

DOCKET NO. 035-SE-1017

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, ***, b/n/f Parents, *** and *** (“Petitioner” or “Student”) brings this action against the Leander Independent School District (“Respondent,” or “District”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (IDEA) and its implementing state and federal regulations. The main issue in this case is whether the school denied Student a Free and Appropriate Public Education (FAPE) in the least restrictive environment for Student and whether Student needs continued placement at the *** (***), where Student was unilaterally placed by Parents on June ***, 2018.

Petitioner first filed a request for due process hearing with the Texas Education Agency on October 12, 2017, and the District received notice of the complaint on October 16, 2017. A prehearing conference was conducted by telephone on October 31, 2017, at which time the parties agreed that the accrual date for the complaint for the purposes of the statute of limitation was October 16, 2016, and Petitioner filed leave to review the Hearing Officer’s statement of the issues. Petitioner filed a clarification of the hearing issues and request for relief on November 3, 2017.

On January 23, 2018, Petitioner filed a second request for due process hearing, and the District received notice of the complaint on January 24, 2018, for which TEA assigned Docket No. 114-SE-0118. Because the second case involves the same parties and common questions of law

or fact, the cases were consolidated and at Petitioner's request, the procedural schedule for 114-SE-0118 was merged into the existing procedural schedule for 035-SE-1017.

The District filed a counterclaim on February 2, 2018, to defend the appropriateness of its Full Individual Evaluation (FIE) completed on November 28, 2017.

A. Continuances and Extension of Decision Due Date

There were four continuances and extensions of the due date granted in this case. The hearing was originally scheduled for November 20-21, 2017, with the decision due on December 30, 2017.

The first continuance was granted at Petitioner's request to accommodate Petitioner's counsel's schedule who had a pre-planned trip outside the country on the scheduled date of the hearing and to allow the District to complete an evaluation of student and conduct an Admission Review Dismissal (ARD) meeting. The hearing was continued to January 3-5, 2018, and the decision due date was extended to February 23, 2018.

The second continuance was granted to allow the Parties to conduct an ARD that was scheduled for December 14, 2017, just prior to the District being closed for Holiday Break. In the event that the ARD ended in non-consensus, the Parties asserted there would be no IEP and the ripeness of some issues for hearing could be impacted. The hearing was continued to March 27-29, 2018, and the decision due date was extended to May 18, 2018.

The third continuance, at Petitioner's request, was granted to allow Petitioner time to obtain potentially relevant video evidence. The hearing was continued to June 5-8, 2018, and the decision due date was extended to July 27, 2018.

The fourth continuance was granted to allow Petitioner additional time to prepare for hearing due to delays in Respondent complying with the ordered production of classroom video surveillance. The hearing was continued to July 23-26, 2018, and the decision due date was

extended to September 13, 2018.

B. Legal Representatives

Student was represented throughout this litigation by Student's legal counsel Dorene Philpot with the Philpot Law Office and her co-counsel, Yvonnilda Muñiz, with the Law Office of Yvonnilda Muñiz. The District was initially represented by Andrew Tatgenhorst of Powell & Leon, LLP, with Jennifer Wells, General Counsel for Leander ISD, serving as co-counsel. The District filed a Motion to Substitute Counsel on October 31, 2017, withdrawing Mr. Tatgenhorst as counsel and naming Kelly Shook and Jaimie Turner of Walsh, Gallegos, Treviño, Russo & Kyle, P.C. as counsel and co-counsel, respectively. Ms. Wells remained co-counsel for the District.

C. Resolution Session and Mediation

The Parties conducted a resolution session on November 13, 2017, but were unsuccessful in coming to an agreement. In addition, the Parties participated in mediation on February 21, 2018, which was also unsuccessful.

D. Preliminary Motions

There were several preliminary motions resolved prior to the due process hearing. Order No. 4 issued on November 16, 2017, denied Respondent's Sufficiency Challenge to the Complaint. Order No. 8 issued on February 12, 2018, denied Petitioner's sufficiency challenge to the District's Counterclaim. Order No. 9 issued on February 15, 2018, found the accrual date for Petitioner's complaint was July 1, 2017. Order Nos. 11, 14, 16-17, 19, and 22 addressed the opposed production of special education classroom video monitoring and were issued on various dates between March 26 and June 14, 2018. Finally, Order No. 23 issued on July 19, 2018, denied the District's motion to exclude Petitioner's disclosed expert witnesses. There were no adjustments to the post-hearing schedule.

II. DUE PROCESS HEARING

The due process hearing was conducted on July 23-26, 2018. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel Dorene Philpot, and assisted by her co-counsel, Yvonnilda Muñiz.

Respondent continued to be represented by its legal counsel Kelly Shook and Jamie Turner. The District's General Counsel, Jennifer Wells, did not participate in the hearing. In addition, Sandra Kelly-Kahn, the District Director of Special Education attended the hearing as the party representative. Both parties filed written closing arguments in a timely manner. The Decision in this case is due September 13, 2018.

III. ISSUES

A. Petitioner's Issues

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

I. EDUCATIONAL PROGRAMMING:

- Failing to devise and implement appropriate IEPs for Student.

II. PROCEDURAL VIOLATIONS:

- Failing to comply with Student's and Parents' procedural rights.

III. NON-IDEA CLAIMS:

- Violating Student's rights under other causes of action (*i.e.*, Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, Family Education Rights and Privacy Act, Section 1983 of the Civil Rights Act of 1964, the Assistive Technology Act of 1998, and the Civil Rights Attorney's Fee Award Act of 1976).

On February 15, 2018, Petitioner's Non-IDEA issues were dismissed in Order No. 9 for lack of subject matter jurisdiction.

The gravamen of Petitioner's complaint is the Student enrolled in the District with an out of state IEP that found private placement was necessary to provide Student with a Free and Appropriate Public Education (FAPE). When Student enrolled, the District agreed in writing to honor the out of state IEP. Petitioner alleges the District never intended to honor the out of state IEP and used its evaluation time to needlessly delay the necessary private placement and to predetermine the isolated resource classroom placement, which is not Student's least restrictive environment (LRE).

B. Respondent's Legal Position and Additional Issues

The District contends the proposed change in placement and return to the public *** school campus is appropriate for Student. The District believes the proposed IEP and schedule of services appropriately address Student's unique and individualized academic and non-academic needs and have been designed to foster progress. The District argues residential treatment at *** is unnecessary and is a more restrictive placement.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

- a. A finding or an admission that the District failed to provide FAPE during the relevant time period.
- b. An order requiring the District to provide Student an appropriate IEP in the LRE that complies with all the procedural and substantive requirements of the IDEA and Texas special education laws.
- c. If the District cannot or will not provide appropriate supports and services to Student, reimbursement for a private placement including past reimbursement for unspecified private services, evaluations, and mileage incurred and prospective evaluations and services for a duration deemed

appropriate to the Hearing Officer. At hearing Petitioner clarified they are seeking an order placing Student at *** for the next two years: one-year compensatory education and services for the past denial of FAPE; and placement at *** for one additional year because of the District's current inability to provide Student a FAPE.

B. Respondent's Requested Relief

1. Dismiss any claims arising outside the one year statute of limitations rule as applied in Texas;
2. Dismiss all claims arising under laws other than the IDEA; and
3. Find in favor of the school district's proposed program and placement.

V. STATUTE OF LIMITATIONS

Petitioner did not plead a statute of limitations exception, and did not seek to expand the statute of limitations. Order No. 13 issued on April 12, 2018, partially granted the District's motion to reconsider the accrual date. The hearing officer determined the District's motion warranted reconsideration and granted Petitioner's request to defer the issue until hearing. The Parties were ordered to present accrual date / statute of limitations (SOL) evidence in a separate SOL binder, neither Party complied with that order and the motion for reconsideration of the accrual date is deemed waived. Based upon the "known or should have known date" the Hearing Officer determined the accrual date for this action, for statute of limitations purposes, was July 1, 2017.

VI. CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

The jurisdiction of a special education hearing officer in Texas is strictly limited to claims arising under the IDEA. Specifically, a hearing officer has the authority to determine claims related to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student. 34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code §§ 89.1151(a), 89.1170.

Therefore, to the extent Petitioner raises claims under laws other than the IDEA, those claims have been / shall be dismissed as outside the jurisdiction of the hearing officer, including specifically claims under Section 504 of the Rehabilitation Act of 1974; the Americans with Disabilities Act; the Family Educational Rights & Privacy Act; the No Child Left Behind Act; Section 1983 and Title VI of the Civil Rights Act of 1964; and, the Technology Related Assistance for Individuals with Disabilities Act.

In addition, Petitioner's Complaint includes a statement placing Respondent "on notice" that Petitioner intends to seek attorney's fees and litigation costs under the IDEA and other federal statutes. The parent of a child with a disability may be entitled to an award of attorney's fees as a prevailing party. An award of attorney's fees is within the sole discretion of either the federal district court or a state court of competent jurisdiction upon appeal of the hearing officer's decision. Reimbursement for attorney's fees and litigation costs are outside the hearing officer's jurisdiction and shall also be denied. 34 C.F.R. § 300.517(a)(i); 19 Tex. Admin. Code § 89.1192.

VII. FINDINGS OF FACT

1. Student is *** years old and is primarily eligible for special education services from the District as a student with Autism (AU).¹
2. Parents report Student has the following additional medical conditions and/or special education eligibilities: *** (***), ***, Attention Deficit / Hyperactivity Disorder (ADHD), ***, Speech Language Disorder, ***, ***, ***, and ***.²
3. ***.³
4. Prior to Student's District enrollment, Parents communicated with the District on June ***, 2017, and June ***, 2017, that they would be moving within the District's geographical boundaries and requested placement and extended school year (ESY) services.⁴
5. Prior to enrolling, Parents met with District staff on September ***, 2017, to discuss

¹ Joint Exhibit (JE) 18 at 22; JE-29.

² JE-18 at 8-9.

³ JE-29

⁴ Petitioner's Exhibit (PE) 5 at 3; PE-62 at 5.

- Student's needs. Student began attending classes in the District at *** (***) on September ***, 2017. Student was placed in ***'s *** (***).⁵
6. Prior to September 2017, Student resided in the *** and had an Individualized Education Plan (IEP) developed by ***, which was the previous Local Education Agency (LEA). The *** IEP privately placed, at public expense, Student at *** (***).⁶
 7. Student formally withdrew from the ***, school district on September ***, 2017.⁷
 8. The *** IEP was completed on August ***, 2017, and noted that due to attentional and behavioral factors it was difficult to assess Student using formal testing measures. Based upon in class performance, teacher observations, and skills comparison to the *** revealed Student was functioning at approximately the *** to *** grade levels of instruction.⁸
 9. The *** IEP noted that Student's current publicly funded private placement at *** was no longer adequate because Student was unable to remain in a self-contained classroom. The IEP noted *** provided an intense schedule with multiple sensory breaks and 1:1 supervision at all times. However, *** there had been an increase in task avoidance, *** (***) activities, perseverative behaviors, noncompliance, verbal disruptions, need for more sensory breaks, and aggressive behaviors that reduced Student's ability to remain in a classroom. In August 2017, Student was only able to remain in the classroom setting an average of *** minutes per *** minute class period before having to be removed.⁹
 10. In August 2017, while documenting Student was friendly and enjoyed interacting with school staff,¹⁰ Student was unable to maintain appropriate behaviors within the self-contained classroom at ***'s, at home, or in the community because of the increased frequency of behaviors and the intensity of the behaviors that posed a risk of injury to ***self, other students, school staff, family, caregivers, and the community.¹¹
 11. The *** IEP agreed with Student's treating neurologist and concluded the Least Restrictive Environment (LRE) for Student was a residential placement.¹²
 12. The *** IEP determined a private residential placement was necessary for Student to make academic progress because a residential placement provides 24-hour, 1:1 supervision that

⁵ JE-29.

⁶ JE-6 at 1; JE-29.

⁷ JE-13.

⁸ JE-6 at 6.

⁹ JE-6 at 18.

¹⁰ JE-6 at 14.

¹¹ JE-6 at 18.

¹² JE-6 at 18.

can ensure classroom teaching is reinforced and applied and generalized outside of the school setting. Residential placement has the ability to enhance Student's verbal intelligibility through repeated drills at home and outside of school. At that time Student could not communicate with Student's peers and Student's parents, caregivers, and school staff could no longer control Student's disruptive behaviors. It was assumed if Student were able to communicate Student's needs and wants more clearly the disruptive behaviors would reduce. Furthermore, in August 2017, Student was exhibiting regression in *** across all settings including *** and *** (*i.e.*, ***) behaviors. Student *** when left unsupervised. Regression and increased behavior problems were noted after breaks. The *** IEP team determined placing Student in a Homebound setting or permitting Student to remain at home while attending a private day school would be a more restrictive environment compared to a residential placement. The *** IEP team decided Student requires licensed behavioral support staff, Speech Language Pathology (SLP), occupational therapy (OT), and Assistive Technology (AT) Specialist available at all times, constant 1:1 supervision and assistance at all times, and limited distractions and small group instruction.¹³

13. On September ***, 2017, the Parties executed a District generated form "Agreement to Implement" the *** IEP, including private placement and the schedule of services. The Agreement to Implement verified that the District had "received, reviewed, and will implement" the *** IEP. The agreement rejected the need for additional evaluations and stated the *** IEP would be implemented. The *** IEP was Student's IEP during the 2017-2018 school year.¹⁴
14. The Special Education Team Lead prepared, presented, and signed the Agreement to Implement on behalf of the District. The Team Lead had full authority to commit the District to the agreement.¹⁵
15. The District's Special Education Team Lead for the 2017-2018 school year was responsible for facilitating the registration process, schedules, coordinating ARDs, and the exchange of information between the special education team and the ARDC.¹⁶
16. The Special Education Team Lead involved with Student was inexperienced, inadequately trained, and lacked understanding of the IDEA's interstate transfer provisions.¹⁷
17. Parents were given confusing, contradictory, and inaccurate information concerning the registration process, the need for additional evaluations, placement, and Student's schedule

¹³ JE-6 at 18-19.

¹⁴ Respondent's Exhibit (RE) 4 at 2-3; PE-34; Transcript (Tr.) at 47-50, 53, 137-38, 539, 772, 928, 938-39.

¹⁵ Tr. at 58-59, 80, 137-38

¹⁶ Tr. at 39.

¹⁷ Tr. at 106-07.

of services.¹⁸

18. The *** IEP provided for transportation services but the District did not begin providing transportation until September ***, 2018.¹⁹
19. Pursuant to the *** IEP, Student's educational program provided that Student receive *** hours and *** minutes per week of classroom instruction outside of the general education setting, and instruction was to be provided primarily by a special education teacher and augmented by the school Social Worker, Behavior Resource 1:1 aide, an Instructional Assistant, a Speech and Language Assistant, a Certified Occupational Therapy Assistant, SLP, and an Occupational Therapist. Furthermore, Student was to receive *** minute OT sessions twice per month, and Speech and Language therapy three times per week for *** minutes per session.²⁰
20. When considering Student's LRE, the *** IEP stated placement in a "private separate day school remains appropriate." Student was placed a ***--that was Student's actual placement;²¹ however, the same document found residential placement was necessary primarily because Student was a threat of harm to ***self and others.²²
21. Based upon a January 2015, Functional Behavior Assessment (FBA),²³ the *** IEP included an extensive Behavior Intervention Plan (BIP) that addressed verbal disruptions and physical aggression. The BIP included detailed prevention, reinforcement, and response strategies.²⁴
22. The *** IEP provided Board Certified Behavior Analyst (BCBA) services. The IEP mandated Student was to receive BCBA support monthly, as needed, and the anticipated frequency was daily.²⁵
23. An August ***, 2017, Assistive Technology (AT) Summary from *** documented that an AT trial using an FM system and headphones was successful in assisting Student pay attention to speakers and to follow directions.²⁶
24. On October ***, 2017, Parents gave written consent for the District to conduct a Full Initial

¹⁸ Tr. at 55.

¹⁹ PE-8 at 13.

²⁰ JE-6 at 54-55.

²¹ JE-6 at 57-58.

²² JE-6 at 18-19.

²³ JE-1.

²⁴ JE-8.

²⁵ PE-1at 2.

²⁶ JE-11.

Evaluation (FIE).²⁷

25. On December ***, 2017, the District convened an Admission, Review and Dismissal Committee (ARDC) meeting to present its proposed IEP based upon the District's FIE completed on November ***, 2017.²⁸
26. Thirty-nine school days elapsed from October ***, 2017 (date of FIE consent), and the December ***, 2017, Annual Review ARDC in which the District's proposed IEP was first presented to Parents.²⁹
27. Despite the statutory and regulatory timelines, in the Agreement to Implement, the District committed itself in writing to convening and conducting a permanent placement ARDC meeting no later than October ***, 2017; however,³⁰ consent for the District's FIE was not sought until two days before the District's self-imposed deadline for conducting a permanent placement ARDC.³¹
28. The District did not conduct an ARDC meeting for Student until December ***, 2017.³² It was not in Student's educational interest to wait until December ***, 2017 (***) days) to convene Student's initial/Annual ARDC.³³
29. The District's proposed IEP identified Student as a student qualifying for special education for autism, an intellectual disability, and speech impairment.³⁴
30. The District determined Student's LRE is a *** ** special education classroom.³⁵ The District's enactment of the *** IEP and its proposed IEP both denied Student the opportunity to socialize with other students.³⁶ Student was isolated in the District's *** ** classroom; Student was essentially required to eat alone in that classroom and was denied the opportunity participate in assemblies or extra-curricular activities.³⁷
31. The District's proposed December 2017 IEP offered the following Related/Other Services:

²⁷ JE-15.

²⁸ JE-22 at 1.

²⁹ JE-28.

³⁰ RE-4 at 3; Tr. at 24.

³¹ JE-15.

³² JE-29.

³³ Tr. at 76.

³⁴ JE-22 at 1.

³⁵ JE-22 at 31-35, 37.

³⁶ Tr. at 218-19.

³⁷ PE-1 at 8; Tr. at 133.

- a. AT — *** minutes yearly;
 - b. In-home Training — *** session for *** minutes per session;
 - c. Occupational Therapy (OT) — *** direct sessions for *** minutes per session, and *** indirect session for *** minutes during each six-week grading period;
 - d. Parent Training — *** sessions for *** minutes per session;
 - e. Psychological Services — *** minutes weekly indirect services every six-week grading period (total of *** minutes indirect psychological services every six-week grading period);
 - f. Speech Therapy — *** direct sessions for *** minutes per session, and *** indirect sessions for *** minutes per session during each six-week grading period; and,
 - g. Transportation – Special transportation to and from school on scheduled school days.³⁸
32. The District’s proposed IEP included a BIP. Despite documenting that Student was not physically aggressive;³⁹ Student’s BIP mirrored the *** BIP by targeting verbal disruptions and physical aggression/protests.⁴⁰
33. The District’s proposed IEP contained an extensive transition plan that focused primarily upon ***.⁴¹
34. The District’s proposed IEP did not provide a 1:1 aide.⁴²
35. Comparing the *** IEP to the proposed District IEP, pursuant to the District’s IEP Student would have lost the support of a 1:1 aide, the District proposed significantly decreasing Student’s Speech support by offering only *** hours of direct support and *** minutes of indirect Speech support every six-weeks and the *** IEP provided *** hours of direct Speech support every six-weeks (*** minutes per week x 6 weeks = *** minutes). Including the indirect speech support the District presented an educational plan that reduced this autistic Student’s Speech support by *** hours every six week grading period.⁴³ The District also proposed a significant reduction Student’s OT support. The District’s proposed IEP reduced Student’s OT support from *** minutes of direct support per month to *** minutes of direct support and *** minutes of indirect support every six-weeks.⁴⁴
36. The District’s proposed IEP offered In-home training (*** sessions of *** minutes per session), parent training (*** sessions at *** minutes per session) and *** minutes of

³⁸ JE-22 at 34-35.

³⁹ JE-22 at 38.

⁴⁰ JE-22 at 47.

⁴¹ JE-22 at 5-13.

⁴² Tr. at 154-55.

⁴³ Compare JE-6 at 55 with JE-22 at 35.

⁴⁴ Compare JE-6 at 54 with JE-22 at 35.

- psychological services every six weeks. In-home training, parent training, and psychological services were not included in the *** IEP.⁴⁵
37. The District's IEP proposed Extended School Year services.⁴⁶
38. The District's IEP proposed School Nurse services due to Student's ***.⁴⁷
39. The District completed the Autism Supplement.⁴⁸
40. Student enrolled in the District on September ***, 2017, and on August ***, 2017, prior to Student enrolling in the District, Mother was in email communication with *** seeking placement at ***.⁴⁹
41. The District's evaluation utilized a variety of assessment tools, did not limit the evaluation to a single measure or assessment to determine eligibility and educational programming, used technically sound assessment instruments and substantially complied with the statutory and regulatory requirements for conducting evaluations; however, the District's evaluation was incomplete because it failed to conduct a FBA for Student who is deemed a risk of harm to ***self and others.⁵⁰

PROGRESS

42. While attending ***, Student received grades for two six-week grading periods in ***, ***, ***, ***, *** ***, ***, ***, and ***. There was no progress data collected during the first six-weeks.⁵¹
43. Student's academic grades ranged from *** – ***. Student maintained a *** grade point average and was ***.⁵² The administrative record contains no evidence on the criteria used to determine Student's grades and academic performance.
44. Parents received a progress report on April ***, 2018.⁵³ Parents requested the data supporting the progress reports on the following day, April ***, 2018.⁵⁴

⁴⁵ See JE-6 at 54-56.

⁴⁶ JE-22 at 35; JE-24 at 54-58.

⁴⁷ JE-24 at 3.

⁴⁸ JE-24 at 49.

⁴⁹ RE-16 at 4.

⁵⁰ JE-18 at 38.

⁵¹ PE-53 at 4.

⁵² PE-72 at 11.

⁵³ PE-53 at 40.

⁵⁴ PE-53 at 46.

45. After Parents requested the underlying data supporting the progress report, the District learned it had incorrectly/inaccurately been collecting data.⁵⁵
46. The District reported progress on eleven IEP goals (with 20 subparts) and noted Student was making sufficient progress on the majority of Student's IEP goals; however, the accuracy of the District's reported progress is unreliable. Student's objectives are stated in percentages but progress is reported in terms of "attempts," *i.e.*, "3 out of 5 of observable opportunities." An "observable opportunity" or how it relates to academic progress is undefined. Progress Codes were not provided. Baselines were not provided. In sub-goals where progress is reported as a percentage it frequently does not align with the stated goal. As an example, Goal 1.2 required Student to ***; however, the progress report states Student is making adequate progress toward accomplishing the goal by the next Annual ARD with ***% accuracy. Where Student is not making progress the report is left blank (*e.g.*, Goals 5.3, 6.1, 7.1-7.4, 10.2, and 10.3).⁵⁶
47. Examples of Student's school work do not reflect academic progress. These pages were *** and depict the depth and severity of Student's academic struggles.⁵⁷ No other examples of Student's school work were provided.

BEHAVIOR

48. On August ***, 2017, immediately prior to Student's September 2017 District enrollment, *** prepared an Annual Psychosocial and Progress Report (*** Psychosocial) prepared by a licensed clinical social worker (LCSW-C); not a licensed specialist in school psychology (LSSP).⁵⁸
49. The *** Psychosocial addressed Student's behavior during the 2016-2017 school year and addresses chronic problematic behaviors that repeatedly occurred at varying levels of intensity since Student started attending school.⁵⁹
50. According to the *** Psychosocial Student is likeable and will self-initiate interactions with preferred staff and peers—including greetings and good byes. Student was deemed playful, responded well to verbal praise and redirection.⁶⁰

⁵⁵ PE-53 at 7-8.

⁵⁶ JE-17.

⁵⁷ RE-15.

⁵⁸ JE-4.

⁵⁹ JE-4. The *** Psychosocial is captioned an annual report but does not specify the time period being addressed. The Hearing Officer infers, as an "annual report," the report addressed the 2016-2017 school year while providing helpful context/background on Student's persistent behavioral issues that have been present for years.

⁶⁰ JE-4 at 2; JE-18 at 11.

51. Student continually would resort to *** (***) (***) (“***”).⁶¹
52. The *** Psychosocial noted Student requires – “relies heavily upon” – routine and structure. Throughout Student’s school history Student exhibited “significant” behavioral and academic regression during times of transition and change.⁶²
53. After completing Student’s first year at ***’s, Student was judged to have demonstrated “relative stability” to the *** school program and behavioral expectations. The term relative stability was used because while Student continued to display the same chronic problem behaviors, data collected over the year indicated the occurrence rate of the behaviors had plateaued or slightly declined. The behavior progress or stabilization was attributed to Student being assigned a 1:1 aide. Student also received direct 1:1 support after school and on weekends.⁶³
54. Any change in Student’s home routine or private providers resulted in significant regression at school.⁶⁴
55. During the 2016-2017 school year Student required behavioral support for *** incidents of aggression resulting in removals—this was a *** incident decrease (*** incidents) from the 2015-2016 school year; however, the incidents during the 2016-2017 school year were more serious/intense; consequently, Student’s BIP provided for ***, and “exclusion and seclusion” as “measures of last resort” when Student presented as a risk of harm to ***self or others. A 1:1 aide was deemed necessary due to the frequency and intensity of Student’s aggression to keep Student and those around Student safe. Furthermore, the 1:1 aide was required to permit Student to “access instruction and make educational, behavioral, social, and *** progress.”⁶⁵
56. Student’s incidents of *** continued to interfere with Student’s progress and Student’s ability to complete tasks. Data showed Student engaged in disruptive *** an average of *** times every school day. Overtime it became increasingly difficult to redirect Student during Student’s ***—Student stopped responding to Staff prompts to stop or redirect.⁶⁶
57. Student’s *** IEP for the 2016-2017 school year identified reducing the frequency of incidents of minor and major aggression as a need. Specifically, Student was to have no more than 18 “aggressive actions” that required additional behavior support over the course of the IEP year.⁶⁷

⁶¹ JE-4 at 2.

⁶² JE-4 at 2.

⁶³ JE-4 at 2.

⁶⁴ JE-4 at 2.

⁶⁵ JE-4 at 3; JE-7.

⁶⁶ JE-4 at 3.

⁶⁷ JE-6 at 15, 51-52.

58. Despite purposely not collecting any data during Student's first six-week grading period, District staff documented *** and *** that occurred from the Fall of 2017 through April ***, 2018.⁶⁸
59. Due to unreliable data collection, it is not possible to determine whether Student made progress on Student's IEP goal of reducing the frequency of incidents of minor and major aggression.⁶⁹
60. While attending the District and while in a school setting, Student continued to display the same maladaptive behaviors identified in the *** IEP (*i.e.*, ***, ***, and ***).⁷⁰ Student's *** behaviors progressed from ***. Parents and staff referred to the *** behaviors as "****." The District's BCBA ("Low Incident Specialist") was aware of Student's *** behaviors as early as October ***, 2017, but chose not to collect data on that maladaptive behavior because it was ***'s (classroom teacher's) job.⁷¹
61. According to the District's Written Summary of Restraint Use dated January ***, 2018, Student was restrained after *** and was deemed to be a threat of harm to ***self or others. The form does not indicate that Student reacted violently when staff attempted to stop Student from ***.⁷²
62. Student did not progress in reducing the frequency and/or intensity of incidents of aggression outside of the school setting.⁷³
63. After enrolling in the District, Student began experiencing *** issues; ***.⁷⁴ Regardless of cause, after enrolling in the District, Student's *** regressed and presented a barrier to academic and non-academic progress.⁷⁵
64. Consistency across settings is critically important for students with autism to make academic and non-academic progress.⁷⁶ Based on the entirety of the record, the Hearing Officer infers the move from *** to Texas, from a much smaller *** school with a student population of *** to a *** public *** school with over *** students,⁷⁷ was disruptive and

⁶⁸ PE-72 at 4.

⁶⁹ Tr. 365-68.

⁷⁰ PE-25; RE-44; Tr. at 776-78.

⁷¹ Tr. at 1084, 1207-08, 1212.

⁷² PE-25; Tr. at 1212-13.

⁷³ Tr. at 734-37.

⁷⁴ PE-30(C), (E), (J)-(O), (Q); Tr. at 1149-50.

⁷⁵ Tr. at 652-56.

⁷⁶ Tr. at 339.

⁷⁷ Tr. at 121, 549.

unsettling for this profoundly autistic young ***.

65. As of October ***, 2017, the District had notice Student was exhibiting significant and escalating school refusal behaviors that were potentially a barrier to Student's educational progress.⁷⁸ Over a period of months Parents informed numerous District personnel, including its lead diagnostician and LSSP of Student's school refusal and provided various forms of supporting documentation, including videos of the behavior.⁷⁹ Student's school refusal would include shouts of, "***"⁸⁰ The shouted refusals would frequently escalate to physical aggression.⁸¹
66. A functional behavioral assessment (FBA) is needed to assess and address school refusal behaviors.⁸²
67. Despite having knowledge of Student's significant school refusal behavior, the District choose not to conduct an in-home or school bus observation for school refusal and decided not to reassess Student for behavior when it conducted it's FIE.⁸³ The BIP created by the District⁸⁴ utilized the 2015 FBA from ***.⁸⁵ The District determined there had not been enough significant changes in behavior, including school refusal, to justify a new FBA.⁸⁶
68. The District employs a Board Certified Behavior Analyst (BCBA) who has the title of "Low-Incident Specialist." The BCBA provides "consult" services for 28 teachers spread over 15-18 campuses.⁸⁷ The BCBA is not deemed a "behavior specialist" within the District. Providing behavior support to students is a LSSP responsibility within the District.⁸⁸ Additionally, the District does not employ any registered behavioral technicians.⁸⁹
69. Student's BIP required Student to abide by the Student Code of Conduct – an impossible expectation.⁹⁰

⁷⁸ PE-10(D) at 1; Tr. at 736-37, 1106, 1160-61,

⁷⁹ PE-14(B) at 1; PE-19(D); PE-31, PE-35(E); PE-75 at 7; Tr. at 619-21.

⁸⁰ PE-31.

⁸¹ Tr. 735-37.

⁸² Tr. at 343, 1195.

⁸³ See JE-18; JE-24.

⁸⁴ RE-34.

⁸⁵ Tr. at 1181.

⁸⁶ Tr. at 1185.

⁸⁷ Tr. at 982, 984.

⁸⁸ Tr. at 1191-92.

⁸⁹ Tr. at 1191-92.

⁹⁰ RE-34 at 1; Tr. at 1194-95.

70. The District was obligated to implement the *** IEP which provided for BCBA support monthly, as needed, and the anticipated frequency was daily.⁹¹ A LSSP is not a board certified behavioral analyst and cannot provide the same specialized assistance. Student was denied the required support of a BCBA. Assuming arguendo that BCBA's and LSSP's are interchangeable, Student did not have daily access to a LSSP.

LRE

71. The District determined Student's LRE is a *** ** special education classroom.⁹² Student was essentially isolated in the *** classroom. Student was either alone with staff or with *** other disabled student ***. There was no effort to expose student to non-disabled peers by having selected students spend time in the *** classroom or socialize with Student during lunch. Student did physical education by ***self. Student did not participate in extracurricular activities and did not attend assemblies.
72. The District's *** placement clearly and unquestionably violated the District's obligation and agreement to implement the *** IEP which determined, at a minimum, Student's LRE was a private day placement and strongly recommended residential treatment.⁹³

TRAINING

73. Student's proposed IEP did not contain a staff training plan provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in Student's IEP.⁹⁴ Student's *** classroom teacher was brand new and teaching with a probationary license.⁹⁵ Student's SLP was also brand new and did not have her Certificate of Clinical Competency.⁹⁶ These staff members spent significant time with Student and their lack of adequate training/experience/supervision resulted in unreliable data collection (when collected at all)⁹⁷ and reinforcement of Student's maladaptive behaviors.⁹⁸

EVALUATION OF ALL SUSPECTED AREAS

74. The District suspected Student would additionally qualify for special education services as

⁹¹ PE-1 at 2.

⁹² JE-22 at 31-35, 37.

⁹³ RE-4; PE-34.

⁹⁴ PE-56 at 13 (citing 19 Tex. Admin. Code § 89.1055(e)).

⁹⁵ Tr. at 1125.

⁹⁶ Tr. at 742, 792.

⁹⁷ PE-53 at 11-12.

⁹⁸ Tr. at 340-41, 764, 811

a student with an Other Health Impairment (OHI) as the result of Student's known ***. The District did not determine whether Student has a qualifying OHI because Parents withheld consent for an OHI evaluation.⁹⁹

75. The District had reason to suspect Student suffers from a *** (***)¹⁰⁰ The District never evaluated for ***.¹⁰¹

ESY

76. The District did not offer or implement Extended School Year (ESY) between the 2016-2017 and the 2017-2018 school years; however, Student did not enroll until September ***, 2017.¹⁰² The Hearing Officer judicially notices and finds the District's ESY program concluded on August 3, 2017.¹⁰³
77. Student was offered full day ESY, at a different campus, for 2018-2019 from June ***, 2018, and July ***, 2018. The offer included three *** minute speech sessions and two *** minute OT sessions each week.¹⁰⁴
78. The *** IEP provided Student an 11 month educational program at the *** campus that fully implemented Student's IEP and schedule of services. The *** IEP stated if Student were to move to a 10 month program Student would meet the criteria for ESY.¹⁰⁵

PREDETERMINED PLACEMENT / CONTINUUM OF SERVICES

79. Mother first contacted the District by email in October 2014 to inquire about moving from *** to Leander. Mother was unequivocally informed the District does not offer non-public school placement for students with disabilities. The District informed Mother Student would be placed in *** *** classroom that does not focus on autism but is individualized as required by a student's IEP.¹⁰⁶ Student arrived in Texas in June 2017.¹⁰⁷
80. After Student enrolled and the District agreed in writing to implement the *** IEP as drafted, without additional evaluations, including the non-public day school placement, the

⁹⁹ PE-10(A); Tr. at 161-62.

¹⁰⁰ JE-18 at 7; PE-10(F) at 1, 8; Tr. at 907.

¹⁰¹ JE-18 at 7.

¹⁰² JE-29.

¹⁰³ See <http://www.leanderisd.org/cms/One.aspx?portalId=79318&pageId=363077> (last visited Aug. 29, 2018).

¹⁰⁴ PE-54 at 16.

¹⁰⁵ JE-6 at 41.

¹⁰⁶ PE-3 at 3.

¹⁰⁷ Tr. at 526-27.

District then immediately placed Student into the isolated and *** ** classroom.¹⁰⁸

81. The District did not consider a non-public school placement, including Parents' multiple requests for residential treatment, at any ARDC meeting.¹⁰⁹

REDUCTION OF NECESSARY SERVICES FOR ADMINISTRATIVE CONVENIENCE

82. A SLP fellow, in her first year of practice and who had not earned her Certificate of Clinical Competency, was assigned to provide Student speech services.¹¹⁰
83. The inexperienced first-year SLP fellow was assigned a caseload of *** students.¹¹¹ The District's average SLP caseload was *** students.¹¹²
84. Pursuant to the *** IEP, Student was to receive *** minutes of direct speech services per week delivered in three *** minute sessions.¹¹³
85. The SLP fellow informed Parents it was "very unusual" for students to receive so much speech therapy and she would have difficulty implementing the IEP because she was only on Student's campus *** per week.¹¹⁴
86. On September ***, 2017 (** days after enrollment) and without any formal evaluation or ARDC consideration, the SLP fellow requested Parents agree to a reduction of direct speech services to *** minutes sessions per week and *** minute sessions of "indirect" services per week.¹¹⁵ This proposal was based on a lack of SLP staff and was not based upon Student's need for speech services and Parent properly declined this recommendation.¹¹⁶
87. The District employs one BCBA.¹¹⁷ The District's BCBA and the District's Director of Special Education both conceded behavioral services within the District are determined based upon the availability/allocation of resources. The District's has only one BCBA possessing the title of "Low Incident Specialist" who does not provide direct behavior support, does not perform evaluations of behavior, and serves as a consulting and referral

¹⁰⁸ JE-29.

¹⁰⁹ JE-22 at 31-33, 37-41, PE-17 at 3-4.

¹¹⁰ Tr. at 742-43.

¹¹¹ Tr. at 793.

¹¹² Tr. at 837.

¹¹³ JE-6 at 55.

¹¹⁴ PE-9(K) at 4; Tr. at 546.

¹¹⁵ PE-9(K) at 3.

¹¹⁶ PE-9(K) at 4.

¹¹⁷ Tr. at 1122.

resource for *** teachers.¹¹⁸ Behavior evaluations, counseling, and direct support are provided by District LSSPs because “we have many of those.”¹¹⁹

88. LSSPs are not interchangeable with BCBAAs who are certified and have specialized training in behavior and the functions of behavior.¹²⁰ LSSPs may have overlapping knowledge and familiarity concerning behavior, but they are not the behavior “experts.” Student’s IEP required BCBA support, which Student did not receive due to the District’s allocation of resources and/or administrative convenience.¹²¹

PWN

89. Any delay in providing, or failure to provide, Parents with prior written notice or the Procedural safeguards were technical violations that did not substantively impact Student’s educational program or parental participation.

WITHHOLDING RECORDS

90. By the start of the due process hearing all production issues had been addressed and resolved. Any delays in the production of records did not impact Student’s educational programming, the delivery of services, or the preparation of the due process hearing.

NO PARENTAL COLLABORATION

91. Petitioner’s Closing Brief (Brief) recites numerous alleged failures to collaborate with Parents to ensure they were equal participants in Student’s educational decision making.¹²² Except for staff visit to *** and the predetermined placement, none of the alleged failures to collaborate adversely impacted Parents’ ability to participate in Student’s education.
92. In Spring 2018, the District sent a delegation to tour ***, which included its BCBA, one of many LSSPs, its diagnostician, and the assistant director of special education.¹²³ Parents were not invited to accompany staff to ***, were never provided information about the visit including notice of the visit, a report about the visit was never generated, Student’s treatment plan was not requested, the BCBA did not observe Student while at ***, and staff programming concerns were never conveyed to ***.¹²⁴

¹¹⁸ Tr. at 1123-24.

¹¹⁹ Tr. at 1276-77.

¹²⁰ Tr. at 1277.

¹²¹ PE-1at 2; Tr. at 1046.

¹²² Petitioner’s Closing Brief (Brief) at 51-54.

¹²³ Tr. at 887, 1092, 1119.

¹²⁴ Tr. at 721-22, 887, 1118-19.

OBSTRUCTING OBSERVATIONS

93. The District has a restrictive but reasonable classroom visitation and/or observation policy requiring such requests be submitted at least 24 hours in advance and requires the assignment of a staff escort during the visitation/observation.¹²⁵
94. Requested visitations/observations that comply with the 24 hour prior notice requirement are still subject to denial if appropriate staff members are unavailable to escort.¹²⁶
95. District staff members were unfamiliar with the policy and the escort requirement. Specifically, staff were confused as to who must be the escort. Staff perceptions as to who was required to escort ranged from any staff member, to the BCBA, to an administrator.¹²⁷
96. Staff's unfamiliarity (*i.e.*, lack of adequate training) concerning the District's visitation/observation policy unjustifiably resulted in delays responding to and permitting parental classroom observations.¹²⁸ Those delays, however, while frustrating did not impede parental participation in Student's educational programming.

SECRET MEETINGS

97. Petitioner alleges that on January ***, 2018, the District conducted a secret pre-meeting prior to the January ***, 2018, ARDC meeting.¹²⁹ The record contains no evidence to support a finding the District was making substantive decisions outside of the ARD process.

RESIDENTIAL TREATMENT / PLACEMENT

98. For reasons previously discussed, the *** IEP placed Student in a non-public day school, but strongly recommend residential care and treatment because Student was deemed a risk of harm to ***self and others and because of the need to reinforce and generalize what is being taught in school to other settings.¹³⁰

¹²⁵ Tr. at 1132.

¹²⁶ Tr. at 719.

¹²⁷ PE-9(G) at 11-14; PE-10(C) at 1-2; Tr. at 66-67, 1131.

¹²⁸ See PE-9(G) at 11-14.

¹²⁹ Brief at 59; RE-48 at 1, "Campus staffing – review IEP."

¹³⁰ JE-6 at 18-19.

99. On May ***, 2018, Parent provided written notice Student was being unilaterally withdrawn and placed at *** as of June ***, 2018.¹³¹ Student enrolled and began attending *** on June ***, 2018.¹³²
100. *** is an Agency approved residential service provider.¹³³
101. *** is not a medical facility/provider; it is an educational facility.¹³⁴
102. According to the *** Residential Treatment Plan (Treatment Plan), Student was enrolled for residential services due to Student's existing and chronic aggression and unmanageable behavior in both the home and school settings. Student requires the structure and supervision of a 24-hour facility due to the severity and unpredictability of Student's behavior.¹³⁵ Student requires a classroom setting with a high teacher to student ratio, and 24 hour supervision in a highly structured and consistent routine, with clear behavioral expectations.¹³⁶
103. *** is only partially implementing the *** IEP.¹³⁷
104. *** is currently not providing the following services/components of the *** IEP:
- Direct training or direct services by a social worker (the school has a social worker, but she works with the teachers rather than the students so she provides indirect training and services);
 - Indirect counseling;
 - Speech therapy;
 - Occupational therapy;
 - One-to-one staff ratio;
 - FM Headset.¹³⁸
105. The *** Treatment Plan currently in place is a draft and will be amended after an observational period and data is collected to determine baselines.¹³⁹
106. The typical staff to student ratio at *** is ***, *** students per staff member, but ratio may

¹³¹ PE-54 at 17.

¹³² JE-29.

¹³³ PE-21(B); Tr. at 264.

¹³⁴ Tr. at 265.

¹³⁵ Tr.at 256.

¹³⁶ PE-78 at 2.

¹³⁷ PE-78 at 2.

¹³⁸ Tr. at 459-60, 467-69, 473.

¹³⁹ Tr. 487-88.

- sometimes fluctuate to ***,¹⁴⁰
107. Student is not isolated at ***. Student transitions from class to class with other students.¹⁴¹ Student eats in the cafeteria and interacts with other students.¹⁴² Student's class sizes range between *** students.¹⁴³ At *** Student participates in PE with other students.¹⁴⁴
108. Since enrolling in *** Student has stopped exhibiting school refusal behaviors.¹⁴⁵
109. Since enrolling at *** there have been no incidents of ***.¹⁴⁶
110. Since enrolling at *** Student's *** issues have resolved; Student no longer requires ***.¹⁴⁷
111. At *** Student has the opportunity to participate in community outings.¹⁴⁸
112. *** is collecting appropriate and competent behavioral data.¹⁴⁹
113. For consistency, *** provides Student with an all year (12 month) educational program with a summer break.¹⁵⁰ Student requires year round educational services to avoid regression and provide critically needed consistency.¹⁵¹
114. ***' *** reinforces what is taught in the classroom and facilitates generalization of instruction across settings because Student is provided the necessary structured environment with context and routine while developing relationships and rapport, all of which assist Student in making academic and non-academic progress.¹⁵²
115. The District opposes residential placement at *** because Student is "not violent

¹⁴⁰ Tr. 277-78.

¹⁴¹ Tr. at 257.

¹⁴² Tr. at 259, 448-49.

¹⁴³ Tr. at 260.

¹⁴⁴ PE-70 at 19.

¹⁴⁵ Tr. at 453.

¹⁴⁶ Tr. at 464.

¹⁴⁷ Tr. at 393.

¹⁴⁸ PE-70 at 19-20.

¹⁴⁹ PE-70 at 33; Tr. at 453.

¹⁵⁰ Tr. at 283.

¹⁵¹ Tr. at 282-84, 423, 491.

¹⁵² Tr. at 446.

enough.”¹⁵³

116. As of July ***, 2018, since unilaterally placing Student at *** on June ***, 2018, Parents have incurred tuition, mileage, tolls and parking expenses in the amount of \$***.¹⁵⁴
117. *** charges \$*** per day for residential treatment.¹⁵⁵
118. Since June ***, 2018, Parents have accrued *** miles at reimbursable rate of \$0.535 cents per mile equaling \$***¹⁵⁶ That figure is included in the \$*** expenses incurred by Parents.
119. Residential placement at *** is necessary for a minimum of one calendar year (12 months). Prior to the 2019-2020 school year, Student will need to be reevaluated to determine if Student needs to remain at *** or is ready to transition home.¹⁵⁷

VIII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (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).

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 the child’s IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v.*

¹⁵³ Tr. at 1117.

¹⁵⁴ PE-69 at 7.

¹⁵⁵ PE-69 at 1, 9.

¹⁵⁶ PE-69.

¹⁵⁷ PE-70 at 36; Tr. at 260.

Rowley, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

B. IEP

In meeting the obligation to provide FAPE the District must have in effect an IEP at the beginning of each school year. 34 C.F.R. §300.323(a). 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).

C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.¹⁵⁸ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). In this case, the District was obligated to provide Student with FAPE during the 2017-2018 school year *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for the 2018-2019 school year. The burden of proof in this case is on Petitioner to show the District did not do so. *Id.*

In addition, Petitioner seeks continued residential placement at *** at District expense. The burden of proof is on Petitioner to show the proposed placement in the *** *** classroom is not appropriate *and* that continued placement at *** is essential and primarily oriented to enable Student to obtain an education. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299 (5th Cir. 2009).

¹⁵⁸ 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).

D. Interstate Transfer

Pursuant to the interstate transfer rules, the new/receiving district must continue to provide a FAPE and must do so by providing services comparable to those described in the IEP from the previous/sending school district. 34 C.F.R. § 300.323(f); 19 Tex. Admin. Code § 89.1050(j)(2). The receiving school district must provide comparable services until the new district has had an opportunity to: (1) Conduct an evaluation pursuant to 34 C.F.R. §§ 300.304-06 (if determined to be necessary by the District); and (2) Develop, adopt, and implement a new IEP, if appropriate, that meets the applicable requirements in 34 C.F.R. §§ 300.320, 300.323(f).

As a student with a disability (who had an IEP that was in effect from another state) transferring into the District (in consultation with the parents), the District must provide Student with FAPE (including services comparable to those described in Student's previous/existing IEP), until the District: (1) Conducts an evaluation pursuant to 34 C.F.R. §§ 300.304-06 (if determined to be necessary by the District); and (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 C.F.R. §§ 300.320, 300.323(f).

Although the IDEA requires the District to provide Student "services comparable to those described in the child's IEP from the previous public agency," it does not define the term "comparable services." The regulations interpret comparable to mean "similar" or "equivalent." 71 Fed. Reg. 46,681 (2006).

A school district does not have to provide a transfer student with services comparable to those in the IEP from the previous district once it convenes an IEP meeting and develops a new IEP, as long as the new IEP complies with IDEA regulations and provides the student FAPE. *See, e.g., Miami-Dade County Sch. Bd.*, 113 LRP 2047 (SEA FL 10/26/12) (finding that a Florida district did not have to offer a student with autism one-to-one SLT and OT as required by Student's previous New York IEP once an IEP team properly determined that group therapy would provide the student FAPE).

The IDEA does not require the new district to provide an exact replica of the services the student received from Student's former LEA. *See, e.g., Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008) (holding that a Nevada district could provide school-based services to a child with a cochlear implant who received home-based services from Student's former district); and *Metro Nashville Pub. Schs.*, 51 IDELR 116 (SEA TN 2008) (finding that the reading services provided in a transfer student's "Learning Strategies" class were comparable to those provided in her former district's "Resource Reading" class). If a district strays too far from the student's existing program, however, it may violate its obligation to provide comparable services. *See, e.g., Alvord Unified Sch. Dist.*, 50 IDELR 209 (SEA CA 2008) (finding that an orthopedic impairment special day class was not comparable to a 6-year-old ***'s prior placement because it served students who functioned on a much lower level and did not provide opportunities to interact with typically developing peers); and *Mountain Home Sch. Dist.*, 110 LRP 66223 (SEA AR 08/07/10) (concluding that social skills services from a mental health counselor were not comparable to the special education services provided by a resource room teacher required by the student's previous IEP).

The new district is only required to provide a transfer student with services that are comparable to those in the last IEP *in effect* at the time of the transfer. In *A.M. v. Monrovia Unified School District*, 55 IDELR 215 (9th Cir. 2010), the 9th U.S. Court of Appeals held that a California district didn't have to place a student with multiple disabilities in a mainstream setting because Student's newly developed IEP calling for a general education placement was never implemented by Student's previous district. Instead, the court found that the new district properly continued the student's home study placement required by the last-implemented IEP until it could conduct an evaluation.

While districts generally are required to implement comparable services for transfer students until they adopt a new IEP, that doesn't mean they are responsible for implementing every promise made in the prior district's IEP. A district may not be responsible for evaluations or other items that don't qualify as either special education or related services *Academy 20 Sch. Dist.*, 114 LRP 27950 (SEA CO 05/01/14).

When a student transfers from another state, an IEP meeting may be helpful to determine an appropriate placement but is not necessarily required. A district may be able to adopt a student's transfer IEP and provide comparable services until it determines that an evaluation is necessary. In another Florida case, a district properly adopted a transfer IEP after limited discussion with the parent and without an evaluation. But because it did not provide the student with a sufficiently similar placement, it nonetheless violated IDEA safeguards with regard to parental notification and participation. *Palm Beach County Sch. Dist.*, 114 LRP 47029 (SEA FL 04/07/14).

In this case, after reviewing the *** IEP the District accepted the *** IEP and committed itself to implementing it without modification and without additional evaluations. Therefore, the District committed itself to implementing the *** IEP with fidelity as written, including the nonpublic day school placement. The District did not implement the *** IEP with fidelity (*e.g.*, improper placement and 1:1 aide), it did not provide comparable services (*e.g.*, denied BCBA support), and therefore Student was not provided a FAPE. Moreover, Petitioner filed their initial Complaint on October 12, 2017. As a result of the Agreement to implement, for purposes of the stay put rule, the last agreed upon placement was a nonpublic day school during the pendency of this action.

E. IEP Implementation

Student arrived in Texas in *** as a special education interstate transfer student from ***. Parents were in communication with the District concerning the transfer and Student's needs before, during, and after the move from *** to Texas. When Student enrolled on September ***, 2017, Student had a *** IEP that was completed on August ***, 2017, that included an extensive BIP based upon a 2015 FBA, and a comprehensive ***.

The evidence was undisputed that when Student enrolled the District committed itself to conducting a "permanent placement" ARDC no later than October ***, 2017 (within 30 calendar days). That meeting never occurred. Furthermore, the District committed itself to implementing the *** IEP as drafted and without additional evaluations. The *** IEP was not implemented. Because of Student's chronic and severe behavior problems the *** IEP determined the

appropriate placement was a non-public day school. 19 Tex. Admin. Code § 89.63(c)(8). Student was not placed in a non-public day school. The *** IEP also concurred with Student's neurologist and strongly recommended residential treatment placement due to Student's aggression and maladaptive behaviors – Student was deemed a risk of harm to ***self or others. 19 Tex. Admin. Code § 89.63(c)(10). The ARDC never considered any form of private placement.

The District obtained consent to reevaluate on October ***, 2017, and on December ***, 2017, finally presented Parents a draft IEP that eliminated or reduced some related services provided under the *** IEP (*e.g.*, speech therapy was significantly reduced and a 1:1 aide was eliminated) and added other services not provided by the *** IEP (*e.g.*, in-home training, parent training, and indirect psychological services); moreover, the District's draft IEP maintained Student's placement in the *** classroom.

The District's draft IEP also addressed Student's needs to develop and improve *** skills, *** and ***, and ***. The evidence showed the District's draft IEP was developed on the basis of formal and informal data, including updated information from parent, and school personnel. Petitioner's real criticism is not with the IEP goals and objectives, but instead with the District's implementation of the *** IEP, the new proposed schedule of services, and the new placement offer to continue in the *** classroom versus placement at *** for residential treatment.

To successfully challenge the implementation of an IEP Petitioner must show more than a *de minimis* failure to implement all elements of that 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). Petitioner met that burden by showing, among other things, Student was not placed pursuant to the IEP, was not provided a 1:1 aide, and was denied BCBA support and services.

F. District Counterclaim

The District chose not to conduct an FBA when it preformed its November 2017 reevaluation. FBAs and BIPs are not required components of the IEP. 34 C.F.R. § 300.320; Fed.

Reg. 46,629 (2006). In developing an IEP, the IDEA requires that ARDC address behavior management whenever a student's behavior is interfering with the child's ability to benefit from Student's educational programming. Specifically, the IDEA states that the IEP team must consider the child's need for the use of "positive behavioral interventions and supports" in the case of a student with a disability whose "behavior impedes Student's learning of that of others." 34 C.F.R. § 300.324(a)(2)(i). While an FBA may help the IEP team address behavioral issues, the IDEA does not require the IEP team to conduct an FBA in order to meet this requirement. 71 Fed. Reg. 46,683 (2006). *See also W.S. and K.M. v. Nyack Union Free Sch. Dist.*, 56 IDELR 210 (S.D.N.Y. 2011) (observing that the lack of an FBA doesn't render an IEP procedurally inadequate; the IDEA requires only that the IEP team consider behavior interventions and strategies); and *L.G. v. Wissahickon Sch. Dist.*, 55 IDELR 280 (E.D. Pa. 2011) (holding that the district argued that its IEPs provided FAPE and that it was unnecessary to conduct an FBA because the student's behaviors, which included *** and tugging on Student's ears, did not impede Student's or other students' learning).

Based upon Student's increasing aggression and maladaptive behaviors noted in the August ***, 2017, IEP and the ***, Student's behavior was interfering with Student's ability to benefit from Student's educational programming. Student's IEP goal was to have no more than *** incidents of aggression over an entire IEP period. The District did not collect data during the first of two six week grading periods Student attended. Even with the unreliable data collection previously addressed, the District recorded *** incidents of aggression. The *** behaviors (and all the experts testified *** must be evaluated with an FBA), the ***, the regression of *** were all indicators that an FBA, or some formal behavior assessment, was required.

The District's reevaluation was incomplete and did not offer a FAPE due to the failure to assess Student's behavioral needs.

G. Autism Supplement

For students with autism in Texas, the ARDC must also consider whether the student's IEP should include the following: extended educational programming, daily schedules reflecting

minimal unstructured time and active engagement in learning activities, in-home and community-based training, positive behavior support strategies based on relevant information, *** for *** environments, parent/family training and support, suitable staff-to-student ratios, communication interventions, social skills supports, professional educator/staff support and teaching strategies based on peer-reviewed, research-based practices for students with autism. 19 Tex. Admin. Code § 89.1055(e). This regulation is commonly referred to as “the Autism Supplement.”

The evidence showed the District’s draft IEP did consider and address Student’s needs as required by the Autism Supplement. The evidence showed a number of strategies and services stated in the Autism Supplement were included in Student’s draft IEP.

H. Progress

Student completed two six week grading periods while enrolled in the District. Staff chose not to collect any data during the first six week grading period. Student received grades for both grading periods in eight subjects.

According to Student’s *** IEP, ***, and Parents’ statements, Student’s behavior impedes Student’s ability to make educational progress. Aggression and *** are behaviors targeted in Student’s BIP.

Remarkably, Student’s academic grades ranged from *** – ***. Student maintained *** grade point average and was ***. However, the administrative record contains no evidence on the criteria used to determine Student’s grades and academic performance.

Parents were not provided a progress report until April ***, 2018, and upon receipt Parents immediately requested the underlying data supporting the progress report. Upon pulling the data, the District discovered for the first time (near the end of the school year) that Student’s provisional *** special education teacher had been incorrectly collecting and recording data. School work examples admitted as evidence do not reflect academic progress. The progress report and Student’s grades are unreliable and cannot be used as indicators of academic progress.

I. Behavior

The *** was completed on August ***, 2017, and it addressed Student's behavior during the 2016-2017 school year and outlined chronic problematic behaviors that repeatedly occurred at varying levels of intensity since Student started attending school. Student would chronically resort to *** (***) and would engage in *** ("****"). The *** behaviors progressed to *** after Student began attending the District. The *** noted Student requires – “relies heavily upon” – routine and structure. Throughout Student's school history Student exhibited “significant” behavioral and academic regression during times of transition and change. Any change in Student's home routine or private providers resulted in significant regression at school.

The *** IEP for the 2016-2017 school year identified reducing the frequency of incidents of minor and major aggression as a need. Specifically, Student was to have no more than *** “aggressive actions” that required additional behavior support over the course of the IEP year.

While attending *** during the 2016-2017 school year, Student required behavioral support for *** incidents of aggression resulting in removals—this was a *** incident decrease (***) incidents) from the 2015-2016 school year; however, the incidents during the 2016-2017 school year were more serious/intense; consequently, Student's BIP provided for ***, and “exclusion and seclusion” as “measures of last resort” when Student presented as a risk of harm to ***self or others. A 1:1 aide was deemed necessary due to the frequency and intensity of Student's aggression to keep Student and those around Student safe. Furthermore, the 1:1 aide was required to permit Student to “access instruction and make educational, behavioral, social, and *** progress.”

While attending the District and while in a school setting, Student continued to display the same maladaptive behaviors identified in the *** IEP (*i.e.*, ***, ***, and ***). Student's *** behaviors progressed from ***. Parents and staff referred to the *** behaviors as “****.” Student's *** regressed. The District's BCBA was aware of Student's *** behaviors as early as October ***, 2017, but chose not to collect data on that maladaptive behavior because it was ***'s

(classroom teacher's) job.¹⁵⁹

According to the District's Written Summary of Restraint Use dated January ***, 2018, Student was restrained after *** and was deemed to be a threat of harm to ***self or others. What the form does not say is Student ***.¹⁶⁰

Despite purposely not collecting any data during Student's first six-week grading period in order to conduct observations, staff documented *** and *** that occurred from the Fall of 2017 through April ***, 2018.

Due to unreliable data collection, it is not possible to determine whether Student made progress on Student's IEP goal of reducing the frequency of incidents of minor and major aggression at school. Student did not progress reducing the frequency and/or intensity of incidents of aggression outside of the school setting.

Consistency across settings is critically important for autistic students to make academic and non-academic progress. Based on the entirety of the record, the Hearing Officer infers the move from *** to Texas, from a much smaller *** school with a student population of *** to a *** public *** school, was disruptive and unsettling for this profoundly autistic young ***. As of October ***, 2017, the District had notice Student was exhibiting significant and escalating school refusal behaviors that were potentially a barrier to Student's educational progress. Over a period of months Parents informed numerous District personnel, including its lead diagnostician and LSSP of Student's school refusal and provided various forms of supporting documentation, including videos of the behavior. Student's refusal would include shouts of, "****" The shouted refusals would frequently escalate to physical aggression.

At hearing the behavior experts agreed a functional behavioral assessment (FBA) is needed to assess and address school refusal behaviors. Despite having knowledge of Student's significant

¹⁵⁹ Tr. at 1084, 1207-08, 1212.

¹⁶⁰ PE-25; Tr. at 1212-13.

school refusal behavior, the District chose not to conduct an in-home or school bus observation for school refusal and decided not to reassess Student for behavior when it conducted it's FIE. The BIP created by the District utilized the 2015 FBA from ***. The District incorrectly determined there had not been enough significant changes in behavior, including school refusal, to justify a new FBA.

The District employs a *** Board Certified Behavior Analyst (BCBA) who has the title of "Low-Incident Specialist." The BCBA provides "consult" services for *** teachers spread over *** campuses. Remarkably, the BCBA does not do behavior – she is not deemed a "behavior specialist" within the District. Providing behavior support to students is delegated to LSSPs within the District.¹⁶¹ Additionally, the District does not employ any registered behavioral technicians.¹⁶²

The District was obligated to implement the *** IEP which provided for BCBA support monthly, as needed, and the anticipated frequency was daily.¹⁶³ A LSSP is not a board certified behavioral analyst and cannot provide the same specialized assistance. Student was denied the required support of a BCBA.

J. LRE

The IDEA requires that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A). Thus, "‘least restrictive environment’ denotes ‘not only freedom from restraint, but the freedom of the child to associate with Student’s or her family and able-bodied peers’ to the maximum extent possible.”

¹⁶¹ Tr. at 1191-92.

¹⁶² Tr. at 1191-92.

¹⁶³ PE-1at 2.

E.M., a minor; S.M., next friend; and C.S., next friend, v. Lewisville Independent School District, 72 IDELR 22 (E.D. Tex. May 4, 2017) citing *Teague*, 999 F.2d at 128 n.2 (quoting *Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.23 (5th Cir. 1992)).

The District insists the proper placement for Student to receive FAPE is the *** ** classroom. The *** IEP demanded structure, a high staff to student ratio, small groups, and minimal distractions. The *** ** classroom certainly possesses those components, but meets those needs by *** Student – the District essentially place Student in “*educational ***.*” The record is devoid of any evidence indicating any effort on the District’s part to expose Student to non-disabled or disabled peers. To prove Student had at least some exposure to student life at ***, the District offered a video prepared for the purposes of this litigation. The video was offered as an example of Student participating in the milieu of a class change with the rest of the student population. The video actually depicted the opposite. Student was *** around Student. Student seemed unaware of Student’s surroundings, other students passed Student like Student was a curiosity, and the staff member made no effort to encourage or facilitate any social contact by or with other students. The video graphically emphasized how utterly cut-off Student was from other students.

Based upon the preponderance of the evidence, the Hearing Officer concludes the District knowingly/purposely/intentionally violated the IDEA’s LRE mandate. For reasons discussed below, the Hearing Officer finds the *** ** classroom was an improper predetermined placement that excluded Parents from the decision making process.

While the District presented some evidence suggesting Student would be unable to tolerate the stimulation of eating in the cafeteria or being exposed to other school activities like assemblies or field trips, that evidence was not credible. At ***, Student transitions between classes, has other students in Student’s classes, eats with Student’s peers, Student’s exposed to other students in the ***, and goes on community outings. Since starting ***, Student’s *** behaviors and *** have resolved and the Hearing Officer concludes those problems were attributable to the improper *** placement in violation of the LRE mandate.

K. Training

For students with autism in Texas, the ARDC must also consider whether the student's IEP should include, among other things, professional educator/staff support and teaching strategies based on peer-reviewed, research-based practices for students with autism. 19 Tex. Admin. Code § 89.1055(e). This regulation is commonly referred to as "the Autism Supplement." Adequate and appropriate staff training is an important aspect of providing educator/staff support.

While it is stating the obvious to note that professionally everyone starts somewhere, in this case Student was left with a first year, provisionally licensed, special education classroom teacher and a first year SLP fellow who had not earned her Certificate of Clinical Competency. The Special Education Team Lead who coordinate the delivery of services, ARDC meetings, and communication with Parents Student was inexperienced, inadequately trained, and lacked understanding of the IDEA's interstate transfer provisions. Assigning this severely autistic student to these very inexperienced teachers and service provider was not a per se violation of the Autism Supplement or a denial of FAPE; however, in this case, Student was educationally harmed due to a lack of supervision and adequate training: the reevaluation was delayed, ARDC meetings were delayed, data collection to determine baselines and progress were inaccurately collected, and SLP and BCBA services were inappropriately rationed or denied. All of these errors are attributable, to some degree, to inadequate staff training.

L. All Suspected Areas

The District did evaluate all areas of suspected disability. The District had reason to believe Student needed to be assessed for Other Health Impairment (OHI) for Student's ***. Parents withheld consent for an OHI evaluation.

M. ESY

Petitioner challenges the District not offering ESY during the 2016-2017 summer recess. Student did not enroll until September 2017 and the District's ESY program ended on

August ***, 2017. The District's obligation to provide ESY services was not triggered until Student enrolled. Furthermore, the District's proposed IEP offered ESY that included *** minute speech sessions and *** minute OT sessions each week. The District met its obligation to offer ESY.

N. Predetermined Placement / Continuum of Services

The difference between proper pre-meeting "preparation" by school district staff and "predetermination" is the district's willingness to listen to the parents' concerns. *P.F. and S.F. v. Board of Educ. of the Bedford Cent. Sch. Dist.*, 67 IDELR 148 (S.D.N.Y. 2016). "The mere fact that the IEP may not have incorporated every request from the parents does not render the parents 'passive observers' or evidence any predetermination. *S.M. v. Gwinnett County School Dist.*, 646 Fed. Appx. 763 (11th Cir. 2016); *R.L. v. Miami-Dade County School Bd.*, 757 F.3d 1173, 1187 (11th Cir. 2014) ("Predetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team."); and *Nack ex rel. Nack v. Orange City School Dist.*, 454 F.3d 604, 609 (6th Cir. 2006) ("Predetermination amounts to a procedural violation of the IDEA. It can cause substantive harm, and therefore deprive a child of a FAPE, where parents are 'effectively deprived' of 'meaningful participation in the IEP process.'").

The evidence demonstrates that Parents were excluded from the IEP placement process. The District was notified in 2014 that Student might be transferring into the District from ***. In 2014, without having ever met Student or evaluating any of Student's records, the District informed Parent that Student would be placed in the *** ** classroom. Approximately three years later, on the day Student enrolled Student went directly to the *** classroom and remained in that setting until Student *** from the District.

Pursuant to Student's IEP Student was required to be privately placed. The District chose to ignore that requirement and never deviated from the *** ** placement it deemed appropriate back in 2014. Parents were never a meaningful part of that decision. Student's predetermined placement rose to the level of a substantive harm by excluding Parents from the placement

decision.

O. Proposed Reduction of Services for Administrative Convenience

A key component of the IDEA is the requirement that special education programs be individualized to meet the educational needs of identified students including necessary related services and supplementary aids and services. 20 U.S.C. § 1414(d)(1)(A)(IV). The regulations specify related services include other supportive services designed to assist a child with a disability to benefit from special education. 34 CFR § 300.34(a). If the ARDC determines that a particular service is an appropriate related service for a student and is required to enable the student to receive FAPE, the Committee's determination must be reflected in the student's IEP, and the service must be provided at public expense and at no cost to the parents. 20 U.S.C. §§ 1414(d)(1)(A)(i)(IV), 1401(9).

As a profoundly autistic individual, Student has serious speech deficits requiring the services of a speech language pathologist (SLP) to make academic and non-academic progress. *See* 34 C.F.R. § 300(c)(1)(i) ([Autism is] “a developmental disability affecting verbal and non-verbal communication and social interaction”). The inability to communicate is a significant barrier in school and in the community. Student's IEP required Student receive *** direct *** minute SLP sessions each week. The testimony of the SLP intern reflects speech services were being proposed based upon SLP staffing and scheduling considerations; not the individualized needs of Student. Specifically, the Hearing Officer notes soon after initially meeting Student, the SLP intern informed Parent she would have difficulty implementing the *** hours of speech services provided in the *** IEP because she was only at the school on Mondays and a half day on Tuesdays.

After Parent rejected any reduction in Speech services not considered by the ARDC and reflected in Student's IEP, the District obtained consent for a reevaluation that included speech. Based upon the new evaluation, the District proposed significantly decreasing Student's Speech support by offering only *** hours of direct support and *** minutes of indirect Speech support every ***-weeks and the *** IEP provided *** hours of direct Speech support every ***-weeks

(*** minutes per week x *** weeks = *** minutes). Including the indirect speech support the District proposed reducing Student's Speech support by *** hours every *** week grading period.

The District's proposed schedule of Speech services was ... eventually ... based upon an assessment. Parents exercised their right to reject the proposal and did not request an Individual Educational Evaluation (IEE) for Speech. The evidence does not support a finding that Speech services were improperly rationed due to administrative convenience. The same is not true for BCBA services.

Student's IEP mandated that Student receive behavioral support with a daily anticipated frequency rate from a BCBA. The District employs one BCBA who is presented as Respondent's behavior expert, but is not employed as a behavior specialist and provides no direct behavior support. The District utilizes LSSPs to provide behavior support but that support is not equivalent to the support a trained and certified BCBA can provide. The District did make decisions and provided behavioral services based upon staffing resources and not the requirements of Student's IEP.

P. Prior Written Notice & Withholding Records

Any delay in providing, or failure to provide, Parents with prior written notice (PWN) or the Procedural Safeguards were technical violations that did not substantively impact Student's educational program. Additionally, any delays in the production of records did not impact Student's educational programming, the delivery of services, or the preparation of the due process hearing.

Q. No Parental Collaboration

The lack of adequate communication with Parents needlessly created some of the tension between the Parties exhibited throughout this due process hearing. Staff's site visit to *** illustrates the problematic communication. A site visit was planned and executed to observe Student at *** and scrutinize the facility. Parents only learned about the *** site visit though

discovery. Student's predetermined placement rose to the level of a substantive harm by excluding Parents from the placement decision.

R. Obstructing Observations

The District has a restrictive, but reasonable classroom visitation and/or observation policy requiring such requests be submitted at least 24 hours in advance and requires the assignment of a staff escort during the visitation/observation. *** serves over *** students and the District must have campus access policies to ensure the safety of students and staff. *See e.g.*, Tex. Ed. Code § 37.102 (“[A] school district may adopt rules for the safety and welfare of students, employees, and property and other rules it considers necessary to carry out this subchapter and the governance of the district”). Requested visitations/observations that comply with the 24 hour prior notice requirement are still subject to denial if appropriate staff members are unavailable to escort.

The record indicates that District staff was unfamiliar with the escort policy. Specifically, staff were confused as to whom must be the escort. Staff perceptions as to who was required to escort ranged from “any staff member,” to the BCBA, to an “administrator.” Staff’s unfamiliarity (*i.e.*, lack of adequate training) concerning the District’s visitation/observation policy unjustifiably resulted in delays responding to and permitting parental classroom observations. Those delays, however, while frustrating did not impede parental participation in Student’s educational programming.

S. Secret Meetings

The record contains no evidence to support a finding the District was making substantive decisions outside of the ARD process. There was no evidence Student’s predetermined placement was the result of a secret meeting.

T. Residential Treatment / Placement

The *** IEP placed Student in a non-public day school, but strongly recommend residential

care and treatment because Student was deemed a risk of harm to ***self and others and because of the need to reinforce and generalize what is being taught in school to other settings; however, the District opposes residential placement at *** because it believes Student is “not violent enough.”

On May ***, 2018, Parent unilaterally withdrew Student and placed Student at ***. Student enrolled and began attending *** on June ***, 2018.¹⁶⁴ *** is an Agency approved residential service provider. *** is not a medical facility/provider; it is an educational facility.

According to the ***, Student was enrolled for residential services due to Student’s existing and chronic aggression and unmanageable behavior in both the home and school settings. Student requires the structure and supervision of a 24-hour facility due to the severity and unpredictability of Student’s behavior. Student requires a classroom setting with a high teacher to student ratio, and 24 hour supervision in a highly structured and consistent routine, with clear behavioral expectations. The *** IEP recommended residential treatment for the same identified needs.

*** is only partially implementing the *** IEP. *** is currently not providing the following services/components of the *** IEP: direct services by a social worker, indirect counseling, speech therapy, occupational therapy, ***, and a 1:1 staff ratio. A private placement may still be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

When Student enrolled on June ***, 2018, *** was not in session and summer session did not begin until June ***, 2018. The *** currently in place is a draft and will be amended after an observational period and data is collected to determine baselines. The typical staff to student ratio at *** is ***, *** students per staff member, but ratio may sometimes fluctuate to ***. *** reserves the option of increasing its daily rate of \$*** if additional services are provided (*i.e.*, OT,

¹⁶⁴ JE-29.

Speech, and 1:1 aide).

Student is not isolated at ***; Student is in Student's LRE. Student transitions from class to class with other students. Student eats in the cafeteria and interacts with other students. At *** Student has the opportunity to participate in community outings. Student's class sizes range between *** students and Student participates in PE with other students.

Since enrolling in *** Student has stopped exhibiting *** behaviors. Since enrolling at *** there have been no incidents of ***. Since enrolling at *** Student's *** have resolved; Student no longer ***. Since enrolling at ***, there has been only one incident requiring restraint. The significant progress Student has made mitigating or eliminating these problem behaviors is directly attributable, at least in part, to being removed from isolation in the *** *** classroom and being placed in Student's LRE. The almost immediate cessation of those maladaptive behaviors upon being removed from the *** *** classroom is a clear indicator placement at a residential facility is essential for Student to make progress.

For consistency, *** provides Student with an all year (12 month) educational program with a short summer break. Student requires year round educational services to avoid regression and provide critically needed consistency. Part of that consistency includes the reinforcement provided by ***' ***. The *** reinforces what is taught in the classroom and facilitates generalization of instruction across settings because Student is provided the necessary structured environment with context and routine while developing relationships and rapport, all of which assist Student in making academic and non-academic progress. Year round educational program is essential for Student's progress and the District's ESY program does not provide a year round program.

As of July ***, 2018, since unilaterally placing Student at *** on June ***, 2018, Parents have incurred tuition, mileage, tolls and parking expenses in the amount of \$***. Since June ***, 2018, Parents have accrued *** miles at reimbursable rate of \$0.535 cents per mile equaling

§***¹⁶⁵

Residential placement at *** is essential for a minimum of one calendar year (12 months) in order for Student to receive a meaningful educational benefit. Before the beginning of the 2019-2020 school year, Student must be re-evaluated to determine if Student needs to remain at *** or is ready to transition home.¹⁶⁶

U. FAPE

1. The Four Factors Test

In Texas, 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 for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

¹⁶⁵ PE-69.

¹⁶⁶ PE-70 at 36; Tr. at 260.

2. Individualized on the Basis of Assessment and Performance

First, the evidence showed the *** IEP that should have been implemented during the relevant time period was individualized on the basis of assessment and performance. The problem is the IEP was not implemented. For the period of time from August ***, 2017 to March ***, 2018 and through the end of the 2017-2018 school year the *** IEP goals and objectives addressed Student's needs based on assessment and performance. Due to faulty data collection and the failure to establish baselines, Student's actual progress during the 2017-2018 school year cannot be determined. The fact that Student's maladaptive behaviors ceased almost immediately upon Student's withdraw from the District strongly suggests the District's program (or attempt to modify Student's existing program) was ineffective and did not provide Student a FAPE. The District's IEP goals and objectives proposed for the 2018-2019 school year also addressed all areas of Student's needs, included academic goals and objectives in line with Student's functional performance, and were based upon information from the District's November 2017 reevaluation.

3. Least Restrictive Environment

Second, the evidence showed Student needed residential placement for the remainder of the 2017-2018 school year. The evidence further showed the District's proposed placement in the *** ** classroom at *** did not meet the IDEA's preference for educating children with disabilities to the maximum extent appropriate with their non-disabled peers. 34 C.F.R. § 300.114.

In the *** ** classroom Student has virtually no opportunity to associate with non-disabled peers, to eat with other students, to participate in student activities such as assemblies, or interact with other students and friends during modified PE. This was sadly emphasized when the District asked Parents if Student would participate in *** and Parents replied it would be pointless because after a full academic year Student had not met one friend. Furthermore, the proposed 2018-2019 *** ** placement failed to provide the necessary 1:1 aide. The evidence showed the assigned *** teacher was inexperienced and poorly supervised. The classroom teacher's supervisory, Team Lead, also conceded she was poorly trained. The District's proposed continuation of the *** ** placement lacks most of the essential features *** offers as a

residential facility – many of which cannot be replicated by the District (*e.g.*, 24/7 supervision, structure, support, and consistency).

Due to Student's unique and individualized needs, the District cannot offer Student FAPE requiring Student's continued placement at *** for the 2018-2019 school year. In Spring 2019, Student must be reevaluated, including conducting a FBA, to determine if residential placement continues to be necessary.

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

Third, the evidence showed Student's services at *** were not provided in a coordinated and collaborative manner by District staff. *** failed to provide the District and the parent with regular IEP progress reports. Key staff members were inexperienced and inadequately supervised resulting in Parents being provided untimely, inconsistent, and erroneous information. The predetermination of Student's *** placement, in direct violation of Student's IEP, is the starkest evidence that services were not collaboratively provided.

The evidence showed *** staff cooperated with the District in making arrangements for school district staff and its consultants to visit and observe Student in the residential facility – in both the educational and home environments. The evidence suggests, at the appropriate time, teaching personnel from *** and the District could work in a coordinated, collaborative manner in devising and implementing a reintegration plan.

However, the evidence also suggests Parents played a role in the lack of collaboration. The evidence indicates prior to enrollment in the District, Parent was already in communication with *** stating they would be seeking District funding to place Student at *** indicating Parents had decided (predetermined?), prior to enrollment, the District could not serve Student's needs.

5. Academic and Non-Academic Benefits

Fourth, the evidence reflects Student received neither academic nor non-academic benefits from the program provided at *** from Student's initial placement there through March ***, 2018 – the date of withdraw. The lack of reliable data and the absence of baselines render any assessment of academic progress speculative. Moreover, the evidence showed upon enrolling in the District, Student regressed in *** and Student's *** behaviors progressed from *** both indicating a lack of non-academic progress.

The IDEA does not require the IEP to guarantee a certain level of accomplishment – only that the IEP is reasonably calculated to meet Student's needs given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). Furthermore, the District is not required to provide Student with the best possible education. Student does not need to improve in every academic and non-academic area to receive an educational benefit. The issue is not whether the District could have done more. Instead, the inquiry is whether Student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.*, 582 F. 2d 576, 590 (5th Cir. 2009). The evidence showed Student did not receive any meaningful educational benefit from the program provided given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, *supra*.

6. Residential Placement at School District Expense

Student must meet a two part test in order to secure continued placement at ***. First, Student must prove the District's proposed program was not appropriate under the IDEA. Second, Student must prove continued placement at *** is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

If placement in a public or private residential placement is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. § 300.104. In this jurisdiction, there is a two-part test to determine whether a residential placement is appropriate in

meeting the Petitioner's burden of proof on the second prong of the residential placement test. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 297 (5th Cir. 2009).

The first part of the test is whether the residential placement is *essential* in order for Student to receive a meaningful educational benefit. If Student is able to receive an educational benefit without a residential placement, even if the residential placement is helpful to the student's education, the school district is not required to pay for it under the IDEA.

If the residential placement is *essential*, the second question is whether the residential placement is *primarily oriented* toward enabling the student to obtain an education. Though broad in scope the IDEA does not require school districts to bear the cost of residential services that are primarily aimed at treating a student's medical issues or enable the student to participate in non-educational activities. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d at 299. Part of this inquiry is a determination of the extent to which the private placement services are "related services" as defined by the IDEA. *Michael Z.* 520 F. 3d at 300, 301.

Other factors to consider include, but are not limited to, whether Student was placed at the private facility for educational reasons and whether the student's progress is primarily judged by educational achievement. If, upon analysis as a whole, the residential placement is primarily oriented towards enabling the student to obtain an education, the judicial forum must then weed out inappropriate treatments from the appropriate; i.e., reimbursement is only available for treatments that are related services as defined by the IDEA. *Michael Z.*, 530 F. 3d at 301.

7. Residential Placement Test Applied to the Facts

In this case, the District's proposed program for the 2017-2018 and the 2018-2019 school years include placement in the *** classroom. The evidence showed that Student is not close to being ready to reintegrate back to Student's home, Student's community, and Student's school -- Student has not yet fully generalized appropriate behaviors across all settings with a variety of people. Therefore, the District's proposed program is not appropriate because it fails to place Student in Student's LRE.

Student met Student's burden of proving that continued placement at *** is essential for Student to receive the requisite educational benefit as Student continues to need the structure and 24 hour behavioral supports provided at *** because Student is still deemed a threat of harm to ***self or others. The evidence also shows Student's placement at *** is primarily oriented towards receiving an education because for Student education means not only academic instruction and progress, but also the acquisition of crucial behavioral, social, and functional skills. *See*, 34 C.F.R. § 300.324(a) (2); 19 Tex. Admin. Code § 89.1055(e). The evidence showed Student did not make measurable progress with aggressive acting out or with inappropriate *** and ***. In fact, the evidence showed since being improperly placed into the *** classroom Student's developed a significant aversion to school that presented another educational barrier.

Petitioner met Petitioner's burden of proving continued placement at *** was essential. Furthermore, Petitioner met Petitioner's burden of proving continued placement at *** for the 2018-2019 school year is primarily oriented toward Student's education. Presently, Student cannot receive the requisite educational benefit at the District due to District cannot properly place Student. *Richardson Ind. Sch. Dist. v. Michael Z., supra.*

8. Procedural Issues

Petitioner met Petitioner's burden of proving the District violated parental procedural rights under the IDEA. The District eventually provided Parents with the requisite Prior Written Notice (PWN), Notice of ARD meetings, consent for evaluations notices, and ARD documents ***. 34 C.F.R. § 300.503(a)(c). Notices of Procedural Safeguards were also provided. 34 C.F.R. § 300.504(a)(d). Any failure to timely provide PWN or the Procedural Safeguards were harmless and did not prevent Parents from participating in the decision making process; however, the District's predetermined placement excluded Parents from the placement decision and rose to the level of a substantive violation and a denial of FAPE because Parents were completely denied any opportunity to participate in the placement decision-making process, and caused a deprivation of educational benefit by isolating Student. 34 C.F.R. § 300.513(a)(2).

IX. CONCLUSIONS OF LAW

1. Respondent failed to provide Petitioner with a free, appropriate public education (FAPE) and failed to implement Student's IEP during the 2017-2018 school year. Petitioner met Petitioner's burden of proof on this issue. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Schaffer ex. rel. v. Weast*, 546 U.S. 49, 52 (2005); *C.G. v. Waller Ind. Sch. Dist.*, 2017 U.S. App. LEXIS 11139* (5th Cir. 2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 34 C.F.R. §§ 300.22, 300.323(a); 19 Tex. Admin. Code § 89.1055(e).
2. Respondent's unilateral and predetermined change in placement for Petitioner from a private day school to the *** ** classroom for the 2017-2018 school year was not reasonably calculated to provide Petitioner with a free, appropriate public education in the least restrictive environment. 34 C.F.R. §300.114. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, *supra*.
3. Respondent's proposed IEP for the 2018-2019 school year fails to provide FAPE by proposing placement in the *** ** classroom, which is not Student's least restricted environment. 34 C.F.R. §300.114. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, *supra*.
4. Petitioner met Petitioner's burden of proving Student's continued placement at the residential treatment center is primarily oriented toward enabling Petitioner to obtain an education and the District is incapable of providing the necessary 24 hour structure, supervision, and reinforcement. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286 (5th Cir. 2009); *Schaffer ex. rel. v. Weast*, *supra*.
5. Respondent failed to comply with parental and student procedural rights under the IDEA when it predetermined Student's placement. The predetermined placement impeded Petitioner's right to a free, appropriate public education, significantly impeded the parents' opportunity to participate in the placement decision-making process and resulted in a deprivation of educational benefit. 34 C.F.R. §§ 300.503(a)(c); 300.504(a)(d); 300.513(a)(2).
6. Respondent's failure to formally reevaluate Student for behavior resulted in a proposed IEP for 2018-2019 that did not address all suspected areas of disability and could not provide FAPE. 34 C.F.R. § 300.304(c)(4).
7. All of Petitioner's claims arising under any laws other than the Individuals with Disabilities Education Act are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503(a); 300.507; 19 Tex. Admin. Code § 89.1151(a).
8. Petitioner's request for an award of attorneys' fees and litigation costs are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.516, 300.517; 19 Tex. Admin. Code § 89.1185(n).

9. Petitioner's claims that accrued before July ***, 2017, are dismissed as outside the one year statute of limitations. 34 C.F.R. § 300.511(e); 19 Tex. Admin. Code § 89.1151(c).


X. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief is **GRANTED IN PART AND DENIED IN PART AS FOLLOWS:**

1. Respondent shall reimburse Parents' for *** tuition during June and July 2018, mileage, tolls and parking expenses incurred while placing and visiting Student at *** in the amount of \$***.
2. Petitioner is awarded one-year compensatory residential placement, at District expense, at *** for the denial of FAPE during 2017-2018 school year. The compensatory placement shall include, and the District shall fund, any necessary related services, including a 1:1 aide, set out in Student's IEP that are not included in the ***' daily tuition rate. The compensatory placement shall end at the conclusion of ***' 2018-2019 school year which provides a twelve month program.
3. By March ***, 2019, the District shall, in coordination and consultation with Parents and ***, reassess Student to determine if residential placement continues to be essential for Student's educational progress. Within 30 calendar days of completing the reassessment, the District shall convene an ARDC to review and amend Student's IEP and make a placement determination.
4. Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are dismissed as outside the jurisdiction of the hearing officer; and,
5. Petitioner's request for attorneys' fees and litigation costs are dismissed as outside the jurisdiction of the hearing officer.

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

SIGNED September 12, 2018.



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

XI. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code § 89.1185(p); Tex. Gov't Code § 2001.144(a)(b).