

**Before the
State Office of Administrative
Hearings**

**STUDENT, BY NEXT FRIENDS PARENT AND PARENT,
PETITIONER
v.
FARMERSVILLE INDEPENDENT SCHOOL DISTRICT,
RESPONDENT**

DECISION OF THE HEARING OFFICER

***, (Student), by next friends *** and *** (Parents and, collectively, Petitioner), bring this action against the Farmersville Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issue in this case is whether District denied Student a free appropriate public education (FAPE) by failing to provide appropriate services and goals to allow Student to make meaningful progress despite Student's behaviors related to autism. The Hearing Officer concludes that District failed to properly

individualize Student's individualized education program (IEP) to address Student's behaviors, resulting in denial of a FAPE.

I. DUE PROCESS HEARING

The due process hearing was conducted on April 30 and May 1, 2024. The hearing was recorded and transcribed by a certified court reporter. Janelle L. Davis of Janelle L. Davis Law, PLLC represented Petitioner. Debra Liva, Petitioner's non-attorney advocate, and Student's Parent were also present at the hearing. Stephen Dubner of the Law Office of Stephen E. Dubner represented Respondent. ***, the Director of Special Programs for District, attended the hearing as Respondent's party representative.

Respondent prepared 15 joint exhibits for the parties, all of which were admitted.¹ Petitioner offered 38 exhibits, 18 of which were admitted over Respondent's objections.²

Petitioner offered the testimony of *****, Student's former teacher and case manager; ***, a former special education teacher with District; ***, *** assigned to Student's campus;

¹ At the hearing, Respondent attempted to add an additional exhibit, Joint Exhibit (J. Ex.) 16, but the request was denied.

² Petitioner's Exhibits (P. Exs.) 1, 14, 15, 17, 18, 19, 23, 24, 25, 28, 30, 31, 37, and 38 were duplicative of joint exhibits and were withdrawn. P. Exs. 20, 26, and 27 were duplicative of exhibits offered by Respondent and were withdrawn. P. Exs. 2-13, 21, 22, 33, 34, and 36 were admitted. P. Ex. 29 was admitted in part, with only pages 73-75, 76, 80-83, 85, 114-118, 121, 124-126, 128, and 132 being admitted.

*****, a licensed speech language pathologist working for District; and
***, Student's Parent.

Respondent offered 36 exhibits, 22 of which were admitted over Petitioner's objections.³ Respondent offered the testimony of *****, District's school psychologist, and ***, Student's case manager and special education teacher for District. Both parties filed written closing briefs in a timely manner. The Decision of the Hearing Officer is due on June 17, 2024.

II. RESPONDENT'S EXHIBIT 36

On May 1, 2024, during the second day of the two-day hearing, ***, Student's Parent, testified regarding a psychological evaluation of Student that had not been provided to Respondent. Ms. Davis, attorney for Petitioner, confirmed that her client received a copy of the evaluation on April 24, 2024, and that she did not learn about the existence of the evaluation until April 26, 2024. She stated that she did not turn the evaluation over to Respondent because she did not want the hearing to be continued and because, by the time she received a copy, the disclosure deadline had passed. After admonishing Ms. Davis regarding her ongoing obligation to supplement discovery responses, the Hearing Officer offered Respondent the opportunity to keep the hearing open until May 10, 2024 to allow Respondent time to review the evaluation. Respondent ultimately declined. Additionally, the Hearing

³ Respondent's Exhibits (R. Exs.) 1, 3, 4, 6, 17, 19, 31, 32, and 35 were duplicative of joint exhibits and withdrawn. R. Exs. 2, 7-11, 13, 15, 18, 20-24, 27, 29, 30, 33, 34, and 36 were admitted. R. Ex. 12 was admitted for the limited purpose of showing that the email was received by Petitioner. R. Ex. 14 was admitted for the limited purpose of showing that the email was received and that Parents had notice of *** concerns from District.

Officer allowed the document to be introduced into evidence at Respondent's request. The exhibit is marked as R. Ex. 36.⁴

III. ISSUES

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

1. Whether District failed to provide Student with a FAPE during the relevant time period by failing to provide speech services and failing to work with Student's parents to provide services pursuant to House Bill (HB) 4545;
2. Whether District denied Student's parents an opportunity for meaningful participation in scheduling services pursuant to HB 4545;
3. Whether District failed to provide Student with a FAPE by failing to develop an appropriate IEP to address Student's unique needs by failing to provide specific and measurable goals, including, but not limited to, goals relating to speech services, psychological consult services, self-advocacy, academics, behavior, and applied behavior analysis (ABA) strategies;
4. Whether District failed to properly train staff who work with Student and failed to provide proper interventions and supports to address Student's unique needs due to Student's disabilities;
5. Whether District failed to provide Student with appropriate related services including, but not limited to, speech for articulation, occupational therapy for handwriting, sensory support, and ABA/social skills training;
6. Whether District properly dismissed Student from speech services;
7. Whether District failed to qualify Student as a student with a speech impairment pursuant to the IDEA; and

⁴ Transcript (Tr.) at 360-361, 412-423.

8. Whether Student made meaningful progress pursuant to the IDEA.

Petitioner requested the following items of relief:

1. An order requiring District to provide an independent educational evaluation (IEE) in all areas of actual or suspected disability, including but not limited to cognitive and achievement, speech, occupational therapy, and a functional behavior assessment (FBA) at district expense;
2. An order finding that Student's rights to a FAPE have been violated;
3. An order requiring an admission, review, and dismissal (ARD) committee meeting to be held to establish specific measurable goals after the IEE is completed;
4. An order requiring District to provide compensatory education and related services specific to Student's academic progress, speech therapy, and direct occupational therapy needs, including but not limited to ABA therapy and *** therapy;
5. An order requiring District to reimburse any out-of-pocket expenses Parents have incurred for private services or therapies or fees related to such services and therapies; and
6. Any and all other remedies that Petitioner may be entitled to under the law.

IV. FINDINGS OF FACT

1. Student is *** years old and in the *** grade. Student enrolled in District prior to the beginning of the relevant time period. On February ***, 2024, Student's parents withdrew Student from District.⁵

⁵ Tr. at 44-47.

2. Student was diagnosed with autism at *** years old and continues to be eligible to receive services under the IDEA due to Student's autism. Student's 2019 full individual evaluation (FIE) found that Student's aggression was clinically significant.⁶
3. In 2016, Student was found to meet the criteria as a student with a speech impairment in the area of expressive language, but Student was dismissed from speech at the ARD committee meeting held on August ***, 2022.⁷
4. The parties stipulated that the relevant time period in this matter began on October ***, 2021.⁸

2021-2022 School Year – * Grade**

5. On April ***, 2022, Student's annual ARD committee meeting was held. Student continued to be found eligible for services under the IDEA in the areas of autism and speech. Student had access to behavior supports in the general education classroom and access to the *** (*****)⁹ for support at any time. Student was passing Student's classes, but Student's teachers noted that Student's behavior detrimentally impacted Student's academic performance. Student's accommodations primarily related to Student's behavior.
6. Student had met all Student's speech goals and only three goals remained in Student's IEP, two related to behavior and one related to visual processing. An FIE was due on April ***, 2022, so it was agreed that the ARD committee would reconvene after that date. It was also noted that

⁶ P. Exs. 2, 5; J Ex. 10;.

⁷ P. Ex. 3; J. Ex. 2.

⁸ Tr. at 46.

⁹ The parties use the term *** (***) and ***** interchangeably. *** is also used in some of Student's documents. No evidence was offered regarding the relationship between the ***** and ***, but they appear to refer to the same or related programs. See Tr. at 126. For consistency, the ALJ uses the term ***** unless directly quoting a record or witness using the term "***."

Student's parents were pursuing ABA therapy. The meeting ended in agreement.¹⁰

7. Student's behavior intervention plan (BIP) was also reviewed and updated. The BIP notes that Student's *** begins as avoidance of school, but Student may become physically aggressive *** when Student is ***. After *** is fulfilled, the function changes to obtaining attention. Student uses ***.
8. The BIP recommended setting well-defined limits, rules, and tasks; providing structured environments and a consistent routine; providing Student with a quiet, non-threatening, non-stimulating place to regain control; *** to give Student the opportunity to transition to the *****; setting easily obtainable daily goals; offering choices; using verbal reminders and If/Then statements; using positive reinforcers; giving Student the opportunity to earn activities/privileges; the use of an at-school reward system; teaching alternative behaviors; coaching in problem-solving situations; review of consequences before behavior escalates; offering choice of changing behavior or going to cooling off area; teacher-initiated cooling off periods; using conflict management and mediation steps; and access to the *****. A ***was to be used to provide structure to Student when Student is making decisions.
9. The behaviors reported in the BIP include disruption in the classroom; ***; task refusal; refusal to follow adult direction; and ***. It was noted that use of tangible items; a reward system; a point/token system; a behavior chart; verbal praise; and earned activities seemed to work effectively for Student. Ignored behavior made the behavior worse. Removal of a reinforcer that was earned or redirection worked inconsistently. A cooling off or failure to earn reinforcers worked effectively.¹¹

¹⁰ P. Ex. 13.

¹¹ P. Ex. 13.

10. The FIE was completed on April ***, 2022. Regarding Student's speech, the report found that Student has demonstrated growth from Student's previous FIE dated April ***, 2019. The report found that Student was average in most areas but was below average in executing oral directions, comprehension of body language and vocal emotion, social and language inference, and in overall social skills communication. However, the FIE concluded that Student does not demonstrate an articulation, voice, or fluency disorder which would directly impact Student's ability to participate and make progress in the general education curriculum.
11. The report found that Student does not exhibit a communication disorder which adversely affects Student's ability to accomplish the Listening and Speaking Texas Essential Knowledge and Skills (TEKS). The report also found that strategies utilized in the general and special education setting, along with Student's IEP, will allow for more meaningful expanded language opportunities for Student. The report concluded Student no longer required specialized instruction from a speech- language pathologist.
12. Regarding Student's behavior, the report noted teacher concerns related to *** and parent concerns with transitions and behavior. Additionally, a review of school records showed that Student struggled with ***, task refusal, classroom disruption, ***, refusal to follow adult directives, ***.
13. The report found that Student had mild-to-moderate autism spectrum disorder, resulting in difficulties with appropriate social interaction which affected Student's ability to build and maintain relationships with others. The report also found that Student's behaviors interfere with Student's learning and the learning of others. The report concluded that Student continues to meet the disability criteria as a student with autism.
14. The report recommended that Student needs special education due to Student's autism. Recommendations included providing rewards; a structured environment; well-defined limits, rules, and expectations; consistent feedback and positive reinforcement; creating a safe place to cool down;

offering choices; providing preferential seating; forewarning of changes in schedule; and social skills instruction.¹²

15. At the hearing Ms. ***, the licensed speech language pathologist who was responsible for the speech portion of Student's assessment, testified that, while Student was slightly below average in several assessed areas, Student's deficits were not greater than one and a half standard deviations off the mean of the test, which means that Student does not meet the criteria of a moderate disorder based on the recommendations of the Texas Speech and Hearing Association. Therefore, Student does not need speech services under the IDEA to access the academic curriculum.¹³

2022-2023 School Year - * Grade**

16. On August ***, 2022, an ARD committee meeting was held to discuss accelerated instruction requirements for Student under HB 4545 due to Student not meeting standards in reading or math on the State of Texas Assessments of Academic Readiness (STAAR). The notes from the meeting state that Parents refused services under HB 4545 because they did not want any changes to Student's schedule.¹⁴
17. District had offered services under HB 4545 over summer or outside of school hours during the school year.¹⁵
18. On the morning of August ***, 2022, Ms. ***, Student's speech teacher, emailed Student's parents to inform them of Student's progress in speech and that Student no longer needs speech therapy in the academic setting.¹⁶

¹² J. Ex. 1.

¹³ Tr. at 209-210, 226, 236, 237.

¹⁴ J. Ex. 2.

¹⁵ Tr. at 292.

¹⁶ R. Ex. 2.

19. On August ***, 2022, an ARD committee meeting was held to review the FIE. The notes of the meeting state that Student no longer qualified as a student with a speech impairment but did continue to qualify as a student with autism. Services were reviewed, speech therapy was removed, and all other services remained the same. The notes reflect that the meeting ended in agreement.¹⁷
20. An annual ARD committee meeting was held on March ***, 2023. Student was passing Student's classes, but Student's academic benchmark scores were low, with a ***. It was noted that Student's *** score was *** because Student refused to attempt the assessment.
21. Behavior continued to be an area of concern and it was noted that Student struggles in large, unstructured groups such as ***. Student was showing improvement in academics but would not participate in tests or independent work. Additional accommodations were added, focused on managing Student's behavior. Student's three goals received minor amendments. No changes were made to Student's targeted behaviors or strategies in Student's BIP. Parent agreed to the ARD committee proposals.¹⁸

2023-2024 School Year - * Grade**

22. On the morning of August ***, 2023, an incident took place at school involving ***. The video of the incident ***. ***. Ms. ***** testified that she gave Student a choice of ***. After she returned ***

¹⁷ J. Ex. 2.

¹⁸ J. Ex. 3.

***. ***. ***. ***. ***. ***. ***. As a result of this ***.¹⁹

23. On August ***, 2023, District removed Ms. *** as Student's
24. teacher and case manager and made *** Student's case manager instead.²⁰
25. Student did not attend school from August ***, 2023 to September ***, 2023.²¹
26. On August ***, 2023, District sent an email to Parents notifying them that the incident qualified as ***; that state law required placement in the disciplinary alternative education program (DAEP) for 30 days; that a manifestation determination review (MDR) would need to be convened; and that, until it could be convened, Student would be placed in in-school suspension (ISS). Any time spend in ISS would be deducted from the 30-day DAEP placement.²²
27. On September ***, 2023, the MDR was held. It was noted that Student's aggressive behaviors had occurred previously on several occasions, that the behavior was included in Student's evaluation and disability determination, and that the behavior was addressed in Student's IEP and BIP. It was determined that Student's behavior *** was a manifestation of Student's autism. It was also determined

¹⁹ J. Exs. 11, 13, 14; Tr. at 72-73, 93-110, 116-122.

²⁰ R. Ex. 7; Tr. at 82.

²¹ R. Ex. 13.

²² R. Ex. 8 at 2.

that the incident was not a direct result of a failure to implement Student's IEP. Parents agreed with not placing Student in DAEP but indicated that they were not agreeing with District on any other points. District attempted to discuss how to support Student moving forward, but Parents tabled the meeting to allow time to process the determination.²³

28. On September ***, 2023, ***, ***, ***, " Additionally, Student ***,²⁴
29. On September ***, 2023, District requested consent for a new FBA due to behavior concerns.²⁵
30. On October ***, 2023, an incident occurred ***. However, it appeared to be an accident ***,²⁶
31. On October ***, 2023, Student ***,²⁷
32. On October ***, 2023, Student ***, ***, " ***,²⁸

²³ R. Ex. 10; P. Ex. 36.

²⁴ R. Ex. 20 at 10-11; P. Ex. 29 at 117.

²⁵ P. Ex. 22.

²⁶ R. Ex. 27 at 11.

²⁷ R. Ex. 27 at 18.

²⁸ R. Ex. 27 at 22, 24.

33. On November ***, 2023, Mr. *** sent an email to Parents stating that Student is currently not being successful in *** or at school. Mr. *** proposed moving Student back to the general education classroom so that “Student will hear the lessons and hopefully make a good choice to do Student’s work.”²⁹
34. On December ***, 2023, an FBA was completed for Student by *****, District’s school psychologist. The areas of behavior identified as interfering with Student’s classroom success were refusal/noncompliance, ***, and ***. *** was identified as a new refusal behavior. It was recommended that instructors provide clear and precise expectations; provide a low- stimulation area for completing work; be consistent with BIP strategies; and provide choices.³⁰
35. On January ***, 2024, Student received a Speech Therapy Initial Evaluation at *** (***). As part of the evaluation, the evaluator received information from Student’s Parent and Student. The report does not reflect that information from District or Student’s teachers was reviewed. Several questions regarding Student’s health and developmental background were marked as unknown. During the testing, Student ***. The report of the evaluation states that, due to Student’s anxious state, it is likely that Student’s answers do not reflect accurate information.
36. A CELF-5 Pragmatic Profile was completed on Student. This descriptive checklist is used to gain information about Student’s verbal and nonverbal pragmatic skills that may influence social and academic communication. Student was found to have a percentile rank of ***. The evaluator recommended that Student initiate speech therapy with two 30-minute sessions a week for 12 months.³¹

²⁹ R. Ex 27 at 28.

³⁰ J. Ex. 4.

³¹ R. Exs. 29, 33, 34.

37. At the hearing, Ms. *** testified that it was not best practice to evaluate a child when they were dysregulated or in an emotional state, which Student was during the *** evaluation.³²
38. On February ***, 2024, an ARD committee meeting was held to review the FBA. Petitioner’s advocate, Debra Liva, was in attendance. Student had ***. District representatives shared that no strategies appeared to be effective to manage Student’s behavior. Ms. Liva declined to discuss what strategies worked at home to managed Student’s behavior. After a review of the FBA, Ms. Liva stated that Parents do not agree with the assessment, but refused to clarify what they did not agree with. Instead, Ms. Liva stated that she was generally disagreeing. She requested an IEE for an FBA and also requested an out of district placement with Behavior Network. Additionally, Parents stated that they were providing their “10-day notice.” District stated that they believed District’s current placement was the most appropriate placement based upon Student’s disability and that a non-public day school is a more restrictive setting.³³
39. On February ***, 2024, ***. ***. ***.³⁴
40. On February ***, 2024, Parents withdrew Student from District.³⁵
41. On April ***, 2024, a private psychological evaluation was completed on Student at the request of Parents due to concerns regarding Student’s autism symptoms, specifically Student’s ***. The evaluator conducted a clinical interview, a review of records, reviewed a child/adolescent

³² Tr. at 233.

³³ J. Exs. 5, 15.

³⁴ R. Ex. 20 at 52, 53.

³⁵ Tr. at 44-47.

biopsychosocial history questionnaire, and administered a variety of assessments, including the Behavioral Assessment System of Children, Third Edition (BASC-3); the Autism Spectrum Rating Scales (ASRS); the Behavior Rating Inventory of Executive Functions, Second Edition (BRIEF-2); the Social Responsiveness Scale, Second Edition (SRS-2) parent report; selected subtests of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); the Wechsler Abbreviated Scale of Intelligence, Second Edition (WASI-2); selected subtests of the NEPSY Developmental Neuropsychological Assessment, Second Edition (NEPSY-II); and the Autism Diagnostic Observation Scale, Second Edition (ADOS-2).

42. The psychological evaluation found that, while Student's activity level was generally within normal limits during the testing, Student gave low effort at times and displayed a haphazard approach to difficult tasks. Student's intellectual function fell in the borderline/below average range. Student also fell in the borderline/below average range for verbal comprehension and perceptual reasoning. Student fell in the very low range for working memory and processing speed. Student demonstrated self-regulatory problems in multiple domains, suggesting global problems with self-regulation. Student's evaluation also suggested a tendency to lose emotional control when Student's routines or perspectives are challenged or when flexibility was required, as well as substantial problems with adaptability, social skills, and functional communication.
43. The report concluded that the presence of an autism spectrum disorder signified deficits in communication, social interactions, and behavior across all settings. In addition, the reported information suggested the presence of significant impairment associated with ***. The report recommended ABA therapy, as well as social skills instruction.³⁶
44. *** may be part of, and could fall under, an autism spectrum diagnosis. Knowledge that a student with autism has

³⁶ R. Ex. 36.

*** may change the accommodations, modifications, and services a student receives under the IDEA.³⁷

45. District does not evaluate students for ***.³⁸
46. District's emails to Petitioner show that Student continued to exhibit regular problems with *** between September ***, 2023 and February ***, 2024. However, some of Student's regression is due to Student's ***-long absence from school from ***.³⁹
47. ***** received her certification as a special education classroom teacher for early childhood through twelfth grade on ***, 2021, which does not expire till ***, 2026. She began working in education as a paraprofessional in *** 2018. Ms. *** received her most recent Crisis Prevention Institute (CPI) training, which is training in de-escalation and restraint, on ***, 2023, which expires on ***, 2025. She testified that she had been previously CPI certified in 2018, while employed as a teacher for another school district, and that her CPI training was current on the date of the incident. She has also received training in special education, including training in autism.⁴⁰
48. Throughout the relevant time period Parents had an opportunity to review the procedural safeguards as well as ask questions at the ARD committee meetings and at other times.⁴¹

³⁷ Tr. at 480, 483-484.

³⁸ Tr. at 482-483.

³⁹ R. Ex. 27; Tr. at 166-167.

⁴⁰ J. Ex. 12; Tr. at 66-67, 122.

⁴¹ Tr. at 350.

V. DISCUSSION

A. DUTY TO PROVIDE A 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 district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), .201; Tex. Educ. Code § 29.001.

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, 188-89, 200-01, 203-04 (1982). The basic inquiry 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. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

B. BURDEN OF PROOF

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁴² *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

⁴² There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding.

The burden of proof in this case is on Petitioner to show that District failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*; *Endrew F.*, 580 U.S. at 399.

C. FAPE

A hearing officer applies a four factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

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

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F., 118 F.3d 245, 253 (5th Cir. 1997); *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765-66 (5th Cir. 2018).

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. *Michael Z.*, 580 F.3d at 294.

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, 320, 323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the District must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress, not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

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

a) Student's Behavior

Whether or not an IEP is appropriate and sufficient to ensure meaningful progress is not just limited to the Student's academic need. Rather, educational need also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S.*, 2002 U.S. Dist. LEXIS 6247 (N.D. Tex. 2002). Petitioner challenged whether the IEP contained individualized specific and measurable goals and appropriate related services to address Student's unique needs related to Student's behavior.

Student, who is *** years old, has been diagnosed with autism. One of the behaviors related to Student's autism is ***. During the relevant time period Student was involved in ***. On November ***, 2023, Mr. ***, Student's case manager, emailed Student's parents stating that Student was not being successful in general education or the ***. At the February ***, 2024 ARD committee meeting, a District member of the ARD Committee stated that District's strategies to manage Student's behavior were not successful. At the hearing, when Mr. ***, District's school psychologist, learned about Student's ***, he agreed that *** may be part of, and could fall under, an autism spectrum diagnosis. However, he testified that District does not test for *** because they do not consider it to be an eligibility category under the IDEA. Mr. *** also testified that, if District had known about Students ***, they may have provided different accommodations, modifications, and supports to Student.

District argues that they did not test Student for *** because it is not a category of eligibility under the IDEA. However, the purpose of evaluations under the IDEA is not only to determine if a student is eligible, but also to determine the educational needs of the child. 34 C.F.R. § 300.301(2)(ii). Based upon the testimony of Mr. **, District's expert, ** may be part of Student's autism and may require different accommodations than Student is currently receiving. The record reflects that District knew that the accommodations they were providing to Student were not being successful, that they failed to evaluate Student in a potential aspect of Student's autism, and that, due to that failure, they may not have had the proper accommodations, modifications, and supports in place to meet Student's unique needs. Therefore, the Hearing Officer concludes that Petitioner has met its burden to prove, by a preponderance of the evidence, that District failed to appropriately individualize Student's IEP to meet Student's unique needs.

b) Speech

The April **, 2022 FIE, along with the testimony of Ms. **, District's speech language pathologist, indicate that, as of the April **, 2022 ARD committee meeting, Student no longer needed speech services under the IDEA to access the academic curriculum. The notes of that ARD committee meeting reflect that Student's parents initially indicated agreement with this decision. While Petitioner's later IEE indicated a need for speech services, at the hearing District argued, and the IEE indicates, that Student's dysregulated state during the administration of the IEE raises serious concerns regarding the reliability of the results of the IEE. Beyond the IEE, Petitioner did not present any evidence to show that Student needs speech

services or was incorrectly dismissed from speech other than the opinion of Student's Parent, who is not qualified by training or experience to offer such an opinion. Therefore, the Hearing Officer concludes that Petitioner failed to prove, by a preponderance of the evidence, that District failed to properly individualized Student's IEP with regards to Student's speech needs or that District's dismissal of Student from speech was improper.

2. Least Restrictive Environment

Both parties recognize that Student needs access to the ***, a more restrictive environment, to address Student's behavior needs, and that Student previously needed access to a speech classroom to assist with Student's speech needs. Neither party has alleged that such a placement was inappropriate, nor does the record reflect that such a placement was inappropriate. Petitioner's request for private placement of Student, which may be considered a more restrictive environment, will be addressed in another section of this decision.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, Civil Action No. 4:16-CV-0058, 2017 WL 3017282, at *27 (S.D. Tex. June 15, 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an

outcome, because parents do not possess “veto power” over a school district’s decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student’s parents or refusal to listen to them, a school district must be deemed to have met the IDEA’s requirements regarding collaborating with a student’s parents. *Id.*

a) Development of IEPs

At the hearing, Petitioner argued that the IEPs were not developed in a collaborative manner. Student’s Parent asserted that, even though Parent had received the procedural safeguards, had the opportunity to attend and participate in the ARD committee meetings, and signed the forms at the end of the IEP meetings, Parent did not understand that Parent had a right to disagree with the district members of the ARD committee. However, the record reflects regular communication between Parents and District, that District sought feedback from Parents regarding the development of the IEPs, and that Parents’ feedback was considered in the development of the IEP. Therefore, the Hearing Officer concludes that Petitioner failed to prove that the IEPs were not developed in a coordinated and collaborative manner.

b) Speech

Petitioner alleged that Student’s dismissal from speech was pre-determined, as indicated by Ms. ***, Student’s speech teacher, emailing Petitioner on August ***, 2022, the same day as the ARD committee meeting, notifying them that Student no longer needed speech therapy in the academic setting. Predetermination occurs when district members of the IEP team unilaterally decide a student's educational placement in advance of an IEP team meeting. *Deal v.*

Hamilton Cnty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). At the hearing, Ms. *** testified that her intent in the email was to let Parents know about Student's progress and her opinion that Student no longer needed speech services so that Parents would be aware of it before the meeting. Nothing in the record reflects that the district members of the ARD committee made a final decision before the meeting, that Parents expressed any disagreement with Ms. *** at the ARD committee meeting, or that the district members of the ARD committee would not have considered any objections Parents may have had about dismissing Student from speech. Therefore, the Hearing Officer concludes that Petitioner has failed to prove that District predetermined Student's dismissal from speech.

c) HB 4545

Petitioner contends that District failed to work with Parents to provide services pursuant to HB 4545 and failed to allow Parents an opportunity for meaningful participation in scheduling services under HB 4545. HB 4545 services were addressed at an August ***, 2022 ARD committee meeting. The notes of that meeting reflect that Parents refused HB 4545 services. At the hearing, Student's Parent testified that Parent did not refuse the services. While Parent did not want Student to receive services over summer or after school, Parent testified that Parent had proposed that District adjust Student's schedule during the school day to allow for the accelerated instruction, which District refused to do. However, Petitioner did not provide any evidence of when these communications took place or who Parent communicated with. Other than the testimony of Student's Parent, nothing in the record reflects that District was informed of anything other than that Parents had refused services under HB 4545. Therefore, the Hearing Officer concludes that Petitioner has failed to

prove, by a preponderance of the evidence, that District failed to work with Student's parents to provide services pursuant to HB 4545 or failed to allow Student's parents an opportunity for meaningful participation in scheduling services under HB 4545.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P.*, 703 F.3d at 813-14.

The focus of the hearing was on the non-academic benefits Student was receiving. While Mr. ***'s testimony indicated that Student's behavior was improving, his emails home to Parents present a different picture. Between September ***, 2023 and February ***, 2024, Mr. *** documented regular instances of ***. On November ***, 2023, Mr. *** emailed Student's parents stating that Student was not being successful in general education or the ***. At the February ***, 2024 ARD committee meeting, less than a month before Student was withdrawn from District, a District member of the ARD committee stated that District's strategies to manage Student's behavior were not successful.

While not the focus of the hearing, the evidence also calls into question the level of academic benefit Student was receiving. Student was passing Student's classes. However, Student's academic benchmarks were low, with a ***. It was noted that Student's *** score was ***

***. The record also reflects that Student would regularly refuse to complete assignments, participate in instruction, or even attend class. Taken together, the evidence shows that District was not successful in managing Student's behaviors and Student's behaviors were severely limiting the academic and non-academic benefit Student was receiving.

5. FAPE Conclusion

District did not fully evaluate Student, and therefore did not appropriately individualize Student's IEP to address Student's behavior. The supports District had in place were insufficient to address Student's behavior needs, and therefore did not provide substantial non-academic benefit. Additionally, Student's refusal and aggression significantly limited the academic benefit Student was receiving. Taken together, Petitioner has met its burden of showing that Student's IEP was not reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances.

D. FAILURE TO IMPLEMENT

Petitioner alleges that the August ***, 2023 incident was a result of District's failure to implement Student's IEP and BIP appropriately. Specifically, they allege that ***, which was not required by Student's IEP.

To prevail on a failure to implement claim, Petitioner must show more than a de minimis failure to implement all elements of Student's IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). When determining whether a school district failed to adequately implement a student's IEP, a hearing officer must determine whether a FAPE was denied by considering, under the third Michael F. factor, whether there was a significant or substantial failure to implement the IEP and whether, under the fourth Michael F. factor, there have been demonstrable academic and non-academic benefits from the IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by next friend Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020), cert. denied, 141 S. Ct. 1389 (2021).

Turning to Petitioner's specific claims, while the ***. While Petitioner does not agree with Ms. ***'s interventions, the record does not support a claim that ***. Also, while the ***, there is no evidence to show that any actions, or failures to act, *** escalated the incident. Regarding the ***. Therefore, the failure to *** does not support a failure to implement claim. Regarding access to ***, while the BIP allows for access to ***—along with other supports—for Student in the ***, nothing in the BIP recommended or required Ms. *** to *** to provide to Student when

Student was outside of the ***. Regarding Ms. ***'s decision to ***, the BIP does provide for a teacher-initiated cooling off period and nothing in the BIP indicates that giving Student space to cool off is not appropriate.

Because Petitioner failed to show that District failed to implement Student's IEP or BIP or that any departures from the IEP or BIP were substantial or significant, the Hearing Officer concludes that Petitioner has failed to prove, by a preponderance of the evidence, that District failed to properly implement Student's IEP or BIP.

E. MS. *'S QUALIFICATIONS**

The IDEA requires that special education and related services be provided by "qualified personnel" who are appropriately and adequately prepared and trained and who possess the content knowledge and skills to serve children with disabilities. 34 C.F.R. § 300.156(a). Petitioner alleges that Ms. *** was not appropriately trained to manage Student's behaviors. However, the record reflects that she was a certified special education teacher, had appropriate training in restraint and redirection of students, and had at least some training specifically related to autism. Therefore, the Hearing Officer concludes that Petitioner has not proven, by a preponderance of the evidence, that District failed to appropriately train staff.

F. REMEDIES

Hearing officers have "broad discretion" in fashioning relief under the IDEA. Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *School Comm. Of Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985).

Regarding Petitioner's request for an IEE, the evidence reflects that District was not aware of Student's *** when drafting Student's IEP. District admitted that Student's *** was possibly related to Student's autism, but that Student had not been tested for *** by District. However, Student has received a number of recent evaluations, including the April ***, 2024 private psychological evaluation, and it does not appear that additional evaluations are needed to diagnose Student. The remaining question is, given the behaviors related to Student's autism and in light of Student's ***, what services and supports does Student need to enable Student to make progress appropriate in light of Student's circumstances. Therefore, instead of subjecting Student to further evaluation at this time, the Hearing Officer is ordering that a qualified evaluator be retained, at District expense, to review the existing evaluation data, including the private psychological report, and propose appropriate accommodations, supports, and services for Student to Student's ARD Committee. The retained evaluator will also make a recommendation as to any additional evaluations that may be needed.

Regarding Petitioner's request for a speech evaluation, Petitioner has not proven, by a preponderance of the evidence, that District's speech evaluation was not proper and the Hearing Officer has not found faults with District's speech evaluation that would justify ordering another IEE in speech.

Regarding Petitioner's request for compensatory education and related services, at the hearing Student's Parent testified that Parent was seeking ABA therapy.

District's school psychologist testified that ABA services were not appropriate because they are too restrictive, take place in a manufactured environment, and that Student had aged out of ABA therapy. However, Student's psychological evaluation recommended that Student receive ABA therapy. The psychological evaluation is persuasive because it was prepared by an impartial third party and was based on extensive evaluation of Student. However, no evidence was offered by Petitioner that would allow the Hearing Officer to determine the amount or duration of ABA services Student should receive. Therefore, Petitioner has failed to provide sufficient information to allow the Hearing Officer to issue an award of compensatory ABA services to Student.

Regarding other compensatory education or specific services, Petitioner has failed to offer sufficient evidence for the Hearing Officer to determine what, if any, other services are needed or appropriate.

Petitioner is requesting private placement at *** at District expense. Petitioner must meet a two-part test in order to secure reimbursement from the District for Student's private placement. First, Petitioner must prove the District's proposed program was not appropriate under the IDEA. Second, Petitioner must prove private placement is appropriate. *Burlington*, 471 U.S. at 370; *Florence Cnty. v. Carter*, 510 U.S. 7 (1993). While the Hearing Officer has found that District did not provide Student with a FAPE, the only evidence offered regarding the appropriateness of Petitioner's proposed placement was opinion testimony from Student's Parent, who testified that *** provides all therapies that Student needs. However, no evidence was offered from *** to show

that they did, in fact, offer those therapies, that the therapies offered would be appropriate for Student, or that *** was otherwise an appropriate placement for Student. Based upon this limited information, the Hearing Officer cannot determine if private placement at *** is appropriate for Student. *See Teague Indep. Sch. Dist. v. Todd L*, 999 F.2d 127 (5th Cir. 1993).

Petitioner did not offer any evidence of any out-of-pocket expenses incurred by Parents for private services or therapies, or fees related to such services and therapies. Thus, the Hearing Officer is unable to award any reimbursement for Petitioner in this area.

VI. CONCLUSIONS OF LAW

1. Petitioner has the burden of proof in this due process hearing. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. Petitioner met their burden to prove that District failed to provide Student with a FAPE during the relevant time period by failing to address Student's unique needs related to Student's behavior. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997). *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386 (2017).
3. Petitioner did not meet their burden to prove that District failed to provide Student with a FAPE during the relevant time period by failing to provide speech services. *Schaffer*, 546 U.S. at 62.
4. Petitioner did not meet their burden of proving that the District failed to implement Student's IEP or BIP. *Schaffer*, 546 U.S. at 62, *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).
5. Petitioner did not meet their burden to prove that District failed to collaborate and allow Student's parents to meaningfully participate in the educational decision making process. 34 C.F.R. § 300.501(b), (c); 34 C.F.R. § 300.322.

6. Petitioner did not meet their burden to prove that District failed to train staff who work with Student appropriately. 34 C.F.R. § 300.156.
7. Petitioner did not meet their burden to prove that Student's proposed private placement was appropriate. 34 C.F.R. § 300.148. *School Comm. Of Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985).

VII. ORDERS

The Hearing Officer makes the following Orders:

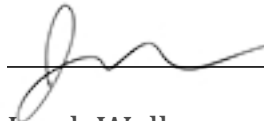
- 1) District is **ORDERED** to provide for an independent evaluator to review the existing evaluation data, as well as education records requested by the evaluator, at District expense for the purpose of determining what accommodations, supports, services, and/or additional evaluations Student needs to allow Student to make academic and non-academic progress appropriate in light of Student's circumstances, including Student's autism and ***. District must provide its criteria for selection of an independent educational evaluator to Petitioner within fourteen calendar days of the date of this decision. District may include a list of approved or preferred evaluators. Petitioner must provide notice to District of its selected evaluator within fourteen calendar days of receiving the selection criteria from District. District has 30 days after receiving Petitioner's evaluator selection to execute a contract with the evaluator. If the chosen evaluator declines to execute a contract with District, District has three business days to notify Petitioner of the refusal. Petitioner then has fourteen calendar days to make a new selection and District has 30 days from the date of the new selection to enter into a contract with the new evaluator.
- 2) Because the retained evaluator is independent, the Hearing Officer is not placing a deadline on how long the evaluator has to review the information and make its recommendations.
- 3) Within fourteen calendar days of receiving the recommendations of the evaluator, District will contact Petitioner to determine a date to convene

an ARD committee meeting to discuss the evaluator's report and consider revisions to Student's IEP. If, within seven calendar days of District contacting Petitioner, the parties are not able to agree on a date for the ARD committee meeting, District shall set a reasonable date and time for the ARD committee meeting and provide appropriate notice to Petitioner.

- 4) If either party requests the attendance of the evaluator at the ARD committee meeting, and if the evaluator agrees and is available, the evaluator shall be allowed to attend the ARD committee meeting. District is responsible for paying any costs associated with the evaluator attending the ARD committee meeting.
- 5) A failure by District to abide by these timelines is a violation of this order. A failure by Petitioner to comply with these timelines is a waiver of the independent evaluator review of the data.

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

Signed June 17, 2024



Jacob Wallace
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this case 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. 20 U.S.C. § 1415(i)(2); 34 C.F.R. §§ 300.514(a),.516; 19 Tex. Admin. Code § 89.1185(n).