CONFIDENTIAL

SOAH Docket No. 701-23-11447
TEA Docket No. 163-SE-0223

Before the State Office of Administrative Hearings

STUDENT, BY NEXT FRIEND PARENT,
Petitioner

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT,
Respondent

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend *** (Parent or, collectively, Petitioner), filed a request for an impartial due process hearing (Complaint) under the Individuals with Disabilities Education Act (IDEA) on February 3, 2023, with notice issued by the Texas Education Agency (TEA) on the same day. The Respondent to the Complaint is the Austin Independent School District (Respondent or the District).

The main issue in this case is whether the District provided Student a free, appropriate public education (FAPE) in Student's least restrictive environment (LRE). The Hearing Officer concludes that the District's proposed individualized education program (IEP) and placement, which cannot be implemented due to Student's stay put[1] status, provides Student a FAPE. However, from August 2021-January 2023, the District failed to provide Student a FAPE in Student's least restrictive environment.

The due process hearing was held February 20-22, 2024. The hearing was recorded and transcribed by a certified court reporter. Mark Whitburn from Whitburn & Pevsner, PLLC, represented Petitioner. Parent also attended the due process hearing, along with the family's advocate, David Beinke. Erik Nichols and Matthew Acosta from Spalding Nichols Lamp Langlois represented Respondent. ***, the Executive Director of Operations and Compliance for the District, attended the hearing as the party representative.

Seven witnesses testified during the course of the three-day hearing:

1. *** is a *** teacher at ***. She was a teaching assistant at *** in the program Student would be attending and testified about that program and how Student, with whom she has experience working, would fit well into the school.
2. *** is Student's *** teacher at ***. She described what it is like to work with Student and how she and other District staff members have *** this school year.
3. *** was the principal at *** during Student's *** years there. She described Student's academic career at *** from remote learning during the 2020-21 school

[1] 34 C.F.R. § 300.518(a).

year to being placed in a classroom by ***self during the 2021-22 and 2022-23 school years.

4. Dr. *** was Petitioner's expert witness. She testified that Student needs a less restrictive environment and a more effective behavior intervention plan and behavioral supports to support Student.
5. Parent testified about Parent's dissatisfaction with both the services provided by the District and the proposed placement at the ***.
6. *** is an applied learning specialist for the District. Part of her job is supporting Student's *** teachers. She testified about Student's need for a new campus to support Student and about the work the District has done to support Student in Student's present setting.
7. *** is a campus support coordinator for the District. She also testified about the need for Student to attend the ***.

The Hearing Officer admitted all 31 joint exhibits without objection. The Hearing Officer admitted Respondent's exhibits 2-3, 5-20, 23, and 25. The Hearing Officer admitted Petitioner's exhibits 1-2, 5 (pages 26-51), 7 (pages 1-4), 9-16, 23 (page 12), and 25.

The parties requested the opportunity to provide written closing briefs at the end of the hearing. Both parties filed timely written closing briefs on March 25, 2024. The Decision in this case is due on April 15, 2024.

II. ISSUES AND REQUESTS FOR RELIEF

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

1. Whether the District denied Student a FAPE.
2. Whether the District failed to develop an appropriate IEP for Student, including an appropriate autism supplement, that appropriately addressed Student's communication needs.
3. Whether the District failed to implement Student's IEP appropriately.

4. Whether the District has denied Student a placement in Student's LRE and denied Student appropriate access to non-academic settings.
5. Whether the District failed to conduct a timely reevaluation of Student.
6. Whether the District denied Parent meaningful participation in the IEP development process.
7. Whether the District procedurally violated the IDEA by pre-determining Student's placement, failing to provide required prior written notice, and failing to timely schedule an Admission, Review, and Dismissal (ARD) Committee meeting.

Petitioner requested the following items of relief:

1. Order the District to develop an appropriate IEP for Student that continues Student's placement at *** (***).
2. Order the District to provide Student with compensatory education services in academics, social skills, ***, and communication.
3. Order the District to provide Student with applied behavioral analysis (ABA) therapy from a board certified behavior analyst (BCBA).
4. Order the District to collect daily data regarding Student for 18-weeks.
5. Order the District to train staff working with Student on Student's IEP and needs.
6. Order the District to assign a de-escalation specialist or appropriately trained behavior specialist to work with Student.
7. Order the District to provide any other relief the Hearing Officer deems appropriate.

III. FINDINGS OF FACT

Introduction to Student

1. Student is *** years old and resides within the boundaries of the District. ***. Student is *** at *** in the District. Student qualifies for special education and related services as a student with autism and a speech impairment. Student is a "genuinely great kid" and Student's teachers enjoy working with Student.[2]

[2] Joint Exhibit (J) 15, at 5; J7, at 1; Petitioner's Exhibit (P) 2, at 1; Transcript (Tr) 75, 443.

2. Student began school in the District during the *** school year at *** and has attended school in the District since that time. Student has been receiving special education and related services since arriving in the District. During the 2020-21, 2021-22, and 2022-23 school years, Student attended *** (***). During every summer since the summer of ***, Student has attended Extended School Year (ESY) services at *** (***) in the District.[3]

Student's evaluations

3. The District conducted a Full Individual Evaluation (FIE) of Student in December 2019. This was a reevaluation of Student as Student had been eligible for special education and related services since arriving in the District. The record does not make clear which tests were conducted during the course of the 2019 evaluation. However, the evaluation found Student eligible for special education as a student with autism and a speech impairment.[4]

4. In January 2022, the District conducted a Review of Existing Evaluation Data (REED). This is the District's most recent evaluation of Student. As part of the REED, a multi-disciplinary team from the District conducted in-person direct observations and completed a new Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V). The District also interviewed Student's teachers and Parents.[5]

5. To communicate, because of Student's limited verbal language ability, Student uses a multi-faceted approach. This multi-faceted communication approach includes ***. Student can communicate *** on Student's communication device and is generally able to use it to express Student's needs but is unable to use it without prompting. When Student is unwilling to use Student's communication device, teachers even sometimes use *** and ask

[3] J20, Tr. 572, 758.

[4] J5.

[5] J4, at 1-4, 14.

Student to ***. Student's teachers are trained in the use of Student's communication device but also rely on a number of lower tech communication options to honor Student's communication needs. However, District staff who work with Student have consistently and effectively used Student's communication device as well.[6]

6. Student is in the "low" range across all areas tested in the evaluation. Student had an Intelligence Quotient (IQ) of *** when tested in 2019. In the 2022 FIE, Student's IQ could not be measured as it was "significantly below average range" and could not be calculated by the software program being used.[7]

7. Student has an attention span of approximately *** minutes. Student does not have independent reading ability, but ***. Student can also ***. Student can *** with Student's communication device and can ***.

8. Behaviorally, Student struggles significantly. Student engages in ***, and physical aggression toward Student's teachers. During the 2023-24 school year, Student has begun ***, as a way to avoid tasks or get attention. Student's IEP does not address that behavior or some others Student has been exhibiting recently. Parent requested a behavioral evaluation during an ARD Committee meeting in September 2021. The District conducted a new Functional Behavioral Assessment (FBA) as part of its January 2022 evaluation. Its last FBA had been conducted in 2017. The District identified two behaviors of concern in the 2022 FBA, namely 1) that Student becomes agitated and physically aggressive to ***self and Student's teachers when presented with academic tasks; and 2) that Student wanders out of Student's assigned area and around the school when

[6] J4, at 13, 41; Tr. 245, 555, 632-33.

[7] J4, at 45.

there is downtime. The District recommended revising Student's Behavior Intervention Plan (BIP) to incorporate the results of the FBA.[8]

9. In preparation for this due process hearing, Petitioner obtained an expert report from psychologist Dr. ***. Dr. *** completed her report in February 2024. In preparing her report, Dr. *** reviewed Student's evaluations and records, observed Student remotely via Zoom, and spoke with Parent. She did not speak with Student's teachers, physicians, therapists, or others who interact with Student. She also did not observe Student in Student's classroom setting, even remotely.[9]

10. Dr. ***'s evaluation asserted that Student's placement in a classroom by ***self with two staff members is too restrictive and such restriction is unnecessary. She recommended Student be gradually moved into a less restrictive environment. Her evaluation also noted that the BIP is difficult to follow and should be written more clearly with reinforcers spelled out in a way teachers can follow. Dr. *** did not ascertain whether teachers were having difficulty implementing Student's IEP as written. She recommended improved data collection to track Student's progress and problematic behaviors.[10]

Student's experience in the District

11. Student attended school remotely during the 2020-21 school year due to the impact of COVID-19. At the end of the 2020-21 school year, the District held four ARD Committee meetings with Parent in attendance and in agreement to prepare for Student's transition to in-person instruction for the 2021-22 school year. For the 2021-22 school year, Student attended in-person at ***. *** held an ARD Committee meeting in September 2021 to plan Student's school year. Parent attended the meeting. Based on Student's previous work and Student's evaluations, the District maintained Student's measurable annual goals in physical education, math, reading, and communication. The District provided Student with two

[8] J4, at 31; J5; Tr. 100, 102, 152, 298, 653.

[9] P2, Tr. 421-22.

[10] P2, at 1-3.

assistive technology devices for Student's communication. To keep Student and others safe, Student required a one-on-one teaching assistant and a one-on-one teacher at all times. The meeting ended in agreement.[11]

12. Student spent Student's school days during the 2021-22 school year primarily in a *** classroom by ***self with a one-on-one teacher and a one-on- one teacher's assistant. The District did make brief attempts to integrate Student into the *** setting with other students. However, incidents occurred that made integration difficult. For instance, on ***, 2021, Student ***. On October ***, when ***.[12]

13. Student eloped multiple times per week during the course of the 2021-22 school year. Student also had several behavioral incidents per week. For instance, during one week in February 2022, Student had ***. That week was fairly typical of other weeks during that school year. Despite the fact that there were always at least two if not three staff members working solely with Student in Student's own classroom all day, Student's behaviors continued to escalate.[13]

14. Student was not progressing and was exhibiting ongoing behavioral issues. The District held an ARD Committee meeting in February 2022 to consider revisions to Student's IEP and to discuss the January 2022 REED and FBA. Because each meeting ended in disagreement, the District held four ARD Committee meetings between February and May 2022. The revisions to Student's IEP proposed by the ARD Committee were minor. The District maintained all of Student's related services—including speech and occupational therapy—at the levels Student was receiving them prior to the District's January 2022 REED. The ARD Committee discussed behavioral strategies but did not significantly revise Student's education

[11] J4, at 6; J8; J9, at 30.

[12] Tr. 48; J8; J9; Respondent's Exhibit (R) 1, at 1.

[13] R1, at 56; Tr. 64.

plan in any meaningful way. The IEP also did not reflect that Student was attending school in Student's own classroom. It still indicated Student was spending 60% of Student's day in a general education setting.[14]

15. Between Student's annual meeting in May 2021, when Student was still learning remotely, and Student's annual meeting in May 2022, Student's goals were essentially identical. This indicated Student did not make progress on those goals.[15]

16. In January 2023, the District held an ARD Committee meeting. Parent attended the properly formed meeting. During the meeting, the District proposed a revised IEP and placement for Student. Namely, the District recommended Student be educated at ***. ***, particularly the "***" where Student would attend, is specifically designed to work with students with significant behavioral needs. All doors are only accessible with a badge so students cannot elope. Staff are specifically trained to work with children like Student who exhibit *** and physical aggression. Student would be able to attend classes with other students instead of solely by ***self, thus making it a less restrictive environment than Student's current one. The entire campus is designed for sensory stimulation. The "whole goal" of *** is to allow children to gain "independence" and "freedom" and then return to their home campuses after they acquire the requisite skills to be successful.[16]

17. Parent rejected the District's proposed IEP with placement at ***. In February 2023, Petitioner filed the instant request for a due process hearing and invoked "stay put" to prevent the move to ***. In August 2023, Student began attending school at ***. Student continued Student's "stay put" placement at ***, with two staff members at all times present with Student and no other students. Student's physical aggression has escalated since being placed at ***. Between the beginning of school and October ***, 2023, Student caused ***

[14] J10, at 1-2, 52-57.

[15] J8, at 6-14; J10, at 8-17.

[16] Tr. 479-80, 687, 693, 730, 798.

***.[17]

18. The District has experience with Student working at ***, because Student has spent Student's summers there participating in ESY. Student has "shown success" and been around more other students during ESY than Student has in Student's setting during the school year. The campus is set up for students like Student who have "extreme behavior needs or dysregulation."[18]

IV. 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), 300.201; Tex. Educ. Code § 29.001.

The District is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). The basic inquiry is whether the IEP implemented by the school

[17] R15; Tr. 787-89.

[18] Tr. 798.

district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1,* 580 U.S. 386, 403 (2017).

B. BURDEN OF PROOF

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.[19] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.; Endrew F.*, 580 U.S. at 403.

C. FAPE

The Four Factors Test

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

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

[19] There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.,* 580 F.3d 286, 292 n.4 (5th Cir. 2009).

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, 300.320, 300.323(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).

The evidence showed that the District conducted an appropriate REED in January 2022. The District made only minor adjustments to the IEP based on that assessment and to what it was observing of Student and Student's behaviors. However, the District did not adjust Student's placement to *** until January 2023. The District's efforts to serve Student were not working. Student was attending school in a room by ***self with two to three staff members and was not even leaving the room for lunch.

Teachers testified that, while they found Student to be sweet and enjoyed working with Student, they were also frustrated and *** Student. Yet the District kept Student in a room by ***self for the entire 2021-22 school year and the first half of the 2022-23 school year without recommending Student go to ***, a school specifically designed to work with students like Student, or making other adjustments to Student's IEP. The District did not make frequent attempts to adjust Student's services in an effort to serve Student in a less restrictive environment with an opportunity to make progress. Finally, in January 2023, the District recommended a change

based on their observations of Student's lack of success and lack of interaction with peers without disabilities in Student's secluded setting. However, it took the District a year and a half to make that adjustment to Student's IEP despite Student's behavioral issues being present the whole time Student attended ***.

2. Least Restrictive Environment

The IDEA requires a student with a disability to 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 "least restrictive environment requirement." 34 C.F.R. § 300.114(a)(2)(i), (ii). State regulations require a school district's continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), non-public day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005(c).

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

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

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

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id*. This determination requires an examination of:

1. a school district's efforts to provide the student with supplemental aids and services in the general education setting;
2. a school district's efforts to modify the general education curriculum to meet the student's individual needs;
3. the educational benefit a student is receiving while placed in the ,bg bgeneral education setting; and
4. 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. *Id.*

In this case, the District has been recommending placement in Student's LRE, a *** classroom at *** where Student can attend class with peers and work on acquiring the skills needed to transition back to Student's home campus, since January 2023. However, the District has kept Student away from Student's peers since Student returned to in-person instruction in August 2021. While the District would occasionally attempt to place Student in a *** setting where other children were present, those attempts were not a concerted part of Student's plan. The District never made any attempts to place Student in a setting with peers without disabilities, including not even allowing Student to have lunch outside of Student's room.

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. at* 909 F.3d 754 Not sure if this is the correct short cite, but the full citation is listed above. The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence showed that the District did work in a collaborative manner. Parent attended each ARD Committee meeting and there were several such meetings per year. The District listened to Parent's concerns and acted on several of them, including Parent's request for an FBA and a re-evaluation of Student. Parent disagreed with the District's recommendation for placement at ***. However, the District believed, and continues to believe, that the recommendation was in Student's best interest. Thus, it continued to recommend it over Parent's objection. Disagreeing with Parent is not the same as failing to collaborate with Parent. *Id.* Petitioner did not present evidence of the District's failure to collaborate with Parent and other key stakeholders.

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 evidence showed the District did not provide Student academic and non-academic benefit. Student needs to be placed at ***. The District did not recommend this until January 2023, more than a year and a half after Student began attending classes in person again after the COVID-19 pandemic.

In the interim, Student had no access to peers without disabilities and almost no access to other peers with disabilities. Student's behavior was regressing and Student was *** multiple times per week. As evidenced by the fact that Student's IEP goals remained nearly identical, Student made no academic progress from August 2021-January 2023. The District did not do enough to address Student's behaviors and help Student make progress. In addition to Student's lack of academic and behavioral progress, without access to peers, Student had no opportunity to make friends or participate in any extra-curricular activities. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit).

5. Conclusion

In evaluating all the *Michael F.* factors together, the District did not provide Student a FAPE during the 2021-22 school year and part of the 2022-23 school year. The District's program was not working. Student was not progressing and was

exhibiting physical aggression and *** behaviors. Yet the District made only minor changes to Student's IEP. While the District made minor changes, Student continued to spend Student's entire school day, even Student's lunch period, in a self-contained setting with no other students present. The District did not propose a drastic change like *** until January 2023.

District witnesses testified that *** would be a less restrictive setting than Student's current one due to Student's having access to peers. Therefore, for a year and a half, the District was knowingly not educating Student in Student's LRE. They also were not acting on their observations of Student's behavior, which was not improving. It resulted in a lack of academic and non-academic benefit.

D. Timely Evaluation

Petitioner alleged the District failed to complete a timely evaluation of Student. However, Petitioner did not meet their burden of proof on this issue. Respondent conducted an FIE in 2019 and completed another in January 2022. Thus, it complied with the requirement to conduct a reevaluation every three years. 34 C.F.R. § 300.303(b).

Petitioner alleges the FBA was untimely. This specifically references the District's FBA. The District conducted an FBA in 2017. It did not conduct another until January 2022, including not conducting one during Student's 2019 reevaluation. However, Student did not attend school in person from March 2020-August 2021.

Once Student returned to school in person, the District heeded Parent's request to

conduct a new FBA and completed it in January 2022. This was not untimely. Further, an FBA is not a required evaluation under the IDEA unless Student has been removed for disciplinary reasons. 34 C.F.R. § 300.530(f).

E. Implementation of the IEP

Petitioner also alleges that the District did not implement Student's IEP. To prevail on a claim under the IDEA, the party challenging implementation of the IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school district failed to implement substantial or significant provisions of the IEP. This approach affords school districts some flexibility in implementing IEPs while also holding them accountable for material failures and for providing each student with a disability a FAPE. *Bobby R.*, 200 F. 3d at 349. Failure to implement a material portion of an IEP violates the IDEA, but failure to execute an IEP perfectly does not amount to denial of FAPE. *See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478, 484 (4th Cir. 2011).

In this case, the District never adjusted Student's placement on Student's IEP. Student was being educated in a classroom by ***self and was not even leaving for lunch. The District's IEP while Student was placed at *** always indicated Student was attending some classes in general education and did not indicate any time alone in a classroom with only staff members. Student's educational placement is a "material" part of the IEP. *See Id.* Therefore, the District did not implement Student's IEP with fidelity.

V. CONCLUSIONS OF LAW

1. The burden of proof is on Petitioner, as the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

2. The District has proposed an IEP that provides a FAPE and is reasonably calculated to address Student's needs in light of Student's unique circumstances. However, Petitioner has shown that the District did not provide Student a FAPE from August 2021-January 2023. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188, 203-04 (1982); *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017).

3. The District failed to implement Student's IEP with fidelity, because its IEP never reflected Student's educational placement. *Bobby R.*, 200 F. 3d at 349.

4. The District completed all required evaluations in a timely manner. 34 C.F.R. § 300.303(b); 34 C.F.R. § 300.530(f).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that the District shall convene an ARD Committee meeting by no later than April 30, 2024.[20] The purpose of the meeting shall be to amend Student's IEP to be compatible with Student's program at ***. Within five school days of that ARD Committee meeting, the District shall transfer Student to ***.[21] The District shall provide transportation for Student to and from ***. The District shall provide Parent a bi-weekly update via collected data on Student's progress at

[20] The parties may agree to a later date and time if both parties are unavailable for a meeting by April 30, 2024.

[21] Parent may disagree with the proposed IEP as is Parent's right under the IDEA. However, unless both parties agree to a placement alternative to ***, the District shall transfer Student to *** regardless of Parent's agreement with that placement.

***. If Student returns from *** to *** or a different school, the District must provide that data at regular intervals.

Unless the parties agree otherwise, the District shall hold an ARD Committee meeting, at a minimum, every 60 school days while Student is attending ***. The purpose of the meetings shall be to review Student's progress, discuss Student's readiness—or lack thereof—to return to ***, and plan for Student's transition from ***.

The District has not effectively managed Student's behavior to date despite conducting FBAs in 2017 and 2022. Student is also showing new behaviors at *** that Student was not showing in January 2022 when the most recent FBA was conducted. Therefore, using the District's criteria for independent evaluators unless the parties agree on different criteria, Parent shall select an independent evaluator to conduct a new FBA. If Parent prefers a District evaluator, Parent may select one instead of an independent evaluator. The evaluator shall work with the ARD Committee to draft a new BIP for Student and to make any other behavioral recommendations the evaluator thinks would benefit Student and the District. Parent shall select an evaluator by no later than May 15, 2024, and send Parent's selection in writing to the District. If Parent selects an evaluator in a timely manner, the District shall enter into a contract with that provider no more than 21 calendar days after Parent selects them. The evaluator must be permitted to interview District personnel and conduct in- person observations of Student. Once the evaluator submits their evaluation and recommendations, Student's ARD Committee shall meet within 30 calendar days of

that submission.[22] The evaluator shall be invited to that meeting and the District shall make best efforts to accommodate the evaluator's schedule so that person can attend the ARD Committee meeting. The evaluator will be allowed to present all of their recommendations to the ARD Committee.[23]

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

Signed April 15, 2024.

ALJ Signature:

Ian Spechler

Presiding Administrative Law Judge

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), 300.516; 19 Tex. Admin. Code § 89.1185(n).

[22] The parties may choose a more convenient date on which to meet by agreement.

[23] This may include meeting more than 30 days after submission of the evaluation if a date on which the evaluator can attend cannot be found within the 30-day timeframe.