attention deficit hyperactivity disorder (ADHD) and would benefit from Section 504 accommodations. *Id.* at 785.
 3. After beginning Student's ***-grade year in the School District, Student began exhibiting behavioral issues once more, including aggression toward School District staff members and other students. Parent was in frequent contact with School District staff. She informed them that Student had previously attended a therapeutic school and struggled with transitions. Parent informed the *** principal that Student was diagnosed with ***. *Id.* at 786.
 4. School District officials worked with Student's parents to correct Student's behavior, but Student continued to act out regularly. On September ***, 2014, the School District provided Student's parents with a Section 504 Notice of Rights and a notice of a Section 504 eligibility meeting, scheduled for October ***, 2014. Parent also signed a Notice and Consent for Initial Section 504 Evaluation, which would allow the School District to evaluate Student to determine if Student qualified for Section 504 accommodations. *Id.*
 5. On September ***, 2014, Parent provided the School District with a Family History Form, detailing Student's history of behavioral problems and a list of Student's medications. Parent also provided the School District with an evaluation performed by Dr. ***. The School District postponed the Section 504 eligibility meeting from October *** until October *** to allow a School District Licensed Specialist in School Psychology (LSSP) to review Dr. ***'s evaluation. *Id.*
 6. At the October ***, 2014 Section 504 meeting, the School District determined that Student qualified for Section 504 accommodations. Student's parents and School District officials agreed to a behavior intervention plan (BIP). However, the implementation of the BIP had little effect on Student's behavioral issues, and Student's grades declined by the end of the semester. *Id.* at 787.
 7. On January ***, 2015, Student ***. On January ***, 2015, the School District held another Section 504 meeting, during which the School District informed Student's parents that Student would be referred for a special education evaluation. The School District gave Student's parents the option to

- enroll Student in the *** program, and Student's parents agreed. *Id.*
8. While attending ***, Student was assigned a multidisciplinary team, which completed a full individual evaluation (FIE) on February ***, 2015, and diagnosed Student with poor emotional and behavioral regulation and an emotional disturbance. *Id.*
 9. On March ***, 2015, an Admission, Review, and Dismissal (ARD) committee convened to develop an IEP for Student based on the FIE conducted by the multidisciplinary team. The ARD committee consulted with Student's parents to create a BIP that focused on using positive behavioral approaches and to teach Student replacement behaviors. The BIP further outlined that staff were to avoid power struggles with Student. The IEP did not state that timeouts or restraints may be used to address Student's behavioral difficulties. *Id.* at 787-88.
 10. The ARD committee, including Student's parents, agreed to enroll Student in an adaptive behavior program located at ***. Student was enrolled at *** on March ***, 2015. *Id.*
 11. At ***, when Student acted out, Student would be directed to a desk in the classroom, separated from the other students, for a five-minute period (Take 5) or a ten-minute period (Take 10). During these breaks, Student was allowed to engage in a replacement behavior such as drawing. Student was placed in a Take 5 or Take 10 timeout during *** of Student's *** days at ***. *Id.*
 12. Student was physically restrained on *** occasions due to physical aggression. On at least *** occasions, *** were called by School District staff after attempts to deescalate, but *** only spoke with Student during one of these incidents. *Id.*
 13. On May ***, 2015, School District staff called *** after Student *** and was restrained by other staff. A confrontation between *** and Student then occurred. The following day, *** faculty and Student's parents, without convening an ARD committee meeting, agreed that Student would begin Student's school day at 9 a.m. instead of 7:30 a.m. On May *** 2015, again without convening an ARD committee meeting, *** officials and Student's parents then agreed that Student's school day would be shortened to 9 a.m. – 12 p.m., resulting in a three-hour school day. *Id.* at 788-89.
 14. Ultimately, at the suggestion of Dr. ***, Student's treating psychiatrist, Student left *** with three days left in the school year. *Id.*
 15. The following summer, Student's parents enrolled Student for tutoring at ***, a private school. After academic and behavioral improvement during the summer, Student's

parents enrolled Student at *** for the 2015-16 academic year. On August ***, 2015, fewer than ten days before the beginning of the School District school year, Student's parents informed the School District that Student would not be re-enrolling in the School District. *Id.*

16. On February ***, 2017, following an incident, Student was removed from ***. Student's parents then enrolled Student at ***, a residential school in ***. *Id.*

V. LEGAL CONCLUSIONS REACHED BY FEDERAL COURTS

After a review of the SEHO'S decision, the record from the original due process proceeding, and the arguments of the parties, the Fifth Circuit and the District Court made legal conclusions in this case. These legal conclusions will not be revisited as part of the decision on remand.³ The following legal conclusions of the courts set a framework for this decision:

1. The school district violated its child find obligations to Student. As of October ***, 2014, the School District was on notice that general education interventions were not appropriate for Student and that relying upon Section 504 interventions would only delay providing Student the services Student needed. ***, 961 F.3d at 794.
2. The School District further violated its child find obligations when it unreasonably delayed the special education evaluation for Student between October ***, 2014, and January ***, 2015, totaling 99 days. Student's declining grades and missed educational benchmarks during this period demonstrate that Student suffered significant deprivation of educational benefits. ***, 2021 WL 3493151 at *1.
3. The IEP developed by the School District was adequate in design, but the School District's use of Take 5 and Take 10 substantially violated the IEP because the IEP did not authorize the recurrent use of timeouts. The School District's failure to properly implement Student's IEP denied Student educational benefits and resulted in an adverse effect on Student's grades and behavior. ***, 961 F.3d at 796.
4. The School District's use of physical restraints did not violate Texas law and force was necessary to prevent serious, imminent harm to Student, other students, and staff members. *Id.* at 797-98.

³ An issue of law or fact decided on appeal may not be reexamined on remand. *Lindquist v. City of Pasadena, Tex.*, 656 F. Supp. 2d 662, 677 (S.D. Tex. 2009), *aff'd*, 669 F.3d 225 (5th Cir. 2012).

5. The School District did not violate student's IEP by requesting *** presence on several occasions, as *** only spoke with Student on one occasion and the School District made efforts to avoid *** interaction with Student. Student's behavior posed risk of imminent, serious harm to Student, other students, and staff members. *Id.*
6. The initial modification of Student's school day from 7:30 a.m. to 9 a.m. did not violate Student's IEP. However, the second modification, which shortened Student's school day to three hours, was a substantial and significant deviation from Student's IEP, and resulted in the loss of academic benefits. *Id.* at 799.
7. Student is entitled to equitable relief for the School District's child find violation and failures to properly implement Student's IEP. ***, 2021 WL 3493151 at *3.
8. The two FAPE violations found for the 2014-15 school year do not extend to the subsequent 2015-16 school year, as Student's parents made the unilateral decision to withdraw Student from the School District shortly before the start of the new year. Furthermore, the School District fulfilled its child find obligation when Student was referred for a special education evaluation on January ***, 2015. There is no evidence that staff at the School District would have been unable to implement Student's IEP during the 2015-16 school year had Student attended. *Id.* at *3-
*4.
9. Petitioner has not shown by a preponderance of the evidence that the School District would have continued to violate Student's right to a FAPE beyond the 2014-15 school year, and therefore Student does not have a right to tuition reimbursement for the 2015-16 school year. *Id.*; *see also* ***, 961 F.3d at 789.
10. Student was denied a FAPE during the 2014-15 school year and is therefore eligible for compensation to remedy the education deficits that resulted. *Id.* at *5.

VI. REMAND HEARING

The hearing on remand was conducted June 6-8, 2023, via Zoom videoconferencing and recorded and transcribed by a certified court reporter. Petitioner was represented at the hearing by Sonja Kerr from the Connell Michael Kerr law firm and co-counsel Dorene Philpot from the Philpot Law Office. Student and Parent also attended the due process hearing.

Respondent was represented at the hearing by Amy Tucker and Myra Schexnayder from the Rogers, Morris & Grover law firm. In addition, ***, Special Education Director for the School District, attended the hearing as the party representative. Both parties timely filed written closing briefs. The Decision in this case is due on September 25, 2023.

VII. EVIDENCE PRESENTED AT REMAND HEARING

The parties submitted 82 joint exhibits, which were received into evidence without objection. The joint exhibits consisted of the exhibits from the original due process hearing, the transcripts of the original due process hearing, the original due process hearing decision, and the decisions and orders from the federal district court and the Fifth Circuit.

Petitioner offered 47 exhibits. Based upon the objections of Respondent, the SEHO excluded ten of Petitioner's exhibits, admitting 37 exhibits over any objections raised by Respondent. Petitioner offered the testimony of the following witnesses:

Student testified about Student's *** and about what little Student remembered from the 2014-15 school year.

Student's Grandfather testified about the expenses Grandfather paid on behalf of the family for Student's education.

***, a volunteer and substitute teacher in the School District, testified about her impressions of Student's classroom teacher in the School District for the 2014-15 school year.

***, an expert in psychology and school psychology, testified about the evaluation she conducted of Student in 2023.

***, the principal of *** during the 2014-15 school year, testified about Student's enrollment at *** and Student's education during the 2014-15 school year.

Dr. ***, an expert in psychiatry and Student's treating psychiatrist from 2020 to 2023, testified about Student's psychiatric treatment.

***, an expert in vocational rehabilitation and life care planning, testified about best practices for remediating Student's loss of educational services in 2014-15 and Student's present vocational needs.

*** testified about Student's education at the *** residential boarding school.

Student's *** testified about her relationship with Student and her recollections of Student's education in the School District.

Parent testified about Student's education and psychological services between 2015 and the present.

Dr. ***, an expert in clinical counseling, testified about psychological services she provided to Student.

Respondent offered 14 exhibits. Based upon the objections of Petitioner, the SEHO excluded nine of Respondent's exhibits and admitted the remaining five exhibits over any objection by Petitioner. Respondent offered the testimony of the following witnesses:

***, the Assistant Principal of *** during the 2014-15 school year, testified about Student's education during the 2014-15 school year.

***, Student's *** grade teacher at ***, testified about Student's educational services, behavior, and progress during the 2014-15 school year.

***, the Principal of *** during the 2014-15 school year, testified about Student's education and behavior while placed in the adaptive behavior program.

***, Student's teacher in the adaptive behavior program during the 2014-15 school year, testified about Student's education and behavior while placed in the adaptive behavior program.

***, an LSSP with the School District and an expert in school psychology, educational evaluations, educational programming, social skills development and behavior management, testified about Student's psychological history and the School District's evaluations of Student.

VIII. FINDINGS OF FACT ON REMAND

1. During the 2014-15 school year, Student failed all of Student's classes at *** and failed to make adequate progress on Student's behavior goals. Joint Exhibit (JE) 52 at 2; JE 60; Transcript (TR) at 347, 389.
2. Student received passing grades for Student's time in the *** program during the 2014-15 school year. However, Student's passing grades do not reflect completion of grade-level work from the *** grade curriculum. Teachers were instructed to give Student passing grades if Student turned in any assignments at all. JE 20 at 2; TR at 412.
3. Student did not make behavioral progress in the adaptive behavior program at ***. JE 52; TR at 472.
4. Best practices to address Student's loss of educational opportunities during the 2014-15 school year were to provide tutoring and other supports during the summer of 2015. TR at 189-90; Petitioner's Exhibit (PE) 35 at 4-5.
5. Student received tutoring services *** during the summer of 2015 at a cost to Parent of \$3,450. PE 22; PE 24 at 16; TR at 568.

6. In the spring of 2017, following Student's removal from ***, Parent requested that the School District provide homebound services. The School District declined this request and offered an adaptive behavior program in the School District as an alternative, convening ARD committee meetings in April and May of 2017 to discuss the proposal. Parent declined the School District's offer and indicated an intention to place Student at ***. Petitioner did not request a due process hearing to challenge the proposed action or request reimbursement for the *** placement. Respondent's Exhibit (RE) 3; TR at 261- 262, 341-342.
7. The School District completed another FIE of Student on October ***, 2018. RE 6.
8. Between 2016 and 2023, Student's Grandfather paid \$879,000 for Student's education and placement at the ***, the ***, and related expenses. PE 27 at 6; TR at 51.
9. Student is currently diagnosed with autism, without intellectual or language impairment, attention deficit disorder (ADD), ***. Student takes several medications to manage Student's conditions., Student's medications were significantly changed and adjusted by Dr. *** beginning in 2020. Student's current medication regimen plays a significant role in Student's success in school and successful mood and behavior management. TR at 156-157, 160-161, and 167.
10. Student attended the *** from 2020 to 2023, *** in Spring of 2023. Student will be *** in the fall of 2023. TR at 32.

IX. ANALYSIS ON REMAND

A. ARGUMENTS OF THE PARTIES

1. Petitioner's Position

On remand, Petitioner argues Student is entitled to compensatory education based upon a current assessment, Student's current needs, and an evaluation of the compensatory services offered by the School District. Petitioner's Closing Brief (PCB) at 22-23. Petitioner asserts, using quantitative analysis, that Student lost 792 hours of instruction during Respondent's child find violation and

was without appropriate instruction for a total of 167 total days. PCB at 23. Petitioner contends, since the School District offered no IEP or compensatory services after the 2014-15 school year, Student is entitled to a larger compensatory award. *Id.* Petitioner admits, however, Respondent convened ARD committee meetings in April and May of 2017 and offered an IEP for Student following Student’s dismissal from ***. Petitioner contends it was Respondent’s burden to prove the appropriateness of the offered IEP. *Id.* at 24.

Petitioner asserts this SEHO should order Respondent to pay for tutoring and support services Student currently requires to attend ***. *Id.* at 25. Petitioner also asks this SEHO to order reimbursement to Parent for Student’s private education and therapy services since the 2014-15 school year to “truly compensate” Student and “undo the damages” Student sustained. *Id.* at 26. Finally, Petitioner asserts Respondent should be required to pay for the recent expert assessments of Student because the assessments were necessary to determine Student’s current need for compensatory services. *Id.* at 27. Curiously, Petitioner, on remand for a determination of a compensatory award, also asks for this SEHO to order training for School District staff. *Id.* at 29.

2. Respondent’s Position

On remand, Respondent first argues its child find violation was isolated to only nine days during the 2014-15 school year. Respondent’s Closing Argument (RCA) at 1, 7. Respondent does, however, admit Student experienced behavior problems on Student’s very first day of school in 2014-15 and struggled with behavior throughout the first month of school. At the same time, Respondent continues to insist on arguing it was Parent’s obligation to identify all of Student’s disabling conditions.⁴ RCA at 4-5.

⁴The Fifth Circuit made it clear that it is the School District, not the Parent, that has the child find obligation. ***, 961 F.3d at n.13.

Respondent admits Student's improved grades while attending *** were not a reflection of actual grade-level work. *Id.* at 8. Respondent contends that Student's placement in timeout at *** was actually a benefit to Student, rather than an implementation failure. *Id.* at 9, 19. Respondent also argues Student made both academic and behavioral progress while at ***, *Id.* at 10.

Respondent asserts no specific educational deficits resulted from Respondent's child find and FAPE violations and Petitioner did not prove a specific compensatory remedy was necessary for Student. *Id.* at 15. Respondent reasserts the argument that Student's significant academic failings in the fall of 2014 are inconsequential because the School District's timelines for completing an evaluation and conducting an ARD committee meeting eliminate any child find failing. *Id.* at 18. Respondent also points out Petitioner is not entitled to reimbursement for *** for 2015-16 or 2016-17 because the Fifth Circuit already determined there was no entitlement for *** for these two school years. *Id.* at 27-28.

B. BURDEN OF PROOF

Generally, the burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). As such, Petitioner had the burden of proof at the original due process hearing to prove the offered IEP and services were not appropriate for Student. On remand, the burden of proof remains on Petitioner to prove Student requires the compensatory relief the SEHO was asked to determine. *J.N. v. Jefferson Cty. Bd. of Educ.*, 12 F.4th 1355, 1364 (11th Cir. 2021); *Phillips ex. rel. T.P. v. Dist. of Columbia*, 736 F. Supp. 2d. 240, 250 (D.D.C. 2010).

C. AUTHORITY OF SEHO TO ORDER REMEDIES

Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 374 (1996). Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *Id.* at 369. While, generally, this SEHO has broad authority to fashion relief, in this case, the SEHO's remedial authority is specifically limited by the factual determinations, legal conclusions, and remand mandates of the federal courts. ***, 2021 WL 3493151 at *2, *5.

D. RELEVANT TIME PERIOD FOR RELIEF

1. Child Find

To reiterate, the District Court remanded this case for this SEHO to determine whether the School District's child find violation and multiple failures to implement Student's IEP during the 2014-15 school year resulted in specific educational deficits for Student and, if so, what specific compensatory measures were needed to correct those deficits. *Id.* Significantly, the courts concluded the School District violated its child find obligations when it unreasonably delayed the special education evaluation for Student for 99 days. ***, 2021 WL 3493151 at *1. Respondent, on remand to this SEHO, tries again to assert the 99-day delay is insignificant, and only really amounts to a nine day delay, because of the timelines for school districts to complete the special education evaluation process. RCA at 1 and 9. However, this argument is a different version of Respondent's "safe harbor" argument the District Court specifically rejected during its remand hearing. ***, 2021 WL 3493151 at *2. Thus, as this SEHO is bound by the courts' determinations, in the first instance, this SEHO must determine if Student is entitled to a remedy for the 2014-15 child find violation, including the unreasonable 99-day delay. ***, 961 F.3d at 794; ***, 2021 WL 3493151 at *1.

2. FAPE Denials

The federal courts determined Respondent denied Student a FAPE in 2014-15 through multiple IEP implementation failures. ***, 961 F.3d at 796, 799. On remand, Respondent argues the use of timeout, or Take 5/10, at *** was actually an appropriate strategy under Student’s IEP rather than an IEP implementation failure. RCA at 9. However, the court already directly rejected this argument. “In sum, the use of the take-discipline was a significant or substantial departure from ***’s IEP. During the time period this departure occurred, *** regressed both educationally and behaviorally.” *Id.* at 797. Thus, this SEHO is charged with determining whether the 2014-15 IEP implementation failures, including the use of timeout, entitles Student to a remedy.

The courts were also explicit in determining the FAPE violations only related to the 2014-15 school year. Specifically, the courts determined Petitioner failed to show the School District would have continued to violate Student’s right to FAPE beyond the 2014-15 school year. Based upon this determination, the courts concluded Student did not have a right to tuition reimbursement for the 2015-16 school year. ***, 961 F.3d at 789; ***, 2021 WL 3493151 at *1.

Nonetheless, on remand, Petitioner requests reimbursement for Student’s private placements from 2015-16 through 2022-23. PCB at 26. Under the IDEA, students may be entitled to reimbursement for private placements when the school district fails to provide a FAPE and the private placement is appropriate. However, a student is not entitled to reimbursement for private placements during time periods where no FAPE violation occurred. ***, 961 F.3d at 789; ***, 2021 WL 3493151 at *1.

The courts have already explicitly rejected Petitioner’s reimbursement request for Student’s 2015-16 school year at ***. *Id.* To be entitled to reimbursement for private

placements in subsequent school years, Petitioner must prove a denial of FAPE for each subsequent school year and that the private placement for that particular school year was appropriate. Moreover, notice of the private placement reimbursement request must be provided to the school district. *Burlington Sch. Comm.*, 471 U.S. at 370; *Florence Cty. v. Carter*, 510 U.S. 7 (1993); 34 C.F.R. § 300.148 (b), (c).

Petitioner never challenged the School District's special education services for Student after filing this present case, which only challenges the School District's 2014-15 program and proposed 2015-16 program. Petitioner admits the School District offered an IEP to Student in spring of 2017 following Student's removal from ***. However, Petitioner never exercised their rights to request a due process hearing to challenge the provision of a FAPE to Student that spring or any other time. 34 C.F.R. §§ 300.503(a)(1)(2), 300.507(a); 19 Tex. Admin. Code § 89.1151(a). Moreover, while Petitioner provided notice of their intention to place Student at ***, they never provided notice to the School District of their intention to place Student at the *** and seek School District reimbursement. 34 C.F.R. § 300.148(b), (c). Since Petitioner has not established Student was denied a FAPE in any year subsequent to 2014-15, Petitioner has not shown an entitlement to reimbursement for any private placement in 2016-17 or beyond. ***, 961 F.3d at 789; ***, 2021 WL 3493151 at *1.

E. COMPENSATORY RELIEF FOR 2014-15 CHILD FIND AND FAPE VIOLATIONS

Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (quoting *G. ex rel. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003)). An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite

educational benefit denied by the school district's failure to comply with the IDEA. Letter to Kohn, 17 IDELR 522 (OSERS 1991). The ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid*, 401 F. 3d at 524.

Here, the parties were given the opportunity to present evidence regarding Student's specific educational deficits resulting from Student's loss of a FAPE in 2014-15 and the specific compensatory measures needed to best correct those deficits. *Id.* at 526. A compensatory education determination in this case is quite challenging given eight years have passed since the violations. Moreover, at the time of the violations, Student was in *** grade and, now, Student has just started Student's ***.

However, an examination of the original record in this case and the record on remand demonstrates that Student experienced significant educational deficits as a result of both the child find and FAPE violations. First, the School District's efforts to address Student's behavior during the unreasonable 99-day delay had little impact. ***, 961 F.3d at 787. During that same time period and while at ***, Student had poor, declining grades. *Id.*; JE 52 at 2; JE 60; TR at 347, 389. Additionally, Student did not complete grade-level work while placed in the *** program. JE 20 at 2; TR at 412. In sum, Student failed to make academic or behavioral progress during the period of the School District's child find violation.

Turning to Student's time at *** and the IEP implementation failures, the record also makes it clear Student experienced significant deficits during this time period. As the Fifth Circuit indicated, during the time period the School District violated Student's IEP by using timeouts, Student regressed both educationally and behaviorally. ***, 961 F.3d at 797. Additionally, as the Fifth Circuit points out, the School District would not have proposed to shorten Student's school day on two occasions if the program at *** had been successful.

Id. Finally, the record on remand made it clear that Student failed to make behavioral progress at ***. JE 52; TR at 472.

To address these deficits, Student is entitled to the services Student needs to elevate Student to the position Student would have occupied absent the School District's failures. *Reid*, 401 F. 3d at 527. Immediately following Student's difficult 2014-15 school year, Student received tutoring at *** during the summer. As one of Petitioner's experts indicated, this type of tutoring was the best means for remediating the deficits Student experienced during the 2014-15 school year. TR at 189-90; PE 35 at 4-5. As such, this SEHO concludes Petitioner is entitled to reimbursement for the tutoring services Student received in the summer of 2015, because these services were necessary to elevate Student to the position Student would have occupied absent the school district's failures. *Reid*, 401 F. 3d at 527.

Petitioner requests reimbursement for Student's multiple private placements as compensatory relief for the 2014-15 FAPE denials. Clearly, in this case, Respondent committed a significant child find violation. Student had behavior challenges while Student was in *** in the School District, struggled immediately upon Student's return in *** grade, and Parent informed School District officials within the first weeks of school that Student had disabilities. Yet, the School District ignored all of these indicators, failed to take proactive steps, and unreasonably delayed Student's special education evaluation.

However, Petitioner failed to make a clear connection between the 2014-15 violations and Student's need for private placements. Student has a complicated diagnostic profile. According to Dr. ***, Student's treating psychiatrist for the past three years, Student has autism, without intellectual or language impairment, ADD, ***. Student's medications were significantly changed and adjusted by Dr. *** beginning in 2020, which played a significant role in Student's success in school and successful mood and behavior management. TR at 156-57,

160-61, 167. Additionally, Student had a significant history of educational and behavioral challenges prior to the 2014-15 school year in the School District. And although Petitioner contends Student experienced trauma during the 2014-15 school year through the actions of the School District, including the use of restraint and *** interventions, the Fifth Circuit concluded both the use of restraint and *** interventions were appropriate. ***, 961 F.3d at 797-98. Therefore, based upon Student's challenges prior to 2014-15, Student's complex diagnostic profile, the conclusions of the Fifth Circuit, and the record on remand, this SEHO concludes Petitioner failed to meet their burden to prove that the private placements were necessary to compensate Student for the School District's child find and FAPE violations in 2014-15.

X. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer*, 546 U.S. at 62.
2. Petitioner has the burden of proof to show entitlement to compensatory relief on remand. *J.N. v. Jefferson Cty. Bd. of Educ.*, 12 F.4th 1355, 1364 (11th Cir. 2021); *Phillips ex. rel. T.P. v. Dist. of Columbia*, 736 F. Supp. 2d. 240, 250 (D.D.C. 2010).
3. Student was denied a FAPE during the 2014-15 school year. *Spring Branch Indep. Sch. Dist. v. ****, *by next friend ****, 961 F.3d 781 (5th Cir. 2020)
4. Petitioner met their burden of proving that Student was entitled to compensatory tutoring services during the summer of 2015. *Schaffer*, 546 U.S. at 62; *Reid*, 401 F. 3d at 523.
5. Petitioner is not entitled to private placement at District expense for the 2015-16 school year and beyond. *Burlington Sch. Comm.*, 471 U.S. at 370; *Florence Cty. v. Carter*, 510 U.S. 7 (1993); *Reid*, 401 F. 3d at 523.

XI. ORDERS

Based upon the foregoing findings of fact and conclusions of law, Petitioner's request for \$3,450 in reimbursement for tutoring for Student in the summer of 2015 at *** is **GRANTED**.

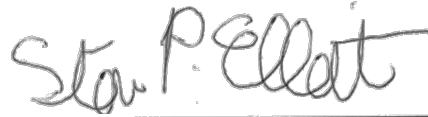
SOAH DOCKET NO. 701-16-0953.IDEA
TEA DOCKET NO. 068-SE-1015

DECISION ON REMAND

PAGE 20

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

SIGNED September 25, 2023.



Steve Elliot
Special Education Hearing Officer
For the State of Texas