

DOCKET NO. 099-SE-0117

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, STUDENT, b/n/f PARENT and PARENT (“Petitioner” or “Student”) brings this action against the Northside Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1482 (IDEA) and its implementing state and federal regulations.

The threshold issue in this case is whether the school district denied Student the right to a free appropriate public education (FAPE) by failing to provide Student with comparable services when Student transferred into the school district from a public school district *** and failed to provide Student with FAPE thereafter. The hearing officer concludes the school district met its responsibilities under the IDEA transfer provisions and provided Student with a free, appropriate public education during the relevant time period.

A. Continuances and Extension of Decision Due Date

The due process hearing in this case was initially scheduled for February 21-23, 2017. The hearing was continued and the decision deadline extended for good cause five times: four times at Petitioner’s request, once at Respondent’s request, and once by joint request. The last continuance set the hearing for August 7-9, 2017 with an extension of the decision deadline of September 7, 2017 for good cause. At the conclusion of the hearing both parties requested the

decision deadline be extended to October 4, 2017 to allow the submission of post-hearing briefs on September 15, 2017.

B. Legal Representatives

Student has been represented throughout this litigation by Student's legal counsel Idris Motiwala and his co-counsel Elizabeth Angelone, with the Cuddy Law Firm, P.C. The school district has been represented throughout this litigation by its legal counsel Elvin Houston with the law firm of Walsh Gallegos Treviño Russo & Kyle, P.C.

C. Resolution Session and Mediation

The parties agreed to attempt mediation in lieu of a Resolution Session. The parties met in mediation on February 8, 2017, but it was not successful.

D. Preliminary Motions

There were several preliminary dispositive motions resolved prior to the due process hearing. Order No. 2 dismissed Petitioner's claims arising under laws other than the IDEA. Respondent's Sufficiency Challenge was granted which required Petitioner to file an Amended Complaint triggering a reset of all hearing timelines. Order No. 10 denied Petitioner's Motion for Summary Judgment.

II. DUE PROCESS HEARING

The due process hearing was conducted on August 7-9, 2017. Petitioner continued to be represented by Petitioner's legal counsel Idris Motiwala. Elizabeth Angelone attended the first day of hearing for a brief period of time. Mr. Motiwala continued to represent Petitioner throughout the remainder of the hearing. Petitioner's parents PARENT and PARENT also attended the hearing.

Respondent continued to be represented by its legal counsel Elvin Houston. ***, Assistant Director of Special Education ***, attended the hearing as the school district's party representative. The hearing was recorded and transcribed by a certified court reporter. Both parties filed written closing arguments in a timely manner. The Decision in this case is due October 4, 2017.

III. ISSUES

A. Petitioner's Issues

Petitioner confirmed the following issues for decision in this case:

1. **FAPE:**

Whether the school district failed to provide Student with a free, appropriate public education (FAPE) within the meaning of the IDEA and specifically:

- **Failure to Implement Comparable Services:** Whether the school district failed to implement Student's Individualized Education Program (IEP) from *** in January 2016, by failing to provide comparable services based on Student's *** IEP, including collaborative Applied Behavior Analysis (ABA) based services, direct Speech and Language Services once per week for *** minutes, Occupational Therapy (OT) direct services for *** minutes per week, and consultation services for *** minutes per month.
- **Failure to Provide** ***: Whether the school district failed to provide comparable services to Student based on Student's *** IEP by *** provided in *** to a *** *** in the District (***), amounting to approximately *** hours of compensatory education to date and ongoing.
- **Failure to Meet Legal Standards for FAPE:** Whether the school district provided Student with a deficient and inappropriate IEP that denied Student meaningful educational benefit or even de minimus/trivial advancement during the 2015-2016 school year, and through the 2016-2017 school year and whether the school district failed to comply with the four factor test set forth in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), cert denied, 522 U.S. 1047 (1998).

- **Failure to Consider Autism Supplement or Add Autism Services:** Whether the school district failed to include adequate information in the Full Individual Evaluation (FIE) and IEP about the Texas Autism Supplement or provide Student services consistent with the requirements of the Texas Autism Supplement.
- **Failure to Include Board Certified Behavioral Analyst (BCBA) and Failure to Collaborate:** Whether the school district failed to make available individuals trained in ABA-based and peer-reviewed research-based programming at Student's ARD meetings resulting in the inability of the ARD to appreciate the necessity and importance of ABA services for Student and whether the school district refused to collaborate with Student's private ABA therapists.

2. Placement:

Whether the school district failed to provide FAPE designed to meet Student's unique needs in the least restrictive environment (LRE) by placing Student in a self-contained class for 30 days when Student first arrived at the district before conducting an evaluation. Petitioner has no objection to Student's current placement at *** as Petitioner's least restrictive environment.

3. Related Services:

- Whether the school district failed and continues to fail to provide Student sufficiently intensive speech and language services by reducing Student's speech and language services from *** per week to *** every *** weeks (with the most recent IEP providing for *** every *** weeks).
- Whether Student continues to be without speech and language services during some weeks of the school year based upon the amount and the schedule of the speech and language services resulting in approximately *** of speech and language services owed as compensatory education to date and ongoing.
- Whether the school district failed and continues to fail to provide Student with sufficiently intensive OT by failing to provide Student with the same amount of OT provided to Student in *** (i.e., *** minutes of direct OT *** per week and *** minutes of consultative OT services per month) resulting in an insufficient amount of OT and approximately *** of OT services owed as compensatory education due to date and ongoing.

4. Procedural:

- Whether the school district misled parents by stating Student was required by law to be in a self-contained class for 30 days.

- Whether the school district failed and is continuing to fail to comply with all procedural requirements of the IDEA and Texas law, including Prior Written Notice, and by doing so, has impeded Student's right to FAPE, significantly impeded Petitioner's parents with an opportunity to meaningfully participate in the decision-making process regarding the provision of FAPE to Student, and impeded or caused an actual deprivation of FAPE to Student.

B. Respondent's Legal Position

The school district contends it provided Student with the requisite "comparable services" when Student transferred from a public school district *** to the public school district in Texas. The school district argues the IDEA does not require it to provide Student with identical services or an identical placement as those provided in the *** public school. Instead, the school district argues it need only provide services comparable to those described in the *** IEP."¹ The school district further contends Student was evaluated in all areas of suspected disability, appropriately identified Student's eligibility for special education, and offered Student an individualized program based on Student's unique needs in the least restrictive environment.

IV. REQUESTED RELIEF

Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. The school district reimburse Petitioner for any and all costs related to ABA services, speech and language services, and occupational therapy services paid for by Student's parents due to the school district's failure to provide FAPE to Student.
2. The school district hire or contract with a licensed BCBA, Registered Behavior Therapist (RBT), OT, and licensed Speech and Language professionals to work with District staff to provide direction and guidance to Student's ARD and all school staff in designing an IEP that meets Student's unique educational needs, including specifically the IEP will provide:

¹ See, 34 C.F.R. §300.323 (f); 19 Tex. Admin. § 89.1050(j)(2).

- (a) peer-reviewed researched programs (i.e. ABA) provided by qualified personnel such as an RBT;
 - (b) a means by which the programs can be provided in a regular education environment with differentiated instruction and supplementary aids and supports to help Student successfully learn academically alongside Student's non-disabled peers;
 - (c) services to ensure that Student is fully socially included with Student's non-disabled peers; and,
 - (d) services to ensure that Student is able to utilize assistive technology devices and programs.
3. The school district provide Student with compensatory education services from a qualified private source of Petitioner's choice in an amount equal to the deprivation of education Student has experienced at school district expense.
 4. The school district revise its district-wide special education plan to ensure the provision of ABA-based services to children with Autism.
 5. The school district revise its district-wide practices for Extended School Year (ESY) services to ensure objective measurement of children's progress so as to determine the need for ESY services.
 6. Any other appropriate relief.

V. FINDINGS OF FACT

1. Student was first identified as eligible for special education services as a *** child with autism and speech impairment by a public school district in ***.² Student's exhibited inappropriate behaviors including: *** (***) , *** , *** , and ***.³ Student is a very active child. Student responds well to redirection but requires quite a bit of it in an unstructured setting.⁴ Student benefits from individualized attention, encouragement and reinforcement.⁵ Assessments of Student's intellectual level probably underestimate Student's true IQ.⁶

² Joint Exhibit 1, p. 1 (referred to hereafter as "J.__:__."); Petitioner's Exhibit 38, p. 1 (referred to hereafter as "P. __:__.").

³ J.2: P.38; Transcript Volume I, p.172, 328 (referred to hereafter as "Tr. __:__.").

⁴ Tr.I:192, 193

⁵ Tr.I: 208.

⁶ Tr.I: 194-195.

2. In *** Student received private Applied Behavior Analysis training (ABA) from a Board Certified Behavior Analyst (BCBA). The *** BCBA was permitted to visit Student's campus and make recommendations for the teacher and related service staff with regard to behavioral strategies to use with Student.⁷ However, the private BCBA was not implementing ABA services under the *** IEP, was not paid by the *** public school district to implement ABA services, and was not asked to provide ABA training to the teachers in ***.⁸
3. Student also received private OT services in *** for about *** months.⁹ The private therapist used *** and *** with Student. These devices worked well in private OT.¹⁰
4. Student enrolled in the school district in *** 2016 when the family relocated to Texas.¹¹ Student enrolled in Student's home campus, ***. The school district convened a Temporary Placement meeting on ***, 2016 with Student's mother, the *** teacher, and the Vice Principal at ***¹² *** *** "****".¹³
5. In conjunction with the Temporary Placement Meeting a Reevaluation Review was also conducted on ***, 2016.¹⁴ School district staff reviewed a *** evaluation report dated July ***, 2014. Current information from Student's mother was also collected during the Reevaluation Review. The Reevaluation Review concluded additional evaluation was needed in the areas of language and communication, OT, emotional/behavioral, intellectual, and, educational performance.¹⁵
6. The purpose of the Temporary Placement Meeting was to confirm a set of services for Student on a 30 day temporary basis until an Admission, Review & Dismissal Committee meeting (ARD) could convene to review any additional information received from *** and new evaluation data collected by the school district.¹⁶
7. In preparation for the Temporary Placement meeting the *** teacher reviewed paperwork provided to the school district by Student's mother, including the most recent *** IEP.

⁷ P.1:13-30; Tr. I: 73, 321-322, 325-326.

⁸ Tr.I: 324, 329-331.

⁹ Tr.I:278.

¹⁰ Tr.I: 280-281.

¹¹ J.2:15; Tr. II: 381, 383.

¹² J.1:1-2; Tr. II: 429-431; Tr. III: 674-675.

¹³ Tr.II:512.

¹⁴ J.2:1-6.

¹⁵ J.2:1-3, 5-6, 8, 16, 17.

¹⁶ J.1:2; Tr. II: 430.

- The *** IEP included goals in the areas of social/emotional, independent functioning, and communication. Specific IEP goals included visual and fine motor tasks, following simple directions with two or less cues, participating in whole group instruction, ***.¹⁷ The *** teacher also conferred by telephone with a Special Education Coordinator from the *** public school to verify Student's special education eligibility, services and placement in ***.¹⁸
8. The *** IEP identified Student's placement as the *** (***) with "****".¹⁹ The *** was described to the *** teacher by the *** *** as a self-contained, special education classroom.²⁰ The *** teacher understood this to mean Student's *** classroom was limited to special education students.²¹ The *** IEP ***.²² Instead, the *** IEP stated Student was to receive services in a "separate class."²³ By parent report Student attended school *****.²⁴
9. ****.²⁵ ****.²⁶ The *** teacher explained the full continuum of options to Student's mother during the Temporary Placement meeting.²⁷
10. For the first 30 days the *** teacher proposed placement in ***, self-contained *** class at *** as it was her understanding this was comparable to the *****.²⁸ Student's mother questioned the proposed *** placement since she reported Student was in school for *** in a class with non-disabled peers in ***.²⁹ Student's mother ultimately agreed to the temporary *** self-contained placement because she thought *** was simply not available.³⁰
11. Under the *** IEP Student received *** minutes of direct occupational therapy (OT) once a week, *** minutes of collaborative OT services once a month, and, *** minutes

¹⁷ P.: 38:3-7; Tr. III:669-671.

¹⁸ Tr. II: 431-432; Tr. III: 670- 672, 724-725.

¹⁹ P.38:9;Tr. III: 669, 672, 724-725.

²⁰ P.38:9; Tr. III: 671, 672-673).

²¹ P. 38:9;Tr. III:673

²² P. 38:9; Tr. III: 674. .

²³ P. 38:9.

²⁴ Tr. II: 383; Tr. III: 674

²⁵ Tr. II: 432; Tr. III: 675, 676.

²⁶ Tr.I: 31, 45; Tr. II: 434-435; Tr. III: 677, 678.

²⁷ Tr. III: 676-677.

²⁸ Tr. II: 432-433; Tr. III: 679-680.

²⁹ Tr. II: 385, 432.

³⁰ Tr. II: 383, 412.

- of speech/language therapy once a week.³¹ Student also received private OT services in ***.³² The school district's *** day temporary service plan provided Student with the same amount of direct and collaborative related services as stated in the *** IEP.³³
12. Student's mother conferred frequently with the *** *** teacher during the initial 30 day period. Student's mother had questions about how Student was doing, how the teacher was responding to Student's behavior, and what the permanent placement proposal would be. Student's mother stated her preference for a collaborative *** placement.³⁴
 13. A Reevaluation Review meeting reconvened on *** ***, 2016. Student's mother attended the meeting along with other members of the multidisciplinary team: a licensed specialist in school psychology (LSSP), a speech/language pathologist intern, the Vice Principal, a general education teacher, the occupational therapist, and the *** special education teacher. The team agreed on the need for an updated evaluation to be completed by *** ***, 2016.³⁵
 14. The school district completed a Full Individual Evaluation (FIE) on *** ***, 2016. The FIE confirmed Student continued to meet eligibility requirements for special education and related services as a student with autism and a speech impairment.³⁶ The FIE included a review of a 2014 *** FIE, previous testing, updated information from Student's mother, updated receptive, expressive, and pragmatic language assessments, and updated OT assessments in ***.³⁷
 15. The FIE also included extensive data on Student's emotional and behavioral needs through updated parent information, observation, formal autism assessment tools, and rating scales completed by both parents and the *** teacher.³⁸ Sociological data was reviewed from the 2014 *** evaluation.³⁹ The school district's Health Inventory and Family Information form was not returned by Student's parents.⁴⁰ The *** teacher also completed an in-home training needs assessment by phone with Student's mother. Student's mother did not have any concerns or needs to be addressed at home.⁴¹

³¹ J.38:9.

³² P.11; P. 36; Tr. I: 263, 278.

³³ J.1:4; Tr. III: 726-727, 755-756.

³⁴ Tr. III: 683-684.

³⁵ J: 2.

³⁶ J: 2: 18.

³⁷ J.2:1-8.

³⁸ J.2:8-15.

³⁹ J.2:15.

⁴⁰ J.2:16.

⁴¹ J.3:31; Tr. III: 744-745.

16. Attempts at evaluating Student's intellectual and educational performance and need for Assistive Technology (AT) were not successful. Student had difficulty with the testing environment. This was consistent with the *** FIE which included some cognitive and adaptive scores but did not include any functional academic results or a norm referenced intelligence measure.⁴²
17. After the initial 30 day period a permanent placement ARD met on *** ***, 2016. A copy of Procedural Safeguards was provided to Student's mother who attended the ARD. IEP progress reports were explained to Student's mother at the ARD. Others in attendance included the Vice Principal, a general education teacher, the *** special education teacher, the speech/language intern, and the occupational therapist.⁴³ Student was now receiving private behavior therapy services from a BCBA in ***.⁴⁴ The private BCBA also participated in the February ARD meeting.⁴⁵
18. The ARD reviewed the school district's FIE. Student's need for continued speech/language therapy was confirmed.⁴⁶ Student's academic and functional skills were described in the ARD. Student demonstrated age appropriate skills in the areas of ***.⁴⁷ A functional behavior assessment (FBA) was conducted as a component of the FIE. The *** teacher proposed a Behavior Intervention Plan (BIP) to address Student's behavioral, social and emotional needs and, more specifically, disruptive classroom behaviors of ***.
19. The BIP included a set of targeted behaviors, classroom strategies, use of a positive reward system, a set of consequences reasonably calculated to improve behavior, and, social skills training.⁴⁸ Student's educational program included consideration of strategies based on peer-reviewed, research-based educational programming. The ARD agreed Student needed a daily schedule reflecting minimal unstructured time and active engagement in learning activities.⁴⁹
20. Student demonstrated age appropriate functional skills such as ***.⁵⁰ *** were included in the revised IEP for ***.⁵¹
21. During the *** 2016 ARD Student's mother expressed concerns about Student's sensory

⁴² J.2:15-17.

⁴³ J.3:19, 20-23, 35; Tr. II: 438-439; Tr. III: 685, 719-722, 747.

⁴⁴ P.13:30; Tr.I:88, 98,100.

⁴⁵ J.3:19

⁴⁶ J.3:2.

⁴⁷ J.3:3-4.

⁴⁸ J.3:24-28, 30; Tr. III: 686, 691.

⁴⁹ J.3:30.

⁵⁰ J.3:4.

⁵¹ J.3:32-33.

- needs, improving communication between home and school, and *** behavior. Parental concerns were addressed and information and explanations were provided. The *** teacher added a visual chart to document Student's behavior. A daily communication log went back and forth between home and school. Student's attempts to *** were not successful. Student's mother was reassured school staff supervised Student at all times during the instructional day.⁵²
22. The *** 2016 ARD developed an IEP for Student that covered the period of time from *** ***, 2016 through *** ***, 2017. Specific IEPs were designed for speech/language and behavior that addressed Student's needs in those areas.⁵³ The IEP included a set of modifications for use in all content areas including ***. *** were included as accommodations for speech therapy⁵⁴
23. The IEP was based on the FIE, Student's present levels of academic achievement and functional performance (PLAAFPs) and outside reports. The evaluations used as the basis for Student's IEP included the *** 2016 FIE, data from the Child Observation Record (COR), a developmental profile, behavior data, classroom observations, progress reports, and input from service providers.⁵⁵ COR is used to determine a student's level of academic skills. At the *** level academic skills include: ***.⁵⁶ The *** *** teacher used the COR to document Student's progress. The COR reports were sent home to Student's parents. The *** teacher reviewed the domains assessed using the COR report and explained what they measure at the ARD.⁵⁷
24. The *** teacher proposed Student's placement change from the *** self-contained special education *** class to a ***, inclusive ***/*** (***) at ***.⁵⁸ The ARD agreed to the change in placement.⁵⁹
25. The ***/*** *** classroom is structured by combining a *** classroom with a *** classroom. Half of the students with special needs spend time in the *** classroom and half of the *** students spend time in the *** classroom. ***. ***. ***." ***. ***.⁶⁰
26. The *** classrooms are staffed by the *** Special Education teacher, a general education *** teacher, and two instructional assistants (IAs) – one from general education, the other

⁵² J.3:1.

⁵³ J.3:6-8; Tr. III: 684; 686-690.

⁵⁴ J.3:9.

⁵⁵ J:2; J.3:2-4; J:10; Respondent's Exhibit 7 (referred to hereafter as "R. __:__); R:9; R:11; R:15:2-4; R:20.

⁵⁶ Tr. II: 561-562.

⁵⁷ Tr. III: 746.

⁵⁸ J.:3; R. 4; Tr. II: 441; Tr. III: 686.

⁵⁹ J: 3: 11, 19.

⁶⁰ Tr. III: 661-664.

- from special education.⁶¹ The daily schedule included ***. Students can spend *** time in either small or large group instruction.
27. The curriculum components of the program included: *** and were integrated throughout the daily class routine. The IEP contemplated Student's placement and course schedule for the remainder of the 2015-2016 school year through *** of the 2016-2017 school year.⁶²
28. Although the school district's OT evaluation did not recommend OT services the ARD decided to provide OT services in response to parental concerns about Student's sensory needs. The IEP for the remainder of the 2015-2016 school year included integrative OT services for *** minutes per week for the *** and *** *** weeks of the semester, and one *** minute session per week for the *** weeks. In an integrative approach the OT works alongside the teachers to gather their input and identify concerns related to a student's ability to meet IEP goals. The OT tries certain approaches with the student in the classroom and then makes recommendations to the teacher on follow through.⁶³ The OT was in the *** *** classroom many times.⁶⁴
29. The ARD discussed Student's functional needs for ***. The OT goals in Student's IEP met Student's needs.⁶⁵ For the remainder of the 2015-2016 school year Student received *** minute sessions per week of direct speech therapy during the *** and *** weeks of the *** week grading period, *** minute direct speech therapy sessions per week for weeks ***, and *** of the *** week grading period, *** minute *** therapy session in weeks *** and *** and no speech therapy weeks ***, and ***.⁶⁶
30. Student exhibited some *** to express Student's feelings in the *** class. ***. Student responded to redirection with a verbal and/or visual prompt. Student did not have difficulty *** in the *** class at ***.⁶⁷
31. Student's mother continued to confer with the *** teacher through phone calls regarding Student's behavior, how the teacher responded, and how Student's behavior was being handled at home. Student's mother also asked the *** teacher to collect behavioral data. In response, the *** teacher implemented a daily data sheet tracking Student's ***. The data sheets were shared daily with Student's mother.⁶⁸ IEP progress reports were also

⁶¹ Tr. I: 64-65, 74-75, 227.

⁶² J.3:14-15; Tr. I: 75-76.

⁶³ Tr. II: 478.

⁶⁴ J.1:4; Tr. III: 728

⁶⁵ Tr. II: 373-375.

⁶⁶ J.3:15.

⁶⁷ Tr. III: 680-683.

⁶⁸ J: 10; Tr. III: 697-698, 701, 709, 737.

provided.⁶⁹

32. Student made progress in the *** classroom at ***. Student improved Student's response to redirection and demonstrated a diversity of interests in classroom activities. Student's *** behaviors decreased at ***. Student increased Student's use of ***.⁷⁰
33. A meeting with Student's mother, the *** teacher, the Vice Principal, and the counselor convened in *** 2016 to discuss parental concerns. One of the topics discussed was Student's ***. The *** teacher and Vice Principal attempted to address the concerns.⁷¹ During the meeting Student's mother discussed the possibility of Student's private BCBA visiting the classroom at ***.⁷²
34. In early May 2016 the Special Education Area Coordinator (the Coordinator) with supervisory duties over *** conferred with Student's mother to discuss continuing parental concerns. Parental concerns included ***, and, how Student's behaviors were being addressed at school.⁷³ She was also concerned Student was *** at school.⁷⁴ Student's mother felt Student needed a regular ***.⁷⁵ ***.⁷⁶ Student's mother also asked whether the school district had an "autism unit" and was told the school district does have a unit primarily serving students with severe autism.⁷⁷
35. Student has been receiving private ABA therapy in ***.⁷⁸ ABA is a scientifically-based, evidence-based program of techniques and strategies used to decrease maladaptive or problem behaviors and develop appropriate replacement behaviors.⁷⁹ A set of target behaviors are identified and the antecedents and consequences associated with the target behaviors. ABA includes the use of general behavioral principles. The structure, intensity, and consistency of ABA differentiates ABA from general behavioral principles.⁸⁰ The cost of Student's private ABA therapy is covered by ***.⁸¹

⁶⁹ R.26; Tr. III: 719-722, 747.

⁷⁰ R.20; R. 21; Tr. III: 699-700, 708, 713-714.

⁷¹ Tr. II: 386, 404,442; 447-448; Tr. III: 701-702, 704-705.

⁷² Tr. II: 449; Tr. III: 769, 742.

⁷³ Tr.I: 40-41, 42-43, 49, 50, 51-52; 53; Tr. II: 381, 394-395.

⁷⁴ Tr.I:51-52

⁷⁵ Tr.I:51.

⁷⁶ P. 41:12; Tr.I:389; Tr. III: 705, 750

⁷⁷ Tr.I:41.

⁷⁸ P.5.

⁷⁹ Tr.I: 97-98, 101.

⁸⁰ Tr.I:196-197.

⁸¹ P.8; Tr.I: 59, 160-161.

36. Student initially received private ABA therapy *** times a week.⁸² The private ABA therapy group also provided Student's parents with parent training.⁸³ Student made progress in Student's private ABA therapy. By January 2017 Student's ABA therapy was reduced to focus on generalization of skills with another BCBA.⁸⁴ Generalization is aimed at maintenance of skills across different settings, different people, and different environments.⁸⁵
37. In the meeting with the Coordinator, Student's mother again discussed the possibility of Student's private BCBA therapist visiting the campus.⁸⁶ In order to visit the campus, the therapist was required to submit a resume and credentials through the school district's website and then submit to a background check. The private therapist then schedules the visit with a school district staff member with similar credentials who accompanies the private therapist during the visit.⁸⁷
38. There were some difficulties getting the private BCBA's background check and credentials properly submitted. The district could not locate the background check information the BCBA said he submitted. The Coordinator notified Student's mother of this issue and had at least one direct email with the private BCBA. The private BCBA never visited the campus.⁸⁸ However, the school district can collaborate with outside therapists through staffings, meetings, and ARD meetings to ensure the school district and outside therapists are "all on the same page."⁸⁹
39. In response to parental concerns over Student's behavior, a school district support specialist conducted an observation and behavioral consult. The support specialist observed Student in the *** classroom at *** from *** through ***, 2016.⁹⁰ A support specialist is assigned to a set of campuses and available to make campus visits to assist with instructional and behavioral strategies, suggestions and classroom management.⁹¹
40. The support specialist observed Student appropriately engaged in the educational activities of the classroom. ***. Student was easily redirected with the use of visual or verbal prompts when needed. When Student became overstimulated in a large group activity Student used appropriate coping strategies. The behavior specialist

⁸² Tr.I:98.

⁸³ Tr.I:99-100., 132.

⁸⁴ Tr.I:100-104; 106, 124; P. 22 - P. 26.

⁸⁵ Tr.I: 105.

⁸⁶ Tr.I: 41, 53-54.

⁸⁷ Tr.I: 54-56.

⁸⁸ Tr.I: 43-44, 45, 56; Tr. II: 459; Tr. III: 710.

⁸⁹ Tr.I: 71-72.

⁹⁰ Tr.I: 43-44, 45, 56; Tr. II: 459; Tr.III:710.

⁹¹ Tr.I: 57; Tr. III: 627.

recommended the *** teacher continue with the strategies in use.⁹²

41. Student's mother also observed Student's classroom in the company of the support specialist. The Coordinator facilitated the parent observation.⁹³ The Coordinator followed up with Student's mother after the observation. Student's mother reported Student was doing better by the end of the year.⁹⁴ The Coordinator continued to confer with Student's mother through early June 2016.⁹⁵ The Coordinator also conferred with the campus Vice Principal over the parental concerns.⁹⁶
42. Student struggles with processing sensory input.⁹⁷ Student was provided with ***.⁹⁸ ***.⁹⁹ ***.¹⁰⁰ ***.¹⁰¹
43. ***.¹⁰² ***.¹⁰³
44. Student began receiving private OT services in *** in *** 2016. Student made steady progress in Student's private OT. Student has been working on *** tasks in private OT such as ***.¹⁰⁴ There is a difference between clinical OT services and school-based OT services.¹⁰⁵ In the clinical setting the focus of the OT is on the client's independence in daily life; in the school setting the focus is on the student's IEP goals. In the clinical setting the OT identifies everything the client needs to do every day to be as independent as possible. In the school setting, the OT identifies what the student needs to be doing at school – i.e. supporting the student towards progress in meeting IEP goals.¹⁰⁶
45. The *** teacher at *** was a highly regarded teacher in the school district. She was designated as a “****” and selected to serve as a *** and mentor for other teachers.¹⁰⁷

⁹² J.14; Tr. III: 628-630, 631, 632-633, 635-636, 637-638, 639-640.

⁹³ Tr.I:57-58, 59; Tr. II: 405-406; Tr. III: 626-627.

⁹⁴ Tr.I:58.

⁹⁵ Tr.I:59-60.

⁹⁶ Tr.I:60.

⁹⁷ Tr.II: 360.

⁹⁸ Tr.I:222-223, 226

⁹⁹ Tr.I:283-284; Tr. II: 491.

¹⁰⁰ Tr. II: 361.

¹⁰¹ Tr. II: 483-484, 499, 544-545, 546, 557-559.

¹⁰² Tr. II: 49-480, 482-483, 495-496, 557-558.

¹⁰³ Tr. II: 479-481.

¹⁰⁴ P.31; P.32; Tr. II: 355-356,357.

¹⁰⁵ Tr. II: 369, 471.

¹⁰⁶ Tr. II: 471-473.

¹⁰⁷ Tr.I:62-63, 80; Tr. II: 426-427; Tr. III: 625, 666-667, 668.

Nevertheless, Student's mother was unhappy with Student's placement in the *** program at ***.¹⁰⁸ Parental concerns were staff-focused; i.e. she was concerned about the *** teacher and IAs.¹⁰⁹

46. The school district agreed to a parental request for an independent educational evaluation in the spring of 2016. An independent LSSP/psychologist (the IEE examiner) began the IEE in April and finished in June 2016.¹¹⁰ The IEE examiner reviewed the school district's FIE and agreed with the conclusions Student met eligibility criteria as a student with autism and a speech impairment.¹¹¹ Student's *** skills fell within the average range with *** skills above expectations for both Student's age and grade.¹¹² Student demonstrated some significant strengths in terms of *** and ***.¹¹³ Student was one of the higher performing *** in the ***/*** class. Student's *** skills were also above most of the other students in the classroom although *** was a particular strength.¹¹⁴
47. The IEE recommended intensive ABA therapy, social skills training, speech therapy and behaviorally-based language skills training, counseling services, OT, continued access to AT as provided in Student's IEP, warnings about changes in routine or transitions, support from an IA, planning and organizing tasks, and limiting attention to negative behaviors. The IEE also recommended a list of suggested accommodations to address Student's difficulties with attention, hyperactivity, and impulsivity. The IEE recommended a set of strategies for the home, participation in extra-curricular activities, and on-going consultation with a physician.¹¹⁵ Many of the recommendations of the IEE were included in Student's IEP and BIP implemented by staff at *** and ***.¹¹⁶
48. Student began the 2016-2017 school year at ***.¹¹⁷ However, Student's mother continued to have concerns about Student's placement. In particular she was concerned Student would not continue to make progress in *** gained over the summer. She also was concerned about Student's safety at school ***. ***. ***.¹¹⁸ The parent conferred again with the Coordinator who referred her to central administration.¹¹⁹

¹⁰⁸ J.6; Tr.I: 26-27, 72-73; Tr. II: 389; Tr. III: 516.

¹⁰⁹ Tr.I:61.

¹¹⁰ P. 10; P: 33; Tr.I:184.

¹¹¹ Tr.I:185-186, 194.

¹¹² P. 10; Tr.I:195

¹¹³ Tr.I:207-208, 210.

¹¹⁴ Tr.I:251-252.

¹¹⁵ P.10:10-13.

¹¹⁶ J. 3; J.8.

¹¹⁷ Tr. III: 715.

¹¹⁸ Tr. III: 716-718.

¹¹⁹ Tr.I:44, 66-67, 68, 76.

49. Student's mother then conferred with the school district's *** (the Director).¹²⁰ Student's mother refused to continue to send Student to ***. The Director suggested a transfer to *** to resolve the parental concerns.¹²¹ Student began attending *** in *** 2016.¹²² Student was placed into the *** program at ***.¹²³ Both groups shared a classroom staffed by a special education teacher and *** teacher and two IAs.¹²⁴ The *** students were in school ***. The *** group spent a *** in school – ***. ***.¹²⁵
50. Student's *** 2016 IEP was implemented at ***.¹²⁶ Under the *** 2016 IEP Student received integrative OT services for *** minutes per week for the *** and *** weeks. Additional OT services were provided as needed to support Student's IEP if there was a change in educational staff/program and/or changes in Student's medical or physical status.¹²⁷ The OT worked collaboratively with the *** instructional staff by providing suggestions and recommendations for meeting Student's physical and sensory needs.¹²⁸
51. Under the *** 2016 IEP speech therapy services Student received *** minute direct speech therapy sessions for weeks ***, and *** during the *** week grading period, *** minute integrated therapy session during weeks *** and *** of the *** weeks and no speech therapy during weeks ***. For the *** week grading period the IEP contemplated *** minute direct speech therapy services for *** of the *** weeks, *** minute *** therapy session for *** and no speech services for ***. For the *** week grading period the IEP contemplated *** minute direct speech therapy services per week for weeks *** and *** minute *** therapy session in the *** week.¹²⁹
52. The *** teacher at *** collaborated with the *** teacher. The teachers teach lessons together ***.¹³⁰ There were *** students in the *** group. The total number of *** students in *** ranged from *** over the school year as some students ***.¹³¹ The ***/*** teachers also selected instructional activities from *** curriculums. The *** and *** teachers worked together in selecting lessons and activities for the students. The

¹²⁰ Tr.I:26, 32; Tr. II: 516.

¹²¹ Tr.I:27, 67-68; J.6.

¹²² R.I:27; J.6.

¹²³ Tr.I: 236-237, 239-240, 518.

¹²⁴ Tr.I:240-241.

¹²⁵ Tr.I:243-244.

¹²⁶ Tr. II: 537-538, 603.

¹²⁷ J.1:4; J.3:15, 18; Tr. II: 476-477.

¹²⁸ Tr. II:478

¹²⁹ J.3: 15-16.

¹³⁰ Tr. II: 512-513.

¹³¹ Tr. II: 513-514.

classroom includes ***. ***.¹³²

53. The *** classes at *** followed a similar structured daily routine to the *** daily schedule with a combination of individual, small and large group activities in different classroom areas.¹³³ The classroom is very safe -- ***.¹³⁴ The *** *** teacher used visual schedules in the classroom and the schedule was very consistent. Students knew what to expect throughout the day.
54. As at ***, ***. For example, ***.¹³⁵ The *** classroom also included ***. ***. ***. Each student also engages in ***. Student learned over the course of the 2016-2017 school year to plan Student's worktime without much prompting. By December Student was ***.¹³⁶
55. For the first few weeks the *** *** teacher *** with Student at parental suggestion. As the staff became more familiar with Student they no longer needed ***. At the beginning of the year Student's mother shared concerns about Student's ***. Student made progress ***. Student did not *** during the 2016-2017 school year.¹³⁷
56. Student's mother and the *** teacher discussed ways to communicate with one another. The *** teacher at *** used a smart phone application to communicate with Student's parents. Parents can add the application to their phone. The application facilitates messages between the teacher and the parent, either as a group or one on one Student's mother responded positively to the phone application.¹³⁸
57. Student enjoyed participating in *** at ***.¹³⁹ Different campuses have different extracurricular activities. At *** Student was not eligible for *** because it was only available for students in *** that campus.¹⁴⁰
58. Student's mother also requested use of ***.¹⁴¹ The school district did not have ***. When Student returned to school in the fall of 2016 Student was staying seated, responding to verbal cues, so there was not much of a need for ***.¹⁴² Student's mother

¹³² Tr.I:242-243, 246-247.

¹³³ Tr.I:244-245; Tr. III: 661-664.

¹³⁴ Tr. II: 519.

¹³⁵ Tr. II: 520.

¹³⁶ Tr. II: 521-524, 560.

¹³⁷ Tr. II: 527-529, 534-535.

¹³⁸ Tr.II: 516-517.

¹³⁹ Tr. II: 392.

¹⁴⁰ Tr. II: 452, 460-461; Tr. III: 706,708-709.

¹⁴¹ Tr. II: 478-480.

¹⁴² Tr. II: 497.

provided the staff at *** with *** at the beginning of the 2016-2017 school year. The instructional staff used *** at times to redirect Student when Student engaged in disruptive *** behavior – ***. The *** was not always effective. However, Student was successfully redirected – sometimes it took five minutes but more often much less. Redirection usually required one-two prompts.¹⁴³ The IAs documented the number of prompts required to redirect Student.¹⁴⁴

59. Another ARD convened on October ***, 2016 at parental request¹⁴⁵ An IEP was developed at the October 2016 ARD.¹⁴⁶ Student's mother brought the two private BCBA's, the private OT, and a private speech pathologist with her to the October 2016 ARD. The private providers had input into the development of the PLAAFPs and the IEP. They shared their experiences providing Student with private therapy and made suggestions.¹⁴⁷ School district staff was considerate and receptive to the input from the private therapists.¹⁴⁸ The outside providers were able to effectively participate in the ARD meetings.¹⁴⁹ Student's mother gave input into the development of Student's IEP.¹⁵⁰
60. The *** teacher gave input into the preparation of Student's PLAAFPs at the October 2016 meeting.¹⁵¹ The PLAAFPs were based on the COR.¹⁵² The October IEP included a set of accommodations including the use of *** and ***.¹⁵³ The October 2016 ARD also discussed Student's BIP.¹⁵⁴ Although Student did not demonstrate *** behavior at school, it was added to the BIP as a target behavior to address parental concerns.¹⁵⁵ At the end of the ARD the *** teacher read the deliberations aloud as well as each page of the ARD document.¹⁵⁶
61. The school district's OT prepared the statement of Student's PLAAFPs with regard to OT needs.¹⁵⁷ Student's *** was somewhat developmentally delayed but not significantly so.

¹⁴³ Tr.I: 231-231, 233; Tr. II: 485-486.

¹⁴⁴ Tr.I: 233, 235.

¹⁴⁵ J.8; J. 9; R. 15; Tr. II: 539.

¹⁴⁶ J. 8; J.9; R.15.

¹⁴⁷ Tr. II: 553-555.

¹⁴⁸ P.19:4; Tr.I:107-108, 114, 117-118; Tr. II: 553-555.

¹⁴⁹ Tr. II: 117-118.

¹⁵⁰ Tr.I:115.

¹⁵¹ R.15:2; Tr. II: 540.

¹⁵² R.22; Tr. II: 541, 605.

¹⁵³ R.15:7, 9; Tr. II: 549.

¹⁵⁴ R.15:22; Tr. II: 550.

¹⁵⁵ Tr. II: 550-552.

¹⁵⁶ Tr. II: 555-556.

¹⁵⁷ R.15:4; Tr. II: 485.

Student received assistance in the classroom working on a variety of fine motor tasks, including ***. These activities, built into the classroom curriculum, supported Student's development of ***. Student was practicing Student's *** every day. Student did not require direct OT services for that purpose.¹⁵⁸ The ARD discussed Student's functional needs for ***. The October ARD also discussed Student's *** – in particular the use of ***, ***.¹⁵⁹ The OT goals in Student's October 2016 IEP met Student's needs.¹⁶⁰

62. The school district special education staff has training and expertise in behavioral programs, strategies, and interventions.¹⁶¹ Some have the BCBA credential. The school district's behavioral specialists are available to support students with behavioral issues in the classroom.¹⁶² Both *** teachers hold bachelor's degrees and certifications in special education and *** education and teaching experience.¹⁶³
63. The need for ESY services is based upon whether a student shows regression in a critical area of need over a long period of time in school. A student's regression is measured through data collection.¹⁶⁴ The data collection includes data from a student's prior school. If the student had not received ESY from the student's prior school that would be a significant factor in determining the need for ESY. Student's *** IEP did not include ESY.¹⁶⁵ A student's recoupment is also a role in determining the need for ESY. The school district also considers whether a student recoups skills following the first 8-9 weeks of school after a break.¹⁶⁶
64. Student's need for ESY at the end of the 2015-2016 school year would be measured by whether Student demonstrated any regression over spring break. For the 2016-2017 school year, Student's regression over the summer would be measured by comparing student's baseline skills from the end of the 2015-2016 school year to the beginning of the next school year.¹⁶⁷ Private services over the summer can support maintenance of skills.¹⁶⁸

¹⁵⁸ Tr. II: 487-488, 489-490; 502-503.

¹⁵⁹ Tr. II: 492.

¹⁶⁰ J.8; Tr. III: 373-375.

¹⁶¹ Tr.I: 41; Tr. II: 423-424; Tr.III: 619-621; 659-660.

¹⁶² Tr. III: 621-624; 651-652.

¹⁶³ T. II: 511; Tr. III: 659-661.

¹⁶⁴ Tr.I: 46.

¹⁶⁵ P.38:2-3; Tr. I: 63-64.

¹⁶⁶ Tr.I: 64.

¹⁶⁷ Tr.I: 47-48, 63-64.

¹⁶⁸ Tr.I:48.

65. The October 2016 ARD discussed Student's need for ESY. The school district proposed collecting data and convene a future ARD at the end of the school year to determine Student's need for ESY.¹⁶⁹ The *** teacher prepared the Prior Written Notice document during the October 2016 ARD that addressed ESY.¹⁷⁰ At the end of the school year Student's mother requested an ARD to discuss ESY. This litigation was pending at the time. The school district's party representative informed Student's mother that the attorneys for the parties would discuss whether to convene the ARD.¹⁷¹
66. The *** *** teacher also used the COR to assess Student's skills over the *** week grading period.¹⁷² By the end of the school year Student made progress in all areas.¹⁷³ COR reports were sent to the parents. A pamphlet explaining the COR was given to Student's mother at the October 2016 ARD.¹⁷⁴
67. Student made progress in the *** program at ***. Student showed improvement in ***.¹⁷⁵ Student made behavioral progress with fewer occurrences of Student's target behaviors of ***, ***, ***, and *** in the fall 2016 as compared to the summer of 2016. There was a higher rate of compliance in the fall as compared to the summer.¹⁷⁶
68. Student's mother was provided with Notice of Procedural Safeguards at both the *** ***, 2016 ARD and the October ***, 2016 ARD.¹⁷⁷ Student's mother read the Notice of Procedural Safeguards.¹⁷⁸ Student's mother also received a "Guide to the Admission, Review & Dismissal Process."¹⁷⁹

VI. DISCUSSION

A. Duty to Provide FAPE

¹⁶⁹ Tr. II: 382, 407; P. 19

¹⁷⁰ R.15:21; Tr. II: 552.

¹⁷¹ Tr. II: 382, 407.

¹⁷² Tr. II: 562, 563-567.

¹⁷³ R.25; R. 26; Tr. II: 566-571, 575, 591, 596.

¹⁷⁴ Tr. II:587

¹⁷⁵ Tr. II: 570-575, 591.

¹⁷⁶ J.11; J. 12; P.22: 3-4, 6; R. 26; Tr. I: 125-126, 171.

¹⁷⁷ J. 3:18, 35; R.15:19; Tr. II: 410-411.

¹⁷⁸ Tr. II: 411-412.

¹⁷⁹ Tr. II: 411.

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 school 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 school 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 a meaningful educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. *20 U.S.C. §1401(9); Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S.Ct. 988, 100 (2017); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-189, 200-201, 203-204 (1982)*.

The basic inquiry is whether IEP implemented was reasonably calculated to enable the student to make progress in light of the student's unique circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. at 999*. FAPE is determined on the basis of the overall educational benefit provided to Student through implementation of the IEP. *See, Klein Ind. Sch. Dist. v. Per Hovem, 690 F. 3d 390, 397-398 (5th Cir. 2012)*.

B. IEP

In meeting the obligation to provide FAPE the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, 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.¹⁸⁰ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The presumption is in favor of the school district's educational plan. *R.H. v. Plano Ind. Sch. Dist.*, 607 F. 3d 1003, 1010-1011 (5th Cir. 2011).

D. IEP Goals and Objectives

In developing an IEP the ARD must consider the student's strengths, parental concerns for enhancing the student's education, the results of the most recent evaluation data, and the student's academic, developmental and functional needs. For students whose behavior impedes his or her learning or the learning of others, the IEP must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. §300.324 (a).

The ARD is also required to review, at least annually, the student's IEP and make any revisions needed to address lack of expected progress or on the basis of any re-evaluations, information provided by parents, or the student's anticipated needs. Consideration of the student's behavioral needs must be addressed in the annual review. 34 C.F.R. § 300.324 (b).

E. Autism Supplement

For students with autism in Texas, the ARD 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, futures planning for post-secondary environments, parent/family training and support, suitable staff-to-student ratios, communication interventions, social skills supports, professional

¹⁸⁰ 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).

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.”

A review of the relevant ARD documents and Student’s IEPs show the Autism Supplement was considered and discussed at relevant ARD meetings and a good number of services stated in the Autism Supplement were included and provided as components of Student’s educational program. For example, both *** classrooms utilized a daily schedule with a minimum of unstructured time. The learning activities were appropriate for Student as a *** and consisted of active engagement in the learning process. Positive behavioral strategies were aspects of Student’s BIP.

The low staff to student ratio was appropriately suitable. Parent support at home was assessed. Student’s mother did not express a need for it. Teaching strategies based on peer-reviewed, research-based practices for Student were utilized. There was a focus on the development of communication skills. Not all of the strategies stated in the Autism Supplement were included in Student’s IEP. However, state law does not require a student’s IEP include each and every one to meet a student’s unique needs nor does it require information about the Autism Supplement be included in an FIE or in the IEP itself. Instead, the regulation simply requires the ARD consider a student’s need for the enumerated strategies. *19 Tex. Admin. Code §1055 (e)*. The evidence showed a good number of strategies from the Autism Supplement were not only considered but included in Student’s IEPs.

F. Comparable Services

The threshold issue in this case is whether the school district’s temporary services plan met IDEA requirements for students with disabilities who transfer from a public school in one state to a public school in another state. If the child with a disability had an IEP in effect in the previous public school district, and then transfers and enrolls into a public school district in another state within the same school year, the new public school district must provide the student with services comparable to those described in the child’s IEP from the previous school

district until the new school district conducts an evaluation and creates a new IEP. *Dallas Ind. Sch. Dist. v. K.W.*, 178 F. Supp 3d 443, 462 (N.D. Tex. 2016); 34 C.F.R. § 300.323 (f). See also, 34 C.F.R. §§ 300.304-300.306, §§ 300.320-300.324.

To facilitate the transition the new public school must take reasonable steps to promptly obtain the child's records from the previous public school district. Those records include the IEP and supporting documents and any other records related to the provision of special education or related services to the child by the previous public school district. The previous public school district must take reasonable steps to promptly respond to the request for records from the child's new public school district. 34 C.F.R. § 300.323 (g)(1)(2). The evidence showed the school district did receive and review records from the *** public school district.

In Petitioner's closing argument Petitioner expanded the scope of the obligation to provide comparable services beyond the 30 day temporary services period. This is an overly expansive reading of the law. The law allows the new school district to conduct an evaluation and revise the student's IEP as needed based on the results and recommendations of the evaluation. 34 C.F.R. § 300.323 (f). See also, 34 C.F.R. §§ 300.304-300.306, §§ 300.320-300.324. Therefore, the analysis of this issue is confined to the period of time covered by the temporary services plan.

The issue here is whether the services provided by the school district were "comparable" within the meaning of the IDEA. Comparable services are not identical services or the same services. See for e.g., *Sterling A. ex. rel. Andrew S. v. Washoe Cty. Sch. Dist.*, 2008 WL 486550 (D. Nev. 2008)(holding Nevada school district not required to adopt a California IEP in its exact form). The interstate transfer provisions are distinguishable from the IDEA's "stay put" provision which does require implementation of the last agreed upon IEP. See, *Michael C. ex. rel. Stephen C. v. Radnor Twp. Sch. Dist.*, 202 F. 3d 642, 651(3d Cir. 2000); *Braden O. v. Chester Area Sch. Dist.*, 2017 WL 2869397 (E.D. Pa. 2017)(distinction between stay put and transfer provision codified by Congress in 2004).

Instead, the issue is whether the goals and substance of the interim IEP are equivalent to

the previous IEP. *Sterling A. v. Washoe Cnty. Sch. Dist. supra*. The new school district must provide special education and related services to a transfer student in accordance with temporary goals aligned with the Student's annual goals for those services as reflected in the student's prior IEP. *Letter to Finch, 56 IDELR 174 (OSEP 2010)*.

Petitioner contends the school district's temporary service plan was not sufficient under the IDEA transfer provision because Student's *** program and the school district offered no proof that student received the related services stated in the *** IEP. On its face the *** IEP did not specify ***. However, Student's mother reported at the temporary services meetings that Student was in ***.

The *** teacher, in following up with a special education coordinator in ***, learned Student's *** program was provided in a self-contained special education class with ***. However she did not inquire or confirm ***. It is reasonable to infer the *** teacher simply assumed the *** self-contained special education *** classroom was akin to the *** self-contained classroom as a *** program.

Petitioner also complains the 30 day placement in the self-contained special education class was not comparable within the meaning of the IDEA transfer provisions. The classroom was described by the *** special education coordinator as a "self-contained" classroom. The *** *** was described *** – or, as Respondent argued, ***. In Texas a self-contained classroom is an instructional setting when the student spends 50% or more time during the school day in the special education classroom with the remaining 50% or less time spent with non-disabled peers. *19 Tex. Admin. Code § 89.63 (c)(6)*. As Respondent argued the self-contained *** classroom in Texas provides more time with non-disabled peers than the *** *** in terms of percentage of the school day.

There is nothing in the IDEA transfer provisions which specifically require the exact same number of hours in a school day. A *** is appropriate if it met Student's needs. *See, Falcon Sch. Dist. 49, 67, IDELR 278 (SEA CO. 2016)(comparable services in another placement were appropriate where new school district did not offer same programming options)*. The

evidence showed the school district does not ***. However, school district staff admitted a *** special education placement can be provided for students when needed to make progress on IEP goals. Once the school district learned from parental report that Student ***, the school district should have followed up with the *** school district to confirm the report and consider whether Student needed *** to make progress on Student's IEP goals. If verified by the *** district, the school district should have placed Student in *** programs during the temporary services period to determine whether Student's ***.

The school district may nevertheless have concluded Student could make progress on Student's IEP with the *** program following the temporary services period. However, it came to that conclusion without first giving the *** a try and in that regard failed to provide Student with comparable services to those provided by the *** public school. Instead, the decision to place Student in the *** self-contained *** program was made on the basis of what was "typical" as opposed to on the basis of Student's individual needs. The purpose of the 30 day temporary services period is for school district staff to get to know and evaluate the student. Had the *** been attempted school district staff would have gathered data on Student's ability to *** program. In that regard the school district failed to provide Student with comparable services. *34 C.F.R. §300.323 (f)*.

However, Student did not prove the failure to *** in a *** setting during the temporary services period resulted in a substantive educational harm. Instead the evidence showed that although Student exhibited some inappropriate behaviors as the teachers got to know Student. Student began responding to the classroom routine and behavioral strategies. The evidence showed the school district implemented the *** IEP in all respects, including the exact same related services, during the temporary services period. There was insufficient evidence to show it could not do so under the *** self-contained *** classroom. The focus of the temporary services provision is on services provided as established by the Student's prior IEP – not necessarily on a specific classroom placement or ***.

As to Petitioner's argument the school district failed to prove it provided the requisite amount of related services - the burden of proof is on the Petitioner to prove they were not; the

burden of proof is not on the school district to prove that they were. *See, Schaffer v. Weast, supra.* Indeed, the evidence showed the temporary services plan did include OT and speech/language services in the same amount and frequency as those stated in Student's IEP during the temporary services period.

G. 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).* The Fifth Circuit recently confirmed the Supreme Court's standard for evaluating the sufficiency of a student's IEP stated in *Endrew F.* is fully consistent with the four factor test. *Keith & Linda G. v. Waller Ind. Sch. Dist., 2017 WL 271341 (5th Cir 2017).*

2. Individualized on the Basis of Assessment and Performance

First, the evidence showed the IEP implemented during the relevant time period was individualized on the basis of assessment and performance. The IEPs implemented during the relevant time period were based, in part, on the school district's FIE which included a FBA. The FIE included a wide range of assessment, information from a variety of sources (including updated parent information), a review of prior assessment data from the *** public schools, and observations and evaluations by teachers and related service personnel.

Petitioner complains about the reduction in direct OT and speech/language services and contends the reduction in direct services was based on insufficient evaluations. The evidence showed otherwise. Student was evaluated by an OT. The OT reviewed the *** OT IEP present levels of performance and observed Student in the classroom. The purpose of related services is to assist the student in benefitting from Student's special education. 34 C.F.R. § 300.8(a). Although the OT and speech therapy services may not have been as intensive as those provided in *** the evidence shows they provided Student with the requisite educational benefit in assisting Student with access to Student's educational program. *See, Miami-Dade Cnty. Sch. Bd., 113 LRP 2047 (SEA Fla. 2012)(Florida school district not required to offer identical 1:1 speech/language and OT therapy provided in New York preschool where student did not need same intensive level of services to receive FAPE).*

Furthermore, while the OT and some speech services were provided through a consultative model nothing in the IDEA requires related services be provided exclusively through direct services. Consultative services may be appropriate when the student's related service goals are clearly defined and the educators working with the student are sufficiently trained to provide services with on-going consultation. *See, T.D. v. Rutherford Cnty. Bd. of Educ., 2017 WL 77114 (M.D. Tenn. 2017).* In this case Student's teachers were sufficiently trained, the IEP goals clearly defined, and there was on-going consultation from related service providers.

Although parents may prefer more intensive, direct services because they believe their child will gain a greater benefit, parents do not have the right under the IDEA to compel a school

district to employ a specific methodology. *See, Lachman v. Illinois State Bd. of Educ.*, 852 F. 2d 290, 297 (7th Cir. 1988). The issue with regard to related services is not which program offers superior services but instead whether the services provide a meaningful, not maximum, educational benefit. *Stanley v. M.S.D. of Southwest Allen Cnty.*, 628 F. Supp. 2d 902, 929, 943 (N.D. Ind. 2008)(*holding school district did not fail to provide FAPE when it declined to adopt recommendations of student's private providers or coordinate a schedule of services with student's private speech therapist*).

Petitioner contends the school district failed to use any assessment in making a determination about Student's need for ESY. Respondent contends Student did not exhibit a need for ESY for the summer of 2016. The record shows the school district planned to convene an ARD at the end of the 2016-2017 school year to discuss Student's need for ESY based on data collected over the school year. It does not appear the ARD for this purpose convened or that ESY was provided over the summer of 2017. This litigation was pending by the end of the 2016-2017 school year. The record is somewhat unclear but it is reasonable to infer that convening an ARD to discuss Student's need for ESY was an item of negotiation between the parties at that point.

The record shows Student's program did not include ESY services based on assessment over the summer of 2016 or 2017. In this jurisdiction FAPE is determined on the overall educational benefit provided to the student through implementation of the IEP. *Klein Ind. Sch. Dist. v. Per Hovem*, 690 F. 3d at 397-398.

3. Least Restrictive Environment

Second, the evidence showed Student's temporary 30 day placement in a self-contained special education *** classroom was the LRE for that limited purpose. The evidence also showed the change in placement into a *** classroom at both *** and *** was the LRE as Student's placement for the relevant time period.

The placement in the *** classrooms at *** met 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 had an opportunity to access non-disabled peers to the maximum extent appropriate. Furthermore, the proposed placement included an appropriate student to teacher ratio. Indeed, Petitioner does not dispute Student's current placement at ***.

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

Third, the evidence showed Student's services were provided in a coordinated and collaborative manner by key stakeholders. Student's mother and private providers participated in ARD meetings, asked questions, and provided input into Student's IEPs. The related service personnel coordinated services and provided consultation to the *** teachers. The special education and general education teachers collaborated together in providing educational services to Student in the *** class where Student received some instruction with Student's non-disabled peers.

School district special education staff and campus administrators met with Student's mother and/or communicated in attempts to respond to parental concerns. Despite arguments to the contrary, the evidence showed the school district was willing to permit Student's private BCBA to visit the campus and *** classroom. Student's mother was notified of the problem with the BCBA's background check. The private BCBA did not follow up on resolving that issue. The evidence showed the school district was willing to collaborate by permitting the campus visit. Furthermore collaboration with outside providers was also possible through other avenues such as in staffings or other meetings.

5. Academic and Non-Academic Benefit

Fourth, the evidence supports the conclusion Student received both academic and non-academic benefits from the program provided by the school district. 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 school 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 school 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 received more than a de minimus educational benefit from the program provided given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist., supra*.

H. Availability of Individuals Trained in ABA

Petitioner complains the school district failed to have available, either through contract or on staff, individuals trained in ABA. Petitioner contends this alleged failure resulted in the failure of the ARD meetings to "appreciate the necessity and importance of these critical services for the student." Petitioner failed to meet the burden of proof on this issue. *Schaffer v. Weast, supra*. First, Student's private ABA therapists did participate in relevant ARD meetings. Second, the evidence showed the ARD did consider the strategies stated in the Autism Supplement, including ABA based, peer-reviewed, research-based programming. Some of those strategies were incorporated into Student's educational program. Third, the evidence showed the school district does in fact have BCBA's on staff. Finally, the district's behavioral specialists are trained in the use of effective behavioral strategies and interventions. Student's behavior improved at school without the need for 1:1 ABA therapy.

I. FAPE Conclusion

In consideration of the four factors discussed above the evidence shows the IEPs implemented for the 2016-2016 and 2016-2017 school years provided Student with the requisite overall meaningful educational benefit given Student's unique circumstances and therefore provided Student with FAPE. *Bd. of Educ. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 188-189; Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. at 100; Klein Ind. Sch. Dist. v. Per Hovem, supra*.

J. Procedural Issues

Petitioner contends the school district failed to consider parental input at ARD meetings. The record leads to a different conclusion. Student's mother attended every ARD. Parental questions, concerns and ideas were considered and addressed both in ARD meetings and in separate conferences with school district special education staff, campus administrators, and the *** teachers. There was a daily communication log that went back and forth between the home and school at ***. A visual schedule and daily behavioral data were also provided at parental request. The *** teacher at *** used a smart phone application that Student's mother appreciated. Petitioner's outside private providers participated in ARD meetings. A parental request for a campus transfer was approved and confirmed in an ARD meeting.

Although school district personnel in an ARD meeting may not agree with a parental request or suggestion does not mean the parent wasn't provided with an opportunity to participate in the educational decision-making process. No one member of an ARD has "veto power" over ARD decisions. Instead, the ARD is a collaborative process that aims to reach consensus. *19 Tex. Admin. Code § 89.1050 (g)*.

The evidence also showed Student's mother was provided with the requisite Notice of Procedural Safeguards and Prior Written Notice at all relevant times. There was insufficient evidence to show Student's mother was advised ***.

It is reasonable to infer from the credible evidence the rationale for the *** *** program as explained to Student's mother was either misunderstood or not explained clearly. The evidence showed *** can be an option for a student who is not making sufficient progress. These facts do not establish the school district purposefully "misled" Student's mother. Furthermore, the evidence showed Student made progress in the *** programs at both campuses. In sum, Petitioner did not meet the burden of proving the school district violated parental procedural rights under the IDEA. *Schaffer v. Weast, 546 U.S. 49, 62 (2005)*.

VII. CONCLUSIONS OF LAW

1. Respondent provided Petitioner with the requisite comparable services upon transfer from a public school district in another state. *34 C.F.R. § 300.324 (f)*.
2. Respondent provide Petitioner with a free, appropriate public education through an Individualized Education Plan reasonably calculated to enable Petitioner to make progress in light of Petitioner's unique circumstances and derive a meaningful educational benefit from the educational program. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S.Ct. 988 (2017); Keith and Linda G. v. Waller Ind. Sch. Dist., 2017 WL 271341 (5th Cir. 2017); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir. 1997)*. Petitioner did not meet Petitioner's burden of proof on this issue. *Schaffer v. Weast, 546 U.S. 49, 62 (2005)*.
3. Respondent provided Petitioner with a free, appropriate education in the least restrictive environment. *34 C.F.R. § 300.114*.
4. Respondent provided Petitioner with appropriate related services. *34 C.F.R. § 300.34 (a)*.
5. Respondent complied with all procedural requirements of the IDEA and did not significantly impede parental opportunity to participate in the educational decision-making process. *34 C.F.R. §§ 300.503; 300.504; 300.513 (a)(2)(ii)*.

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**. All other relief not specifically stated herein is **DENIED**.

SIGNED October 4, 2017.


Ann Vevier Lockwood
Special Education Hearing Officer
For the State of Texas

IX. 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, Sec. 2001.144(a) (b).*