DOCKET NO. 024-SE-0919

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Having reviewed the evidence, the arguments of the parties, and the relevant law, the Hearing Officer concludes Petitioner failed to establish a denial of a Free and Appropriate Public Education (FAPE) during the relevant time period of September 24, 2018 through September 2019. Specifically, Petitioner did not meet Petitioner's burden of proving: (1) the District failed to implement Student's IEP; (2) the District failed to devise an adequate safety plan to prevent ***; and (3) the District failed to timely and properly evaluate Student in all areas of suspected disability and failed to identify Student as a student with autism, dyslexia, and a specific learning disability.

II. PROCEDURAL HISTORY

Student, ***, b/n/f Parent, (Student or, collectively, Petitioner), filed a request for an impartial due process hearing (Complaint) under the Individuals with Disabilities Education Act (IDEA) on September 24, 2019, as a self-represented litigant, with Notice of the Complaint issued by the Texas Education Agency (TEA) on September 25, 2019. The Respondent to the Complaint is the Campbell Independent School District (Respondent or District).

On October 16, 2019, Daniel Garza of Cirkiel & Associates entered an appearance as Petitioner's attorney of record.

On November 8, 2019, the District sent an email status report indicating mediation had been successful. The District asserted that the parties had resolved all disputed issues and, pursuant to a signed settlement agreement, Petitioner would file a Motion to Dismiss with Prejudice no later than 5:00 p.m. that day. The motion to dismiss was not filed and counsel for Petitioner filed a Motion to Withdraw explaining, "An impasse has been reached in the handling of the case, making it impossible for the Petitioner and counsel to continue to work cooperatively on the case." The Motion to Withdraw was filed on November 8, 2019. Student's parent replied on November 11, 2019, stating she was not in agreement with the signed settlement and intended to move forward with Student's due process complaint. That same day, November 11, 2019, the District filed a Motion to Dismiss with Prejudice seeking to enforce the settlement agreement. The Hearing Officer denied the Motion on November 12, 2019. Respondent filed a Motion for Reconsideration on November 14, 2019, and the Hearing Officer denied that Motion on November 20, 2019.

On November 25, 2019, the District filed a Motion to Stay the Proceeding to pursue an interlocutory appeal (breach of contract civil action) in state court. The District sought relief from the Hearing Officer's orders denying the District's Motions to Dismiss with Prejudice. The District was attempting to enforce a "settlement" upon Petitioner and moved for over $100,000 in damages plus attorneys' fees from Student's parent for breach of contract.

The District's Motion to Stay the Proceeding was incomplete and relief could not be granted in the manner requested. The motion requested a stay while the District's interlocutory appeal/breach of contract suit proceeds to findings in the District Court, *** County, Cause No. ***. As of December 3, 2019, the District's civil action had not been set for trial—the requested stay was indefinite.

After reviewing the motion, the Hearing Officer notified the District via email on November 26, 2019 that pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. § 300.513(a), and 19 Tex. Admin. Code § 89.1185(l), Petitioner has the statutory right to a final decision within 45 days of the conclusion of the 30-day resolution period. The District's Motion to Stay the Proceedings did not address the federal and statutory timelines applicable to IDEA actions. Furthermore, the

Motion failed to address the state regulatory good cause factors that must be weighed prior to any delay in a Texas IDEA case. 19 Tex. Admin. Code § 89.1186(b).

On November 27, 2019, the District filed an opposed Motion for a Continuance in an attempt to gain additional time to have its civil action against Student's parent heard. The Disclosure Deadline was December 10, 2019, the hearing was set for December 18-19, 2019, and the final decision was due January 22, 2020. The motion sought to continue the hearing until February 26-27, 2020 and extend the statutory decision due date until April 8, 2020. The Hearing Officer denied the Motion on December 3, 2019, for failing to state good cause.

A. Legal Representatives

Student was represented throughout this litigation by Student's Parent and Next Friend, ***. The District was represented throughout this litigation by its legal counsel Jan Watson, who was assisted by her co-counsel Kaitlyn Traeger of Walsh, Gallegos, Treviño, Russo & Kyle, P.C.

B. Resolution Session

On October 16, 2019, the parties agreed in writing to attend mediation in lieu of the resolution session. The parties attended an unsuccessful mediation on November 7, 2019.[1]

C. Continuances

There was one pre-hearing continuance in this case to permit mediation. There was also a post-hearing continuance to permit the parties additional time to brief their closing arguments with the benefit of the hearing transcript.

III. DUE PROCESS HEARING

[1] The District contests the conclusion that mediation was unsuccessful and is seeking judicial review of that finding.

The due process hearing was held in the District on December 18, 2019. Student attended the hearing and continued to be represented by Student's Mother. Respondent continued to be represented by its legal counsel, Jan Watson, who was assisted by her co-counsel Kaitlyn Traeger of Walsh, Gallegos, Treviño, Russo & Kyle. ***, Director of Special Education at the Tri-County Shared Services Agreement, attended the hearing as the District's party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing, the District made an unopposed request to leave the record open to allow for submission of written closing arguments with the benefit of access to the hearing transcript. The District also proposed an extension of the decision due date to give the Hearing Officer time to review the extensive record, conduct legal research, and consider the parties' written closing arguments in preparing the decision. The decision due date was extended, by agreement, to February 6, 2020.

IV. ISSUES

A. Petitioner's Issues

Whether the District denied Student a FAPE during the relevant time period by:

(1) failing to properly implement Student's Individualized Education Program (IEP);

(2) failing to provide a minimally adequate safety plan that specifically addresses ***; and,

(3) failing to timely and properly evaluate Student in all areas of suspected disability and failing to identify Student as a student with autism, dyslexia, and a specific learning disability.

B. Respondent's Legal Position:

On October 4, 2019, Respondent filed a timely Response to the Complaint in the form of a General Denial.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests a finding or an order mandating:

(1) The District conduct a reevaluation in all areas of suspected disability and need.

(2) An Independent Educational Evaluation (IEE) at public expense including evaluating for autism, speech, occupational therapy (OT), behavior, social skills, pragmatic language, dyslexia, processing, transition, tutoring, and expression.

(3) An Assistive Technology (AT) evaluation that includes assessing the need for a tape recorder, digital recorder, Livescribe/Text to Speech applications, a tablet, Bookshare, online OCR application, Re-Wordify electronic application, dictation tool, grammar, Scribe Application, Mind Meister, National Museum of Math subscription, and graphic digital organizer.

(4) Direct services for speech, pragmatic language, social skills, and behavior.

VI. FINDINGS OF FACT

1. Student is *** years-old and is in *** grade. Student enrolled at the District's *** on August ***, 2019.[2] Classes for the 2019-2020 school year began on August ***, 2019.[3] Student was previously identified for special education as a student with an Other Health Impairment (OHI) for an Attention Deficit/Hyper Activity Disorder (ADHD) an Emotional Disorder (ED) while attending ***.[4]

2. Student's initial Full and Individual Evaluation (FIE) was conducted by the *** on October ***, 2016,[5] and Student was identified for special education as a student with an OHI for ADHD and an Emotional Disorder (ED).[6] The Initial 2016 FIE also determined Student did not meet the special education criteria for an Intellectual Disability (ID) or autism.[7]

---

[2] Transcript (Tr.) at 21, 23.

[3] Respondent's Exhibit (RE)-42.

[4] RE-1 at 2; RE-3 at 12.

[5] RE-3 at 12.

[6] RE-3 at 12, 32; RE-4 at 2.

[7] RE-3 at 12, 32.

3. The initial 2016 FIE noted Student had experienced numerous moves and change of schools and had a significant ***.[8]

4. On October ***, 2018, *** concluded a FIE and convened an Admissions, Retention, and Dismissal (ARD) Committee meeting that determined Student continued to qualify for special education as a student with an OHI for ADHD and an ED. *** reassessed Student for autism and determined Student did not meet the special education criteria for autism. *** also reevaluated Student for an ED and found Student no longer met the ED eligibility requirements. *** also reassessed Student for an Intellectual Disability (ID) and found Student does not have an ID; however, it did note Student had a Fluid-Crystalized Index score *** just above the score of someone with an ID. The Fluid-Crystalized Index measures a subject's general cognitive abilities using five broad ability areas and a score of 70 or below is deemed to constitute an ID.[9]

5. *** convened a Revision ARD Committee meeting on February ***, 2019 to revise an October 2017 ARD Report and discuss assessment findings and changes to Student's IEP.[10] During this meeting Student's parent was informed Student no longer met special education eligibility requirements as a student with an ED and Student did not meet the criteria as a student with an ID. The parent strongly believes Student has an ID and autism. The *** ARD Committee, including Student's parent, agreed to wait until the following school year (the current 2019-2020 school year) to reconsider the ID findings and to continue with the then existing placement and revised IEP.[11]

6. Student's parent agreed with the *** ARD Committee's decision to remove Student's ED eligibility.[12]

7. The October 2018 *** IEP did not contain a safety plan to prevent *** and *** was not addressed in the document.[13]

8. The classroom accommodations provided in the October 2018 *** IEP did not contain a cool down area where Student could remove ***self when Student became upset.[14]

9. On August ***, 2019, five days after Student enrolled, the District completed a timely Transfer Student – Agreement to Implement (existing IEP from ***) and scheduled a

---

[8] RE-3 at 12.

[9] RE-3.

[10] The record is silent as to why it took four months to convene an ARD meeting to discuss assessment findings with Student's parent.

[11] RE-4 at 2.

[12] RE-4 at 2.

[13] RE-1 at 22-23, 29-30; Tr. at 45-46.

[14] RE-1 at 12-13.

permanent placement ARD Committee meeting for October ***, 2019.[15]

10. ***.[16]

11. On September ***, 2019, the District conducted a review of existing evaluation data (REED) that reexamined the October 2018 FIE. Based upon the REED, the District concluded Student's FIE was still current and continued to meet Student's educational needs.[17]

12. Based upon Student's existing IEP, the District placed Student in a mixed special education and general education setting with additional support services. Student received instruction *** in general education, and instruction *** in a special education resource setting. The District's Transfer IEP limited instruction in the resource setting to at least 21%, and less than 50%, of the instructional time (*specifically*, 48 minutes per class per day). Instruction for *** was delivered in a special education setting, but not in a resource classroom. Student received IEP support for *** once per week for 15 minutes, and *** for 25 minutes every two weeks.[18]

13. The ARD Committee timely telephonically convened on September ***, 2019, to conduct Student's annual IEP review.[19] The Committee reviewed Student's PLAAFP's. Review of the existing data indicated Student was making A's in Student's special education classes, but Student was performing below grade-level expectations in ***. Student's attendance *** issues were also noted by the committee.[20]

14. The September 2019 IEP included a Behavioral Intervention Plan (BIP) that targeted *** a behavioral concern and provided a designated cool down area as a strategy ***.[21] Furthermore, the BIP allowed Student to walk around campus with a teacher and gave Student the ability for Student to call Student's parent as additional strategies ***.[22]

15. At the September ***, 2019, ARD Committee meeting, the ARD Committee devised an IEP that contained ten measurable goals: two goals for ***, two goals for ***, one goal for ***, one goal for ***, one goal for ***, two *** goals, and one goal for ***.[23]

---

[15] RE-8.

[16] Tr.at 23.

[17] RE-15.

[18] RE-8 at 3.

[19] RE-20 at 24. The ARD Committee meeting was originally scheduled for September ***, 2019, but Student's parent rescheduled twice and requested a telephonic meeting which was conducted on October ***, 2019.

[20] RE-20 at 2-3.

[21] RE-20 at 25, 37-39.

[22] RE-20 at 39.

[23] RE-20 at 9-13.

16. The District's September 2019 IEP provided Student *** different classroom accommodations.[24]

17. The District's September 2019 IEP also continued the same mixed general/special education placement that was established in the *** IEP.[25]

18. During the September 2019 ARD Committee meeting, Student's parent expressed disagreement with Student's current FIE and requested additional evaluations for autism, speech, occupational therapy (OT), behavior, social skills, academics (dyslexia, writing and math), assistive technology (AT), cognition (processing), ***. The District agreed to conduct an additional psychological assessment that would address autism and social/emotional issues.[26]

19. The District sent Student's parent a Consent for an FIE, Notice of Proposal to Evaluate, and Informed Consent for Psychological Services on September ***, 2019.[27]

20. On September ***, 2019, Student's parent notified the District she would not consent to another school district evaluation, objected to the District closing the September ***, 2019 ARD meeting, and requested Independent Educational Evaluations (IEEs) to assess academics, psychological issues, and Student's ***. Student's parent also provided notice of a unilateral homeschool placement and requested reimbursement for homeschooling.[28]

21. Student was formally withdrawn from the District on September ***, 2019.[29] Student attended school in the District for a total of *** school days.[30] From August ***, 2019 through September ***, 2019, Student had unexcused absences in ***, and was suspended for an additional ***. During this time period, there were a total of ***. Student was not in class 50% of the time.[31]

22. Student's parent reconsidered and signed a consent to evaluate on November ***, 2019. She granted written consent for the District to evaluate for: communicative status, health, motor abilities, emotional/behavioral status, sociological status, intellectual/adaptive

---

[24] RE-20 at 14-15.

[25] RE-20 at 21.

[26] RE-20 at 24-26.

[27] RE-25.

[28] RE-26.

[29] RE-37. The withdraw form is dated October ***, 2019, but states the withdraw was backdated to September ***, 2019 – "the last day Student attended school."

[30] RE-42.

[31] RE-20 at 43.

behavior, academic performance, and AT.[32]

23. The parties conducted formal mediation on November ***, 2019. Student was represented by counsel during mediation. The mediation session was lengthy (over ten hours); however, a settlement agreement was eventually drafted and signed by the parties. Nonetheless, Student's parent withdrew from the agreement a few hours after it was signed and Student's counsel was subsequently granted permission to withdraw on November 11, 2019.[33] Based upon Petitioner's rejection of the settlement agreement, the District sought clarification of the November ***, 2019 consent to evaluate.[34]

24. On November ***, 2019, the District sent Student's parent notice of a December ***, 2019, ARD Committee meeting. The notice stated the purpose of the meeting was to discuss Student's educational program including an IEP review, consider Extended School Year (ESY) services, consider *** ***, and discuss a possible change in placement.[35]

25. Student's parent notified the District on November ***, 2019, that Student would be reenrolling in the District. The campus secretary telephonically contacted Student's parent that same day to discuss the reenrollment paperwork.[36]

26. Student's parent refused to participate in the scheduled December ***, 2019 ARD Committee meeting and the meeting was cancelled.[37] Student did not reenroll. Student's parent contacted the District on December ***, 2019 and informed the District that Student will not be attending District schools in the future.[38]

27. The District sent prior written notice on December ***, 2019, stating it was ready, willing, and able, upon receipt of written consent, to provide an FIE to evaluate: (1) Psychological assessment (autism and ED); (2) a functional behavioral assessment (FBA); (3) cognitive; (4) adaptive behavior and achievement (specific learning disability (SLD), dyslexia and ID); (5) *** evaluation; (6) parent training; (7) AT; (8) communication; (9) physician input for OHI; and, (10) occupational therapy (OT).[39]

---

[32] RE-28 at 6-8.

[33] Order No. 6 issued November 12, 2019, denied the District's motion for dismissal with prejudice based upon the settlement agreement of November 8, 2019. The District filed for reconsideration, again seeking a dismissal with prejudice, on November ***, 2019, and that motion was denied in Order No. 7 issued November 20, 2019. The District filed an interlocutory appeal of the denial of its dismissal motions in the form of an Original Petition for Declaratory Relief in the *** District Court, ***, Texas, Cause No. ***.

[34] RE-30.

[35] RE-30 at 2.

[36] RE-32;

[37] RE-34.

[38] RE-34 at 2.

[39] RE-35.

28. On December ***, 2019, the District notified Student's parent that it would not approve the requested IEEs until the District has had the opportunity to conduct its own evaluations.[40]

29. Student progress reports reflect Student was progressing in all of Student's IEP goals and had completed three of Student's goals in the short period Student was enrolled in the District. Student's progress report on Student's behavior goal included the comment, "[Student] is very cooperative and is willing to work on Student's skills."[41]

VII. DISCUSSION

A. FAPE

1. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The District has a duty to provide FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3).

2. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.[42] *Schaffer v. Weast,* 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.,* 999 F.2d 127, 131 (5th Cir. 1993). In this case, Petitioner bears the burden of proving the designated issues by a preponderance of the evidence.

3. The Four Factors Test

[40] RE-35.

[41] RE-36.

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

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

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

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.,* 580 F.3d 286, 294 (5th Cir. 2009).

4. Denial of FAPE

Petitioner asserts the District failed to provide Student a FAPE during the short time period Student was enrolled at *** because:

(1) it failed to properly implement Student's IEP;

(2) failed to provide a minimally adequate safety plan that specifically addresses ***; and,

(3) failed to timely and properly evaluate Student in all areas of suspected disability and failing to identify Student as a student with autism, dyslexia, and a specific learning disability.

Petitioner was unable to meet the burden of proof concerning the alleged denial of a FAPE. A FAPE is special education, related services and specially designed personalized instruction with

sufficient support services to meet the unique needs of the child in order to receive a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

While the IDEA guarantees only a "basic floor of opportunity" the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 188-189.

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential the school district must nevertheless provide Student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP,* 582 F. 3d 576, 583 (5th Cir. 2009) *cert. denied,* 559 U.S. 1007(2010). The basic inquiry in this case is whether the IEP implemented by the District was reasonably calculated to provide the requisite educational benefit given the child's unique circumstances. *Rowley*, 458 U.S. at 206-20*; Endrew F. v. Douglas Cnty. Dist. RE-1*, 137 S.Ct. 988 (2017). Having reviewed the evidence and considered the parties' arguments, the Hearing Officer concludes the District provided Student a FAPE at all times relevant to this case.

a. Factor 1 – Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide FAPE, the 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, and the duration and frequency of the services and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

b. IEP Implementation

Petitioner asserts Student was denied a FAPE, because the District failed to implement Student's IEP. Specifically, Petitioner asserts the District failed to provide a cool down area where Student could go when Student became upset and failed to devise a safety plan to prevent Student from ***. Petitioner believes a designated cool down area was an accommodation in Student's October 2018 IEP from ***. Furthermore, Petitioner states the District was on notice that Student had *** issue because it was a concern when Student attended ***; however, Student *** was never mentioned in the October 2018 *** IEP.

The preponderance of the evidence shows during the *** school days that Student was enrolled, the District diligently attempted to devise an educational program that meets Student's unique needs. It was the District that identified the need to help Student deescalate when Student becomes upset and proposed adding a cool down area as an accommodation. Student's excessive unexcused absences, parental refusal to participate in ARD meetings after November 2019, and Student's ultimate withdrawal are the reasons a cool down area was not added to the IEP/BIP. Furthermore, Petitioner did not present evidence that *** was aware that Student was *** risk. The District had no reason to believe Student was prone to *** until September ***, 2019, when Student received *** in-school suspension (ISS) ***. Student's September 2019 IEP/BIP specifically addressed *** a targeted behavioral concern and provided a designated cool down area, allowing Student to walk around campus with a teacher, and the ability for Student to call Student's parent as positive strategies ***. Based on the assessments to which the District had access and the brief time period during which the District could observe Student, Respondent individualized Student's educational program based on Student's performance and assessments.

c. Factor 2 – Least Restrictive Environment

There is a two-part test for determining whether an educational placement is the Least Restrictive Environment (LRE). First, the hearing officer determines whether education in the regular classroom, with the use of supplemental aids and services can be achieved satisfactorily for the student. If it cannot and the school intends to provide special education or to remove the child from regular education, the hearing officer asks, second, whether the school has

mainstreamed the child to the maximum extent appropriate. At the outset of step one, the hearing officer examines whether the school district has taken steps to accommodate the special needs child in regular education. If the school district has made no effort to take such accommodating steps, the inquiry ends, for the school district is in violation of the IDEA's express mandate to supplement and modify regular education. If the school district is providing supplementary aids and services and is modifying its regular education program, hearing officers then examine whether its efforts are sufficient. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

The accommodation mandate is not limitless. A school district is not required to establish a "class within a class" or to modify the general education curriculum beyond recognition to accommodate a handicapped student. The child's needs and the impact of those needs on other children must also be considered. If a regular education instructor must devote all of his/her time to one handicapped child, the instructor will be acting as a special education teacher in a regular education classroom. Moreover, a general education placement is pointless if teachers are forced to modify the regular education curriculum to the extent that the child with a disability is not required to learn any of the skills normally taught in regular education. *Daniel R.R.*, 874 F.2d at 1048-49. However, a child with a disability may not be removed from a general education classroom solely because of needed modifications to the general education curriculum. 34 C.F.R. § 300.116(e). If the hearing officer determines that education in the regular classroom cannot be achieved satisfactorily, the hearing officer then asks whether the child has been mainstreamed to the maximum extent appropriate and whether the school district considered the continuum of placements. *Daniel R.R.*, 874 F.2d at 1049; 34 C.F.R. § 300.115.

Placement was not a designated issue during the due process hearing; however, the preponderance of the evidence established the District has taken steps to accommodate Student in regular education and fully considered the continuum of placements when it devised Student's hybrid placement, with supplemental aids and services. The hybrid placement mainstreamed Student to the maximum extent appropriate. Student was placed in general education for *** and received instruction for *** in a special education setting. Furthermore, Student received IEP support for *** and *** in a special education setting. Petitioner did not challenge Student's

placement, no evidence was presented that the placement was inappropriate, and the Hearing Officer concludes Student's hybrid placement is Student's LRE.

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

All members of the ARD Committee, including parents, must have the opportunity to participate in a collaborative manner in developing the IEP. 34 C.F.R. § 300.322(a). A decision of the ARD Committee concerning required elements of the IEP must be made by mutual agreement if possible. 19 Tex. Admin. Code § 89.1050(g). The evidence establishes Student's parent was fully involved in Student's educational decision making. Student's Parent initially attended and cooperated in ARD meetings, voiced her concerns and disagreements which were fully considered by the District members of the ARD Committee. Furthermore, the Complaint does not allege, and no evidence was presented at hearing addressing a lack of coordination or parental exclusion from the decision making process. In this case, services were provided in a coordinated and collaborative manner. Student's parent had the opportunity to meaningfully participate in Student's educational decision making.

e. Factor 4 – Academic and Non-Academic Benefits

When considering a student's IEP, courts must consider whether the child will receive an educational benefit from regular education. This inquiry necessarily will focus on the student's ability to grasp the essential elements of the regular education curriculum. Thus, hearing officers pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class. Recognizing there are benefits to peer modeling and integrating special education students with their non-disabled peers, hearing officers pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class. If the goal of a particular program is enhancing the child's development, as opposed to teaching Student's academics, the inquiry must focus on the child's ability to benefit from the developmental lessons, not exclusively on Student's potential for learning academics. *Daniel R.R.*, 874 F.2d at 1049.

The evidence presented reflects Student's September 2019 IEP adequately addressed Student's academic and non-academic needs. Again, the District only had *** school days to integrate Student into a new campus while attempting to identify Student's unique needs before Student was unilaterally withdrawn. As discussed below, it was Student's parent who prevented additional evaluations in other areas of suspected disability that would have potentially identified more academic and non-academic needs. Student's progress reports reflect Student was progressing in all of Student's IEP goals and had mastered a behavior goal prior to withdrawing. Petitioner did not prove Student's IEP failed to provide sufficient academic and non-academic benefits.

B. Other Designated Issue – Reevaluation and IEE

Petitioner alleges the District failed to identify all areas of disability and need during the *** school days Student attended ***. Student transferred into the District from *** on August ***, 2019, with an existing FIE and IEP. Upon Student's enrollment, the District had 30 calendar days to either implement the existing *** IEP or create and implement a new IEP. 34 C.F.R. § 300.323(e); 19 Tex. Admin. Code § 89.1050(j)(1). The ARD Committee meeting held on September ***, 2019, determined the *** October 2018 FIE was current and devised a new IEP. On November ***, 2019, the District offered to evaluate Student's communicative status, health, motor abilities, emotional/behavioral status, sociological status, intellectual/adaptive behavior, academic performance, and AT. Moreover, on December ***, 2019, the District notified Petitioner it was ready, willing, and able, upon receipt of written consent, to provide an FIE to include: (1) a psychological assessment (autism and ED); (2) a functional behavioral assessment (FBA); (3) cognitive; (4) adaptive behavior and achievement (SLD), dyslexia and ID; (5) *** evaluation; (6) parent training; (7) AT; (8) communication; (9) physician input for OHI; and, (10) OT.

With limitations, a school district must reevaluate whenever a student's educational or related service needs, including improved academic achievement and functional performance, warrant reevaluation or whenever a reevaluation is requested by a parent or teacher. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303(a). The IDEA prohibits reevaluations without informed parental consent.

20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i). The District has not reevaluated Student since Student enrolled, because Student's parent has refused to provide consent in hope of obtaining IEEs. The right to an IEE at school district expense extends to parents who suspect their child might be a child with a disability and who disagree with the school district's initial evaluation. 34 C.F.R. § 300.502(b)(1); *Letter to Zirkel*, 119 LRP 18141 (OSEP May 2, 2019); however, the parental right to an IEE at school district expense does not arise until the school district has had the opportunity to conduct its own evaluation. *G.J. v. Muscogee County Sch. Dist.*, 688 F.3d 1258, 1263-64 (11th Cir. 2012) (observing "Every court to consider the IDEA's reevaluation requirements has concluded if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.").

Because the right to an IEE at public expense is conditioned on a parent's disagreement with the school district's evaluation, parents may forfeit their right to an IEE by failing to give consent for a district assessment); *Id.* (holding "the right to a publicly funded IEE does not obtain until there is a reevaluation with which the parents disagree."); *D.Z. v. Bethlehem Area Sch. Dist.*, 54 IDERL 323 (Pa. Comm. Ct. 2010) (ruling the right to request an IEE does not vest until there is a completed evaluation with which the parent disagrees). Therefore, short of filing its own due process complaint to override the lack of parental consent, the District has done everything it can to timely evaluate Student's needs. *See* 34 C.F.R. § 300.300(c)(2) (consent override procedures). Student does not have the right to an IEE at this time.

VIII. CONCLUSIONS OF LAW

1. The District is a local education agency (LEA) responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*

2. Student, by next friend, Mother, (collectively, Petitioner) bears the burden of proof on all issues raised in Petitioner's complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).

3. The District properly and timely concluded Student's 2018 FIE was valid upon Student's transfer into the District. 34 C.F.R. § 300.323(e); 19 Tex. Admin. Code § 89.1050(j)(1).

Necessary reevaluations have not been conducted due to a lack of consent. 20 U.S.C. §§ 1414(a)(D)(i)(I)-(II), 1414(E)(2); 34 C.F.R. 300.300(c)(1)(i).

4. At all relevant times, Student's IEPs provided a FAPE and contained all required components of an IEP, including present levels of performance, measurable goals that adequately met Student's unique academic and non-academic needs, and included a BIP that adequately addressed ***. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a), 300.324(2)(a)(i); 19 Tex. Admin. Code § 89.1055; *Endrew F. v. Douglas Cnty. Dist. RE-1*, 137 S.Ct. 988 (2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

5. At all relevant times, the District provided special education and related services in conformity with Student's IEP. *L.J. v. Broward School Board of Broward County*, 119 LRP 24771 at 6 (11th Cir. Jun. 26, 2019).

6. The District timely offered to appropriately reevaluate Student. 34 C.F.R. §§ 300.300, 300.303.

7. Petitioner is not entitled to an IEE. 34 C.F.R. § 300.502(b)(1); *Letter to Zirkel*, 119 LRP 18141 (OSEP May 2, 2019); *G.J. v. Muscogee County Sch. Dist.*, 688 F.3d 1258, 1263-64 (11th Cir. 2012); *D.Z. v. Bethlehem Area Sch. Dist.*, 54 IDERL 323 (Pa. Comm. Ct. 2010).

IX. ORDERS

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

SIGNED January 27, 2020.

David A. Berger
Special Education Hearing Officer
For the State of Texas

X. NOTICE TO PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code § 89.1185(n).