

**DOCKET NO. 117-SE-0217**

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

**DECISION OF THE HEARING OFFICER**

Petitioner, \*\*\* (Student) b/n/f \*\*\* (Father) (collectively, Petitioner), filed a request for an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA) on February 2, 2017, with notice of the complaint being served by the Texas Education Agency (Agency) on February 2, 2017. The Respondent to the complaint is Pearland Independent School District (District).

After review of the evidence and the closing arguments of the Parties, the Hearing Officer determined that Petitioner did meet their burden of proof concerning the lack of an effective behavioral intervention plan and the alleged incomplete reevaluation and granted the relief noted below.

**I. PROCEDURAL HISTORY**

After reviewing the complaint that was initially filed by Father as a self-represented litigant, on February 3, 2017 the Hearing Officer issued Order No. 2 seeking clarification of some of the alleged issues and requested remedies. Petitioner sought additional time to respond to the request for clarification and that request was granted in Order No. 3 issued on February 7, 2017.

On February 10, 2017, Attorney Elizabeth Angelone entered an appearance on behalf of Petitioner and filed a request to amend the complaint. Order No. 4 issued on February 14, 2017, granted Petitioner's request to amend the complaint and the amended complaint was filed on

February 20, 2017. 34 C.F.R. § 300.508(c)(3)(ii). The District filed its response to the amended complaint on March 2, 2017 and did not file a challenge to the sufficiency of the complaint or a plea to the jurisdiction.

Order No. 5, the First Amended Scheduling Order, was issued on February 21, 2017.

Order No. 6 of March 8, 2017, granted the District's request to delay the prehearing conference by one week due to the District being on Spring Break. After finding good cause, the request was granted and the prehearing conference was reset to March 20, 2017. 19 Tex. Admin. Code § 89.1186(b)(1)-(4).

Pursuant to 19 Texas Administrative Code § 89.1180, the telephonic prehearing conference convened on March 21, 2016. Attorney Elizabeth Angelone of the Cuddy Law Firm appeared on behalf of Petitioner. Attorney Marri Schneider-Vogel of Thomas & Horton, LLP appeared for the District and was assisted by \*\*\*, District Director of Special Services, \*\*\*, District General Counsel, and \*\*\*, District Special Programs. During the prehearing conference the Parties informed the Hearing Officer that they had agreed in writing to forgo the resolution session and proceed straight to mediation. 34 C.F.R. § 300.510(a)(3)(ii).

During the prehearing conference the Parties reported that their hearing preparations had been delayed because both sides were awaiting the results of an IEE that wasn't due to be completed until the existing disclosure deadline had lapsed. Having found good cause for the requested continuance and extension of the decision due date, the unopposed motion was granted and the case was continued until April 26-28, 2017; the decision due date was extended until July 3, 2017. 19 Tex. Admin. Code § 89.1186(b)(1)-(4).

During the prehearing conference the Hearing Officer determined, without objection from either Party, the accrual date of the amended complaint for purposes of the statute of limitations was February 2, 2016. 19 Tex. Admin. Code § 89.1151(c). Order No. 7 was issued on March 22, 2017, to memorialize the prehearing conference and the continuance.

On March 21, 2017, Petitioner filed an unopposed request for a continuance based on the same IEE that was still not complete and the report being unavailable to the Parties prior to the existing disclosure deadline. Again, after having found good cause, the unopposed motion was granted in Order No. 8 issued on March 27, 2017, and the hearing dates of April 26-28, 2017, were reconfirmed along with the July 3, 2017, Decision Due Date. 19 Tex. Admin. Code § 89.1186(b)(1)-(4).

Prior to the prehearing conference that was conducted on March 21, 2017, the District filed subpoenas and requests for production seeking Student's \*\*\* records from \*\*\* through the present. During the prehearing conference Petitioner raised concerns about the scope of the requested information and requested an *in camera* review for relevancy of the responsive materials. The District noted that it objected to an *in camera* review arguing that it should have unfiltered access to the information in preparation of its defense. The Hearing Officer directed the Parties to brief the issue.

In Order No. 11, issued on April 4, 2017, the Parties were provided a draft protective order and were directed to confer in order to see if the language and scope of the protective order could be resolved by agreement. Petitioner's objections to the protective order were overruled and the District's motion to compel production was granted.

On April 6, 2017, Petitioner filed an unopposed Motion for a Continuance due to the same IEE still having not been completed as expected and the report not being available for the existing setting of the due process hearing. Petitioner requested that the hearing be reset from April 26-28, 2017 to the third week in May 2017 and that the decision due date be extended by a corresponding 27 days. Having found good cause, the motion was granted in Order No. 12, issued on April 6, 2017, and continued the due process hearing until May 23-25, 2017, and extended the decision due date until July 31, 2017. 19 Tex. Admin. Code § 89.1186(b)(1)-(4).

On May 11, 2017, the District filed a Motion for a Third Continuance and Third Extension of the Decision Due Date. Petitioner filed a response in opposition on May 12, 2017. The District sought a 55 day continuance of the hearing and a 67 day extension of the decision due date. The motion was denied in Order No. 13 issued on May 15, 2017, for lack of good cause.

The hearing convened on May 23, 2017, at the District's Education Support Center located at 1928 North Main, Pearland, Texas. Attorney Elizabeth Angelone appeared on behalf of Petitioner. Attorney Merri Schneider-Vogel of Thomas & Horton, LLP appeared for the District and was assisted by \*\*\*, District Director of Special Services, and \*\*\*, District General Counsel. Vickie D. McConnell provided the court reporting services.

At the conclusion of the hearing, the District moved for an extension of the post-hearing briefing deadline and the decision due date to afford the Parties time to write their closing briefs with the benefit of having the completed transcript and to afford the Hearing Officer time to write the final decision while considering the Parties' briefs. Petitioner concurred and did not oppose the motion. After considering the factors set out in 19 Tex. Admin. Code § 89.1186(b)(1)-(4), the Hearing Officer found that the District stated good cause and the motion was granted on the record during the hearing. Specifically, the District requested to extend the decision due date from July 31, 2017, until August 4, 2017 – a period of 4 days. The Hearing Officer found in Order No. 14, issued on June 8, 2017: (1) the extension of time will not adversely affect Student's educational interests because Student will be in summer recess even if the extension of time were denied; (2) the Parties need the additional time due to the time necessary to transcribe the proceeding and make the transcript available to the Parties for briefing; (3) the delay will not cause a financial burden or cause some other detrimental consequence on either Party; and (4) the prior continuances were for good cause and were not excessive.

## **II. ISSUES, PROPOSED RELIEF, AND BURDEN OF PROOF**

### **A. Issues**

In the complaint, Petitioner alleges that the District denied Student a FAPE and raised the issues below, which were noted in Order No. 7:

1. Did the District fail to design, update, and implement individual education plans (IEP) as necessary to meet Student's individualized needs on the basis of Student's assessments and performance, including failing to design an IEP with a behavior intervention plan (BIP) to address Student's special education needs and behavioral issues;
2. Did the District fail to timely and comprehensively evaluate Student in all areas of suspected disability and need?
3. Did the District fail to provide Student's educational program in the least restrictive environment at school and in Student's current home placement;
4. Were Parents denied meaningful participation in the ARDC / IEP process by failing to provide the Procedural Safeguards and/or Prior Written Notice;
5. Was Student socially promoted despite Student's alleged lack of academic and non-academic progress; and,
6. Did the District retaliate against Student and family (\*\*\*)?

**B. Proposed Remedies**

Petitioner requested that the Hearing Officer order the following relief:

1. That Student be placed in a non-public or private day school;
2. An IEE for assistive technology and/or any other area not provided;
3. Compensatory relief that is equal to the amount of deprivation; and
4. Attorney's fees. **DENIED / DISMISSED** in Order No. 7. 19 Tex. Admin. Code § 89.1192.

**C. Burden of Proof**

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all

times.<sup>1</sup> Petitioner must, therefore, establish that the alleged violations resulted in a denial of FAPE or other substantive violation of the IDEA.

### III. FINDINGS OF FACT

1. Student is a \*\*\*-year-old \*\*\* student who resides with Student's parents within the geographical and jurisdictional boundaries of Pearland Independent School District.<sup>2</sup>
2. The accrual date of Petitioner's amended complaint for purposes of the Statute of Limitations (SOL) was \*\*\*, 2016.
3. Student was referred for a special education evaluation during the 2012-2013 school year when Student was in the \*\*\* grade and attending \*\*\* within Pearland ISD. Student was found eligible under the IDEA as a student with an emotional disturbance.<sup>3</sup>
4. On \*\*\* \*\*\*, 2016, Student had a psychological reevaluation performed and was found to exhibit many of the characteristics commonly associated with the Other Health Impairment (OHI) of Attention Deficit Hyperactivity Disorder (ADHD).<sup>4</sup>

**Issue 1: Did the District fail to design, update, and implement individual education plans (IEP) as necessary to meet Student's individualized needs on the basis of Student's assessments and performance, including failing to design an IEP with a behavior intervention plan (BIP) to address Student's special education needs and behavioral issues?**

5. While Student was in the \*\*\* grade at \*\*\*, the ARDC met on \*\*\*, 2016, to devise Student's annual IEP. Student's three-year evaluation was in progress at the time of this ARDC meeting. Parents did not attend the meeting but gave the District permission to proceed in their absence.

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<sup>1</sup> *Schaffer ex rel. v. West*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005), *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. V. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

<sup>2</sup> JE-21.

<sup>3</sup> JE-3 at 1.

<sup>4</sup> JE-9 at 7; *see* JE-38; 34 C.F.R. § 300.

6. On \*\*\*, 2013, a District LSSP conducted an FIE for Student recommending that Student should be considered for special education services as a student with an emotional disturbance to the degree of significant interference with Student's learning and that of others. The LSSP recommended related services counseling with goals that Student demonstrate appropriate and functional reactions to frustration and stress (including anger management), and that Student demonstrate appropriate participation (including attendance, respect for teacher and peers, rules of the class, meeting teacher expectations, and completing classwork in a timely manner). The LSSP also recommended implementation of a behavior improvement plan and the completion of a functional behavioral analysis. The LSSP concluded that Student met the following criteria for emotional disturbance: \*\*\*. The LSSP noted the behaviors above are not the result of social maladjustment.<sup>5</sup>
7. Student did not meet the requirements for the grade \*\*\* STAAR test.<sup>6</sup>
8. After transferring to \*\*\*, the following schedule of services for the \*\*\* grade were presented and discussed at the \*\*\*, 2016 ARDC meeting: the Schedule of Services was amended to reflect support in terms of days versus weeks. Student was to continue receiving pullout (Resource) instruction in the amount of \*\*\* minutes \*\*\* days per week. Student was to receive continued inclusion support during \*\*\* for \*\*\* minutes \*\*\* times per week. Counseling was continued in the amount of \*\*\* minutes direct counseling \*\*\* week and \*\*\* minutes of consult / indirect counseling services delivered on \*\*\* as the direct counseling services. Classroom accommodations were updated including continuing to permit Student to \*\*\* as a means of minimizing distractions and Student's frustrations. Student was placed in the general education setting while receiving daily inclusion support in the amount of \*\*\* minutes per day, per subject, for the following subjects: \*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\*.<sup>7</sup>
9. The \*\*\* 2016 IEP contained detailed discussion concerning Student's behavior, contained behavioral goals and progress reports, and an extensive Behavior Intervention Plan (BIP).<sup>8</sup>
10. Student had Student's three-year reevaluation timely performed on \*\*\* \*\*\*, 2016, and the Reevaluation Committee convened an ARDC meeting on \*\*\*, 2016, to review the reevaluation and recommend educational programming for Student.<sup>9</sup>

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<sup>5</sup> JE-1 at 3.

<sup>6</sup> JE-41.

<sup>7</sup> JE-18 at 21.

<sup>8</sup> JE-18 at 3, 6-10, 21.

<sup>9</sup> JE-20 at 2.

11. Although Student was mainstreamed in the general educational setting with supports, Student was assigned to a “\*\*\*\*” (\*\*\*\*) class.<sup>10</sup>
12. The \*\*\*\* program was under the supervision of a \*\*\*\* certified special education teacher. The \*\*\*\* teacher has an aide and at the time had up to \*\*\*\* students assigned to \*\*\*\* classroom. The \*\*\*\* program is intended to provide behavioral supports, classroom monitoring of behavior every 15 minutes, and to provide needed supports for academic, behavior, and social deficits. The \*\*\*\* monitored Student’s grades and assignments, communicated with Parents, coordinated with teachers, attended ARDC meetings, and met with Student’s teachers daily.<sup>11</sup>
13. All \*\*\*\* students are required to \*\*\*\*.
14. \*\*\*\* students who display behavioral problems in their general education classrooms are subject to being assigned “\*\*\*\*” in the \*\*\*\* classroom for up to two weeks. During \*\*\*\* students do not go to their regular classes but are instructed in the \*\*\*\* classroom. The District does not consider \*\*\*\* \*\*\*\* to be a disciplinary measure; it is deemed a behavioral support.<sup>12</sup>
15. Despite the District labelling \*\*\*\* \*\*\*\* a non-disciplinary measure it is documented in Student’s disciplinary file.<sup>13</sup> \*\*\*\* students may be pulled out of their general education classrooms to cool / calm down or otherwise control their problematic behaviors.<sup>14</sup> Student’s \*\*\*\* program, as administered, was not a disciplinary measure.
16. Record notations of when Student was assigned to \*\*\*\* in the \*\*\*\* room were documented on the Student’s discipline record as a way to document actions taken to assist the school in tracking whether the parent was called, and what the incident was leading up to the \*\*\*\*.<sup>15</sup> The District’s Executive Director of Special Programs was aware that administrators document behavior on the discipline form and it is a way to communicate with other people on the campus.<sup>16</sup> The mere fact that notations of \*\*\*\* \*\*\*\* were noted on Student’s discipline record does not transform the \*\*\*\* into a disciplinary action.
17. During the annual review of \*\*\*\* 2016 the ARDC considered and determined that Student would gain the most educational benefit from being placed in general education classes with supports, and when Student’s behavior escalated Student would be temporarily

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<sup>10</sup> Tr. at 218; RE-12.

<sup>11</sup> Tr. at 212-13.

<sup>12</sup> Tr. at 212, 268, 554-56.

<sup>13</sup> Tr. at 555-56.

<sup>14</sup> Tr. at 212.

<sup>15</sup> Tr. at 934-35.

<sup>16</sup> Tr. 555-56.



removed to the \*\*\* classroom until Student regained control of Student's behavior. This quasi "dual placement" was deemed to be the least restrictive environment (LRE).<sup>17</sup>

18. On \*\*\*, 2016, Parent requested an ARDC meeting.<sup>18</sup>
19. The \*\*\*, 2017 ARDC report left the PLAAFPs as they were previously. This report did not include goals.<sup>19</sup>
20. The ARDC met on \*\*\*, 2017 and left the PLAAFPs, including behavior, exactly as they were previously.<sup>20</sup>
21. During the relevant time period during the 2016-2017 school year, Student was restrained approximately \*\*\* times<sup>21</sup> and had approximately \*\*\* disciplinary referrals.<sup>22</sup>
22. During the relevant time period during the 2016-2017 school year, Student was placed into out of school suspension \*\*\* times for a total of \*\*\* school days.<sup>23</sup>
23. Student received \*\*\* disciplinary referrals between \*\*\*, 2016 and \*\*\*, 2017. Throughout this time, Student's IEP indicated that office referrals do not work well for Student.<sup>24</sup>
24. On \*\*\*, 2016, Student was sent to the office. \*\*\*. \*\*\*. Student's \*\*\* teacher, e-mailed Parent indicating she had sent Student to the office for disruptive behavior.<sup>25</sup> Student received a \*\*\* out of school suspension resulting from this incident.<sup>26</sup>
25. Parent sent an email to Student's Principal on \*\*\*, 2016, about Student taking some time off from school on doctor's recommendation so Student could \*\*\*. The Principal asked Parent to let her know if Student would be missing more days than required by the school related to that incident.<sup>27</sup>

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<sup>17</sup> JE-18 at 21.

<sup>18</sup> PE-49.

<sup>19</sup> JE-22.

<sup>20</sup> JE-26.

<sup>21</sup> PE-13 at 19-29.

<sup>22</sup> PE-14.

<sup>23</sup> PE-15 at 2-3.

<sup>24</sup> PE-14, 15; RE- 3.

<sup>25</sup> PE-23; JE-46a.

<sup>26</sup> PE-16.

<sup>27</sup> PE-35; RE-21.

26. Based on the information forwarded by Student's psychiatrist about the need to \*\*\* and the fact that he described Student's inability to cope with the rigors of the school day, the ARDC decided that \*\*\* per week of homebound instruction was appropriate.<sup>28</sup>
27. Homebound services are for general or special education students who cannot tolerate a regular or even a shortened school day.<sup>29</sup> The ARDC can determine if a special education student needs home bound services.<sup>30</sup> The ARDC has the authority to determine any appropriate placement for a student.<sup>31</sup> The District believes that for most cases a doctor's note is required in order for a student to receive services at home.<sup>32</sup> Father requested the ARDC approve \*\*\* hours of at-home services per week.<sup>33</sup> Father sent an email accepting the \*\*\* hours of homebound services per week "because it was better than nothing."<sup>34</sup> The length of time Student will receive homebound services depends on \*\*\*.<sup>35</sup> It is a District policy before a student can re-enroll in school a doctor's release is required before they return to school.<sup>36</sup>
28. Parent submitted a letter from Student's psychiatrist dated \*\*\*, 2017 stating, "[Student] has continued to experience a severe deterioration of [Student's] symptoms, which is requiring \*\*\*. It also appears that [Student] is not able to tolerate the school environment at this time as Student has frequently become \*\*\* due to [Student's] disorders."<sup>37</sup>
29. In \*\*\* 2017 the \*\*\* teacher believed that \*\*\* had established a rapport with Student, but at some point Student started to disconnect from the \*\*\* teacher and doing things toward the \*\*\* teacher that dissolved the relationship.<sup>38</sup> The \*\*\* teacher's perceptions were consistent with what Student's psychiatrist shared in his documentation.
30. On \*\*\*, 2017, Parent e-mailed the Principal requesting a \*\*\*. The Principal replied asking if Parent was withdrawing Student from the District. Parent replied that they were not withdrawing Student; Parent clarified he was requesting an ARDC meeting to discuss placement by the District.<sup>39</sup>

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<sup>28</sup> Tr. at 560.

<sup>29</sup> Tr. at 522.

<sup>30</sup> Tr. at 523.

<sup>31</sup> Tr. at 544.

<sup>32</sup> Tr. at 523.

<sup>33</sup> Tr. at 525.

<sup>34</sup> Tr. at 541.

<sup>35</sup> Tr. at 543.

<sup>36</sup> Tr. at 543-44.

<sup>37</sup> JE-35 at 2; Tr. at 552.

<sup>38</sup> Tr. at 319.

<sup>39</sup> PE-40.

31. On \*\*\*, 2017, Student's psychiatrist completed the homebound recommendation paperwork. It stated that Student was unable then to function in a school setting even for a shortened day, that homebound was the most restrictive environment, and that this recommendation was based on his professional \*\*\* assessment of Student's condition. Student would be able to complete \*\*\* hour sessions per week, which is the length of time indicated on the pre-printed form.<sup>40</sup>
32. Parent requested \*\*\* and the District denied that request; Parent then requested temporary services at home.<sup>41</sup>
33. The District explained the process to Parent for a \*\*\*, general education, homebound placement and predetermined Student would receive \*\*\* hours per week of general homebound services.<sup>42</sup> However, Parent asked that the full IEP be implemented in the home as an interim placement for a minimum of \*\*\* hours per week, but the request was denied.<sup>43</sup> Additionally, Student's schedule of services did not reflect the change to the \*\*\* hours per week. The ARD ended in non-consensus.<sup>44</sup>
34. Every day a student is counted as being in attendance the District gets some amount of funding from the State.<sup>45</sup> For homebound students the District receives full attendance credit if the student receives \*\*\* hours of instruction per week.<sup>46</sup> For homebound services an ARDC may give a student more hours.<sup>47</sup> The District Executive Director of Special Programs does not know how many, if any, students within the District have received more than \*\*\* hours of home-based services.<sup>48</sup>
35. On \*\*\*, 2017, Parent notified the District via email that he accepted the \*\*\*-hour sessions of services per week (*i.e.*, \*\*\* hours of homebound instruction per week). On \*\*\*, 2017, Parent clarified that he accepted \*\*\* hours per week because "some services were better than none."<sup>49</sup>

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<sup>40</sup> JE-36.

<sup>41</sup> JE-31.

<sup>42</sup> Tr. at 540.

<sup>43</sup> JE-31.

<sup>44</sup> JE-31.

<sup>45</sup> Tr. at 524.

<sup>46</sup> Tr. at 524.

<sup>47</sup> Tr. at 525.

<sup>48</sup> Tr. at 525.

<sup>49</sup> JE-39.

36. On \*\*\*, 2017, a brief ARDC meeting was held to discuss Student receiving homebound services. The report did not list PLAAFPs or goals, but approved Student for homebound services.<sup>50</sup>
37. Beginning \*\*\*, 2017, Student's homebound teacher began visiting Student for homebound instruction. The homebound teacher kept a log indicating her time and a summary of instruction provided. The log was frequently incomplete, indicated she occasionally did not stay for her full required hours, and indicated she did not make up time missed for outside consultations.<sup>51</sup>
38. Student's psychiatrist forwarded an affidavit, dated \*\*\*, 2017, which indicated his \*\*\* opinion that Student's diagnoses of \*\*\*, ADHD Combined Type, and \*\*\* were affecting Student's ability to \*\*\*. The psychiatrist noted that he was still working on \*\*\*. The psychiatrist's recommendation was that Student continues homebound instruction \*\*\* to prevent further deteriorations.<sup>52</sup>
39. No meaningful input or cogent explanation was provided by the District as to why Student should only have \*\*\* hours per week. However, the Executive Director of Special Programs admitted that \*\*\* hours of homebound instruction per week \*\*\*.<sup>53</sup> The Executive Director of Special Programs also stated the decision to provide just \*\*\* hours of general homebound services was based on Student's psychiatrist's recommendations.<sup>54</sup> Yet, the District did not provide the psychiatrist a choice, but rather the District predetermined that Student would receive \*\*\* by sending the psychiatrist a form that merely asked:
- “Can the student tolerate \*\*\* hour sessions per week: \_\_ yes \_\_ no.”<sup>55</sup>
40. The District's decision to provide only \*\*\* hours of homebound instruction per week made Student's temporary and inherently restrictive homebound placement even more restrictive and was based solely upon Student's psychiatrist's recommendation. The psychiatrist never recommended limiting Student's instruction time; Student's recommendation concerned the educational setting/placement while Student was being \*\*\*. The homebound placement decision did not consider the amount of instruction Student needed to make meaningful educational progress based upon Student's unique circumstances.

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<sup>50</sup> JE-31.

<sup>51</sup> RE-18.

<sup>52</sup> PE-11.

<sup>53</sup> Tr. at 524.

<sup>54</sup> Tr. at 585.

<sup>55</sup> JE-36; Tr. at 585.

41. During the current 2016-2017 school year Student \*\*\*,<sup>56</sup>
42. \*\*\*,<sup>57</sup> The District convened a Manifestation Determination Review (MDR) on \*\*\*, 2017 to determine whether Student's misconduct was a manifestation of Student's ED. The review determined Student's misconduct was a manifestation of Student's ED and did not order an interim change of placement to a Disciplinary Alternative Educational Placement (DAEP) as normally required by the Student Code of Conduct.<sup>58</sup> Student remained at Student's home campus.
43. On \*\*\*, 2017, an incident occurred in the \*\*\*. \*\*\*,<sup>59</sup>
44. \*\*\*,<sup>60</sup>
45. On \*\*\*, 2017, Parent emailed staff requesting the following ahead of an ARDC meeting: written summary of all physical restraints of Student; copies of the psychological report, FBA dated \*\*\* \*\*\*, 2016; documentation of all counseling supports, including meetings with teachers, as noted in the IEP. Additionally, Parent stated his expectation that the meeting would have documentation of how Student's behavior plan was utilized prior to Student's suspension (specifically whether Student was able to explain or respond orally or by typing, and whether Student was allowed to \*\*\* to become calm.)<sup>61</sup>
46. On \*\*\*, 2017, emails were exchanged between the District's Executive Director of Special Programs and the District's Board Certified Behavior Analyst (BCBA) concerning Student's behavior in the \*\*\* classroom. In response, Parent requested a temporary placement so Student could work at home.<sup>62</sup>
47. On \*\*\*, 2017 the BCBA emailed the Executive Director of Special Programs indicating additional staffing could help with other students so he and the \*\*\* teacher could focus on "that one student." He suggested the \*\*\* teacher begin and end the period in the general education classroom for \*\*\* minutes. Realigning staff in that way could let the District show it "tried everything possible to keep [Student] [there] on campus but if this behavior continues that would justify an out of District placement."<sup>63</sup>

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<sup>56</sup> PE-18 at 2-3.

<sup>57</sup> PE-23 at 16.

<sup>58</sup> JE-23 at 9-12. The \*\*\*.

<sup>59</sup> PE-13.

<sup>60</sup> Tr. at 310.

<sup>61</sup> See PE-23.

<sup>62</sup> PE-23.

<sup>63</sup> PE-23.

48. \*\*\* and provided notice to Parents.<sup>64</sup>
49. On \*\*\*, 2017, Parent sent an email to three District representatives expressing concern for Student's safety at school. Parent brought up that \*\*\* were being used as a substitute for implementing an effective behavioral plan for Student. Parent requested the District present him with a plan for keeping Student safe.<sup>65</sup>
50. On \*\*\*, 2017, the Principal emailed Parent regarding his request for safety plan, stating she believed he was asking to withdraw Student. Parent emailed the Principal about Student \*\*\*. Student was feeling increased anxiety that Student is getting further behind in Student's classes. Parent expressed concern that Student was not having the opportunity to \*\*\*. Parent requested make-up work be sent home so Student could \*\*\*.<sup>66</sup>
51. Regarding Student's behavior, Student's 2016-2017 progress report said Student had many instances of inappropriate response when \*\*\*. Student became frustrated and will \*\*\*. \*\*\*. Often, Student \*\*\*. Student will frequently \*\*\*.<sup>67</sup>
52. The \*\*\* teacher kept weekly behavior logs on Student keeping track of Student's negative behaviors, including: \*\*\*.<sup>68</sup>
53. During the relevant time period, Student had an extensive, well-written, comprehensive, and carefully devised BIP that was carried over from year-to-year and was prepared with the assistance of a BCBA but proved over time to be ineffective in supporting Student with Student's behavioral issues. The ineffectiveness of the BIP is apparent when reviewing Student's escalating behaviors, school disciplinary incidents including \*\*\*in addition to Student's \*\*\*.
54. The lack of an effective BIP negatively impacted Student's education and impeded Student's educational progress in light of Student's unique circumstances.
55. The failure to implement the BIP as drafted (*e.g.*, continuing to use office referrals despite the IEP/BIP expressly noting the ineffectiveness of such referrals) resulted in a gradual escalation of Student's \*\*\* and problematic behaviors at school.

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<sup>64</sup> PE-18.

<sup>65</sup> PE-23.

<sup>66</sup> PE-23.

<sup>67</sup> PE-27.

<sup>68</sup> JE-46.

56. Student's ARDC convened on \*\*\*, \*\*\*, 2016, for another IEP annual review after completion of the reevaluation. Except for the dates and the participants the \*\*\*, \*\*\*, 2016, IEP was identical to the \*\*\*, 2016 IEP.<sup>69</sup>
57. The \*\*\*, 2016, IEP contained measurable goals with progress reported quarterly for \*\*\*, \*\*\*, and \*\*\*. The IEP also contained an extensive (but ineffective) BIP. The IEP included the same BIP without any changes implemented prior to the ARD that was ineffective in meeting Student's behavioral needs. There were no goals for \*\*\*, \*\*\*/\*\*, or \*\*\*/\*\*. <sup>70</sup>
58. Parents participated in the \*\*\*, 2016, ARDC and indicated that they agreed with the actions and/or decisions of the school members of the committee.<sup>71</sup>
59. The ARDC wrote goals for \*\*\*, \*\*\*, and \*\*\* because classroom observations and input from teachers and Parents, and the reevaluation all identified \*\*\* as a "trigger" most likely to escalate Student's \*\*\* behavior.<sup>72</sup>
60. On \*\*\*, 2016, Student's ARDC met again to consider Student's IEP for the following year (\*\*\* grade). Student transferred from \*\*\* at the conclusion of \*\*\* grade to \*\*\* for \*\*\* grade. In anticipation of Student being required to \*\*\* more in the \*\*\* grade, the ARDC directed an Assistive Technology consultation, and if warranted after the consultation, a full OT/AT assessment. The Committee also increased Student's inclusion support for \*\*\* grade \*\*\* to \*\*\* minutes per day because Student would be taking the \*\*\* STAAR assessment during the \*\*\* grade.<sup>73</sup> Parents participated and agreed with the school members of the ARDC.<sup>74</sup>
61. On \*\*\*, 2016, Student's \*\*\* ARDC convened and decided to place Student in \*\*\*.<sup>75</sup>
62. The September 2016 ARDC decided to change Student's placement to \*\*\* because they perceived Student was becoming \*\*\* and they believed \*\*\* would be better behavior role models.<sup>76</sup>

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<sup>69</sup> Compare JE-19 with JE-18.

<sup>70</sup> JE-19.

<sup>71</sup> JE-19 at 17.

<sup>72</sup> JE-19 at 3 \*\*\*)). These identical comments are also in JE-18. See also JE-20 at 14 ("The Committee discussed \*\*\* Grade requirement that students use a daily agenda and write down information for each class that is written on the board. ... However, the \*\*\* requirement may prove to be an issue for [Student].").

<sup>73</sup> JE-20 at 14.

<sup>74</sup> JE-20 at 27-28.

<sup>75</sup> JE-21 at 10; Tr. at 767-68.

<sup>76</sup> JE-21 at 10; Tr. at 768.

63. Student's special education in-class supports were removed when Student was placed into \*\*\* because Student was performing at grade level.<sup>77</sup>
64. Student remained in the \*\*\* program after being placed into \*\*\*.<sup>78</sup>
65. After being placed into \*\*\* Student was restrained \*\*\* times from \*\*\* 2016 through \*\*\* 2017 (a period of four months),<sup>79</sup> received \*\*\* disciplinary referrals,<sup>80</sup> \*\*\* out of school suspensions,<sup>81</sup> and \*\*\* incidents \*\*\* at school.<sup>82</sup>
66. Prior to the change of placement to \*\*\* during the 2016-2017 school year, Student was restrained \*\*\* times,<sup>83</sup> received \*\*\* disciplinary referrals,<sup>84</sup> no out of school suspensions and no \*\*\*.
67. The change of placement to \*\*\* and the removal of special education supports was a stressor that contributed to Student's behavioral decline during the 2016-2017 school year.
68. On \*\*\*, 2016, Parent requested an ARDC meeting.<sup>85</sup>
69. The \*\*\*, 2017 ARDC meeting left the PLAAFPs as they were previously. This report did not include goals.<sup>86</sup>
70. On \*\*\*, 2017, Student wrote in Student's \*\*\* assignment, "\*\*\*\*."<sup>87</sup>
71. Student was issued Student's final report card from the District on \*\*\*, 2017, and passed all of Student's classes with the exception of \*\*\* and \*\*\*: \*\*\* (with accommodations), \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\* (with accommodations) \*\*\*, and \*\*\*.<sup>88</sup>

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<sup>77</sup> Tr. at 768-69; 839.

<sup>78</sup> Tr. at 840.

<sup>79</sup> PE-13 at 21-29.

<sup>80</sup> PE-14 at 8-65.

<sup>81</sup> PE-16.

<sup>82</sup> PE-18.

<sup>83</sup> PE-13 at 1-13

<sup>84</sup> PE-14 at 15.

<sup>85</sup> PE-49.

<sup>86</sup> JE-22.

<sup>87</sup> JE-43.

<sup>88</sup> PE-27 at 22.



**Issue 2: Did the District fail to timely and comprehensively evaluate Student in all areas of suspected disability and need?**

72. Student's initial Full Individual Evaluation (FIE) was performed on \*\*\*, 2013. The evaluation process was begun because of concerns with Student's in-school behavior.<sup>89</sup>
73. The \*\*\* 2013 FIE determined that Student qualified for special education as a student with an Emotional Disorder (ED) for significant \*\*\*.<sup>90</sup>
74. On \*\*\*, 2015, the ARDC referred Student for an Occupational Therapy (OT) consult, and if deemed necessary, an evaluation due to concerns that Student's \*\*\*. The ARDC sought to rule out whether Student's \*\*\* difficulties were caused by physical problems or motor skills problem.<sup>91</sup>
75. Student's three year reevaluation was due in \*\*\* 2016. The District obtained written parental consent to reevaluate on \*\*\*, 2015.<sup>92</sup>
76. Student's three-year reevaluation was timely completed on \*\*\*, 2016. The reevaluation determined that Student continued to qualify for special education for ED, and assessed Student's cognitive/intellectual abilities to be average, Student's educational and developmental performance to be average, determined that assistive technology was not needed after using informal measures to assess, and according to the psychological evaluation Student suffers from \*\*\*. Based on information provided by teachers, staff, Parents, and a \*\*\* diagnosis the psychological evaluation raised the possibility that Student also suffers with an Other Health Impairment (OHI) of Attention Deficit Hyperactivity Disorder (ADHD).<sup>93</sup>
77. The \*\*\* LSSP conducted the academic and achievement portion of the \*\*\* 2016 reevaluation. There were no significant problems or deficiencies concerning the academic and achievement portion of the reevaluation (excepting for failing to evaluate Student for ADHD) or in the set of procedures associated with a reevaluation or the variety of tools and strategies that were utilized.<sup>94</sup>
78. The experienced LSSP from \*\*\* conducted the psychological portion of the reevaluation because she had established rapport with Student from the 2014-2015 school year.<sup>95</sup> Her

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<sup>89</sup> JE-1.

<sup>90</sup> JE-1 at 11.

<sup>91</sup> JE-5.

<sup>92</sup> JE-6.

<sup>93</sup> JE-8.

<sup>94</sup> JE-8.

<sup>95</sup> Tr. at 871.

report is dated \*\*\*, 2016.<sup>96</sup> Several tests were administered as part of the psychological reevaluation including the Behavior Assessment for Children (BASC 3), the \*\*\*, and the \*\*\*.<sup>97</sup> The LSSP determined that Student continued to meet the special education eligibility criteria for a student with an emotional disturbance.

79. Based upon the results of the reevaluation testing, the LSSPs determined that there was not a need for additional testing in the area of reading. Based on the reported scores which indicated all of Student's reading scores were in the average range, there was no indication that additional assessment was required.<sup>98</sup> Student's scores indicate that Student is performing at a higher level than Student's peers. Specifically, Student's Relative Proficiency Index (RPI), which measures how Student is performing in that area compared to age-related peers, indicates that Student is performing basic reading at \*\*\* percent accuracy while Student's peers are performing at 90% accuracy. In fact, the RPI on all of the tests related to reading indicate that Student has a higher accuracy rate than Student's peers.<sup>99</sup>
80. \*\*\* report indicates Student has a \*\*\*.<sup>100</sup> Petitioners did not present the \*\*\* report to any ARDC or the District. All of \*\*\* classroom recommendations can be implemented by the District.<sup>101</sup> The \*\*\* therapeutic recommendations are in the nature of \*\*\* services and are not required for Student to make educational progress.<sup>102</sup>
81. District's Assistive Technology Liaison (ATL) conducted an AT consult. The original concern was Student's \*\*\* and some task refusal. The ATL summarized the concern as increasing Student's \*\*\*.<sup>103</sup> After consulting with the \*\*\* teacher and looking at the tasks that Student was being asked to complete, she determined that she would administer a \*\*\* profile.<sup>104</sup> A \*\*\* compares the student's \*\*\* versus Student's ability to \*\*\* to determine which one is most efficient for Student. The ATL explained that Student did quite well and that Student was able to use both tools efficiently.<sup>105</sup> As a result of that \*\*\* profile, the ATL agreed to provide a \*\*\* or a \*\*\* that would give Student the opportunity to \*\*\* in hopes that Student would get more task completion. There were no

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<sup>96</sup> JE-9 at 1.

<sup>97</sup> JE-9; Tr. at 872-73.

<sup>98</sup> Tr. at 894.

<sup>99</sup> JE-8 at 3-4; Tr. at 895.

<sup>100</sup> PE-5.

<sup>101</sup> PE-5 at 8.

<sup>102</sup> PE-5 at 9.

<sup>103</sup> Tr. at 657.

<sup>104</sup> Tr. at 653-54.

<sup>105</sup> Tr. at 654.

concerns with Student's \*\*\*; the ATL concluded it was a task completion issue and that providing Student \*\*\* would relieve Student's frustration \*\*\* and increase \*\*\*.<sup>106</sup>

82. The District agreed to conduct a full assistive technology evaluation after the due process hearing was filed. The ATL completed the AT evaluation and report on \*\*\*, 2017. The ATL testified that Student was receiving homebound instruction at the time that she conducted the evaluation so she contacted Mother to ask to come to the house to observe Student's instruction. The ATL also wanted to obtain information from Student's mother about her concerns so she could assess them. She wanted to look at what tasks are difficult so she could assess what technologies would be helpful. The ATL testified that Mother indicated that she \*\*\*, but she was concerned that Student could \*\*\* so the ATL informed Mother that she would bring her a \*\*\* to the home and make sure everyone knew how to use it.<sup>107</sup> The homebound teacher already knew how to use the device as did Student, so the ATL only had to train the parent.<sup>108</sup>
83. The only other concern that Mother shared in addition to \*\*\* was reading. To determine how Student processed written material, the ATL administered \*\*\*. \*\*\* assesses how a person processes information with \*\*\*. The results of the \*\*\* indicated that Student did better with \*\*\* but Student indicated that Student \*\*\*.<sup>109</sup> Student told the ATL that Student \*\*\*. That is why she didn't recommend use of the \*\*\* because the goal was to reduce the frustration and \*\*\* and the \*\*\* increased both.<sup>110</sup> The ATL decided to still give Student access to \*\*\*, which is a reading tool. \*\*\* gives access to all state-adopted textbooks and the general literature. \*\*\*. The ATL provided all of the information about accessing \*\*\* to Student's mother.
84. The ATL followed the \*\*\* protocol when she conducted the AT evaluation. The ATL has conducted approximately 200 AT evaluations.<sup>111</sup> The ATL looked at Student's strengths and weaknesses, the environment in which Student will be doing the task, the task Student is asked to do, and the tools available.<sup>112</sup>
85. After consultation with Student's Mother the ATL determined that \*\*\* was not a viable technology to assist Student with reading. Mother did not want Student to have access to \*\*\*. Student became \*\*\*. The ATL and mother agreed that although Student had the

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<sup>106</sup> Tr. at 654.

<sup>107</sup> Tr. at 658.

<sup>108</sup> Tr. at 659.

<sup>109</sup> Tr. at 660.

<sup>110</sup> Tr. at 689-90.

<sup>111</sup> Tr. at 672.

<sup>112</sup> Tr. at 662.

- cognitive skills to use the tool, but \*\*\* was much more effective for Student than the \*\*\*.<sup>113</sup>
86. \*\*\*.<sup>114</sup>
87. The ATL opined that there was no need to conduct an occupational therapy (OT) evaluation as recommended by the individual who conducted the FBA IEE. The ATL addressed the concern identified in the IEE – \*\*\*.<sup>115</sup> The ATL saw no concern with Student’s \*\*\*.<sup>116</sup>
88. The ATL included as part of her AT evaluation an evaluation of whether Student would benefit from a \*\*\* device. She determined that Student would not because in order to use it, Student would have to \*\*\*.<sup>117</sup>
89. The ATL recommended that Student have access to a \*\*\* for \*\*\*.
90. The ATL addressed reading in her AT evaluation and not in her AT consult because Mother expressed a concern about reading when she sought her input for the evaluation and this concern had not been addressed previously when she did the consult.<sup>118</sup>
91. An occupational therapy evaluation was conducted on \*\*\*, 2015. The OT who conducted the evaluation determined that direct occupational therapy was not indicated. She found the Student demonstrated \*\*\*. She found Student’s \*\*\*. She opined that the areas that are supported by educational occupations therapy: fine motor skills, self-care, and sensory awareness/processing were not currently affecting Student’s access to Student’s education.<sup>119</sup>
92. There was no indication that an OT evaluation was needed as part of the 2016 reevaluation.<sup>120</sup>
93. The 2016 reevaluation was administered appropriately, but failed to evaluate all areas of suspected disability. Specifically, the District had reason to know or suspect that Student should be assessed for the OHI of ADHD at the time of the reevaluation.

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<sup>113</sup> Tr. at 666.

<sup>114</sup> Tr. at 690.

<sup>115</sup> Tr. at 671.

<sup>116</sup> Tr. at 671.

<sup>117</sup> Tr. at 667.

<sup>118</sup> Tr. at 685-86.

<sup>119</sup> JE-12 at 19-20.

<sup>120</sup> PE-44 at 4; Tr. at 384, 387, 674.

**Issue 3: Did the District fail to provide Student's educational program in an appropriate educational environment (i.e. both the least restrictive environment (LRE) and Student's current at home placement).**

94. During the relevant time period Student was placed in general education with special education supports while in regular classes and without special education support when in \*\*\*. Student was also placed in the \*\*\* classroom as a behavioral support.
95. Based upon Student's \*\*\* Student was placed on homebound instruction for a period of approximately \*\*\* months.

**Issue 4: Denied Parents meaningful participation in the ARDC / IEP process by failing to provide the Procedural Safeguards and/or Prior Written Notice?**

96. During the relevant time applicable to this hearing, Petitioners were provided copies of the Notice of Procedural Safeguards every time Student was evaluated and with the notice of every ARDC meeting.<sup>121</sup>
97. Petitioners also received Prior Written Notice, on a Prior Written Notice form, after each ARDC meeting held during the 2016-2017 school year.<sup>122</sup> Prior written notice was not given at the \*\*\*, 2017 ARDC meeting because the ARDC was not completed and it was agreed that the ARDC meeting would reconvene after there was a chance to revise Student's behavior objectives. The ARDC reconvened on \*\*\*, 2017 at which time consensus was not reached and a prior written notice was provided to Parents.<sup>123</sup>
98. Prior written notice was provided after the ARDC meetings held on \*\*\*, 2016, \*\*\*, 2016 and \*\*\*, 2016 although a form identified as "Prior Written Notice" was not was not completed.
99. Copies of the ARD paperwork was sent home to Parent after the \*\*\*, 2016 ARDC, the one ARDC meeting Parent did not attend but consented for the ARDC to proceed without him. At the \*\*\*, 2016 ARDC meeting, and after notifying Parent of their intent, the ARDC

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<sup>121</sup> JE-5 at 3; JE-6 at 1; JE-10; JE-18 at 25; JE-19 at 26; JE-20 at 16; JE-21 at 16; JE-22 at 11; JE-28 at 15, 21; JE-30 at 12, 19; JE-31 at 16.

<sup>122</sup> JE-21 at 16; JE-28 at 21; JE-30 at 18; JE-31 at 16.

<sup>123</sup> JE-30 at 12, 18.

decided to meet again to review Student's reevaluation.<sup>124</sup> All of the decisions of the ARDC were included in the ARD paperwork.

100. The post-ARD paperwork provided to Parents after the \*\*\*, 2016 ARDC meeting, included extensive deliberations, along with the goals and objectives, the BIP, the evaluation and the contents of the ARD paperwork prepared during the ARDC meeting.<sup>125</sup> The same is true of the \*\*\*, 2016 ARDC.<sup>126</sup>
101. The purpose of the \*\*\*, 2016 ARDC was to review the reevaluation, and to confirm and review information presented and discussed at the \*\*\*, 2016. The documentation provides a description of the program that was recommended, the rationale for the program and services, progress of Student's goals and objectives, Student's annual goals moving forward and the BIP that was developed for Student. Page 15 of the ARD document reviews the LRE determinations made. Mother was present, participated in the ARDC meeting, and signed that she was in agreement with the decisions made.<sup>127</sup> The last ARDC held during the 2015-2016 school year was held on \*\*\*, 2016 for the purpose of reviewing Student's proposed program for the next year and make any needed updates for Student's \*\*\*. The decisions that all of the ARDC members agreed to, including Student's parents, were documented in the ARDC document that was shared with Parent.<sup>128</sup> The deliberations outline the decisions made and the rationale for the decisions.

**Issue 5: Did the District socially promote Student despite Student's lack of academic and non-academic progress?**

102. The District's decision to promote Student from \*\*\* grade to \*\*\* grade was made at the end of the 2014-2015 school year. Student earned passing grades at the end of the 2013-2014 school year.<sup>129</sup> Student had a final grade of \*\*\* in \*\*\*; a grade of \*\*\* in \*\*\*; a grade of \*\*\* in \*\*\*; a grade of \*\*\* in \*\*\*; and a grade of \*\*\* in \*\*\*.<sup>130</sup> Student satisfied the STAAR test objectives in \*\*\* and \*\*\* and had passing grades in all of Student's subjects.<sup>131</sup>
103. Student was promoted to the \*\*\* grade at the end of the 2015-2016 school year. Student's grades at the end of the \*\*\* grade were: \*\*\* in \*\*\*; \*\*\* in \*\*\*; \*\*\* in \*\*\*; \*\*\* in \*\*\*;

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<sup>124</sup> JE-18 at 21.

<sup>125</sup> JE-18.

<sup>126</sup> JE-19.

<sup>127</sup> JE-19 at 17.

<sup>128</sup> JE-20 at 15.

<sup>129</sup> RE-4 at 1.

<sup>130</sup> RE-4 at 1.

<sup>131</sup> JE-41.

and \*\*\*in \*\*\*,<sup>132</sup> Student passed the STAAR test in \*\*\* and \*\*\*. Student did not pass the STAAR test in \*\*\*,<sup>133</sup> The District makes grade promotion decisions on the basis of grades. The STAAR test is not determinative of whether a student is promoted until the \*\*\* grade and \*\*\* grade. There was no reason that would have required Student not to have been promoted from \*\*\* grade to \*\*\* grade.<sup>134</sup>

**Issue 6: Did the District retaliate against Student and family?**

104. The District's Code of Conduct states, "\*\*\*\*"<sup>135</sup> The Principal believed that she did not \*\*\*.<sup>136</sup>
105. \*\*\*.<sup>137</sup> \*\*\*.<sup>138</sup>
106. \*\*\*.<sup>139</sup>
107. \*\*\*.<sup>140</sup>
108. On \*\*\*, 2017, \*\*\*. The \*\*\* teacher restrained Student with the \*\*\* classroom paraprofessional. \*\*\*.
109. \*\*\*.<sup>141</sup> \*\*\*.
110. \*\*\*.<sup>142</sup>

**Remedy: Private Therapeutic Day School.**

111. \*\*\* is a therapeutic day school that is fully accredited.<sup>143</sup> The school has a \*\*\* who is a licensed \*\*\* and a total of three \*\*\* on staff.<sup>144</sup>

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<sup>132</sup> RE-4 at 2.

<sup>133</sup> JE-41.

<sup>134</sup> Tr. at 580.

<sup>135</sup> RE-6 at 14; Tr. at 936.

<sup>136</sup> Tr. at 937.

<sup>137</sup> PE-19; Tr. at 134.

<sup>138</sup> Tr. at 135.

<sup>139</sup> Tr. at 138-39.

<sup>140</sup> RE-19, 20; Tr. at 164.

<sup>141</sup> Tr. at 158.

<sup>142</sup> Tr. at 272.

<sup>143</sup> Tr. at 173.

<sup>144</sup> Tr. at 170; 172.

112. Every family at \*\*\* is assigned a \*\*\*. The \*\*\* consist of two licensed \*\*\* and \*\*\* and family therapist who is certified in \*\*\*.<sup>145</sup> Parents of \*\*\* students are required to meet \*\*\* with the \*\*\* staff (\*\*\*) to discuss what is being observed in school versus what the parents are observing at home in an effort to devise appropriate interventions to assist students.<sup>146</sup> If parents do not attend the \*\*\* sessions the student is dis-enrolled.<sup>147</sup>
113. Student receive \*\*\* administered by the licensed \*\*\*.<sup>148</sup>
114. All of \*\*\*' academics are aligned with the TEKS.<sup>149</sup>
115. All \*\*\* teachers are certified and there is a master level special education teacher.<sup>150</sup> The student/teacher ratio is \*\*\*.<sup>151</sup>
116. The \*\*\* has spoken with Student's \*\*\* and has reviewed Student's educational records.<sup>152</sup> The \*\*\* program is intended to be a \*\*\* program<sup>153</sup> with the goal being to get the child out of whatever crisis they are in and help teach them coping skills to move on to a less restrictive level of care than that of a private therapeutic day placement.<sup>154</sup>
117. \*\*\* is not on the Agency's approved private school list and \*\*\*.<sup>155</sup>
118. \*\*\* can accommodate Student's \*\*\* (*i.e.* Student's \*\*\*) by offering and using \*\*\* programs such as \*\*\*.<sup>156</sup> \*\*\* does not specifically remediate learning disabilities but they help with the emotional/behavioral components of those things.<sup>157</sup> Parental participation

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<sup>145</sup> Tr. at 172.

<sup>146</sup> Tr. at 172.

<sup>147</sup> Tr. at 180.

<sup>148</sup> Tr. at 172.

<sup>149</sup> Tr. at 173.

<sup>150</sup> Tr. at 173.

<sup>151</sup> Tr. at 173.

<sup>152</sup> Tr. at 171.

<sup>153</sup> Tr. at 187.

<sup>154</sup> Tr. at 187.

<sup>155</sup> [http://tea.texas.gov/Student\\_Testing\\_and\\_Accountability/Monitoring\\_and\\_Interventions/Program\\_Monitoring\\_and\\_Interventions/Nonpublic\\_School\\_Monitoring\\_and\\_Guidance\\_Resources\\_for\\_Special\\_Education](http://tea.texas.gov/Student_Testing_and_Accountability/Monitoring_and_Interventions/Program_Monitoring_and_Interventions/Nonpublic_School_Monitoring_and_Guidance_Resources_for_Special_Education) (last visited July 21, 2107); *see Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

<sup>156</sup> Tr. at 173-74.

<sup>157</sup> Tr. at 174.



is an important crucial aspect.<sup>158</sup> \*\*\* does \*\*\* with a signed consent from the parents.<sup>159</sup> They have private speech therapists and occupational therapists that come and use their facility.<sup>160</sup> Student would be an appropriate student for \*\*\*.<sup>161</sup> \*\*\* does not have a BCBA on staff.<sup>162</sup> They do have a social skills curriculum.<sup>163</sup> The \*\*\* believes Student is “reactive” - it is not likely Student purposely sets out to \*\*\*.<sup>164</sup>

119. \*\*\* rarely restrains students but has done so on occasion when needed. \*\*\* used a program called “\*\*\*\*.”<sup>165</sup> \*\*\*, as a last resort, for use during restraint.<sup>166</sup>
120. \*\*\* attempts to identify a Student’s triggers and devises a plan to help alleviate the stressor.<sup>167</sup> \*\*\* has not \*\*\* in response to behavioral problems.<sup>168</sup>
121. \*\*\*,<sup>169</sup> Student could begin attending the \*\*\* summer program; it is more hands-on projects and relationship based.<sup>170</sup>

#### IV. DISCUSSION

##### A. Statutory Overview and FAPE

The placement recommended by the District is presumed to be appropriate and Petitioner bears the burden of proof at all times.<sup>171</sup>

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<sup>158</sup> Tr. at 180.

<sup>159</sup> Tr. 181.

<sup>160</sup> Tr. at 182.

<sup>161</sup> Tr. at 175; 177.

<sup>162</sup> Tr. at 178.

<sup>163</sup> Tr. at 186.

<sup>164</sup> Tr. at 186.

<sup>165</sup> Tr. at 175.

<sup>166</sup> Tr. at 179.

<sup>167</sup> Tr. at 180.

<sup>168</sup> Tr. at 175.

<sup>169</sup> Tr. at 182.

<sup>170</sup> Tr. at 176-77.

<sup>171</sup> See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); see also *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003).

The primary purpose of the IDEA is to ensure that children with disabilities receive a FAPE.<sup>172</sup> The Fifth Circuit has explained that a FAPE “need not be the best possible one, nor one that will maximize the child’s educational potential.”<sup>173</sup> Instead, the IDEA only guarantees a child with a disability an education reasonably calculated to enable a child to make progress appropriate in light of the child’s unique circumstances. The District is not required to implement the “best” program designed by an expert to remediate or maximize a child’s educational potential.<sup>174</sup> Restated, the IDEA guarantees only a “basic floor of opportunity...” for every disabled child, consisting of “specialized instruction and related services which are individually designed to provide educational benefit...”<sup>175</sup> Still, “the educational benefit to which the IDEA refers cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”<sup>176</sup> “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”<sup>177</sup> In short, the educational benefit that an IEP is designed to achieve must be “meaningful” and “appropriately ambitious in light of the student’s circumstances.”<sup>178</sup>

The IDEA’s FAPE mandate requires schools to provide eligible students with special education and related services that, in part, “include an appropriate preschool, elementary school, or secondary school education.”<sup>179</sup> “Special education” is defined to mean *specialty designed instruction*, provided at no cost to the parents, that is intended to meet the unique needs of a child

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<sup>172</sup> See *White*, 343 F.3d at 378.

<sup>173</sup> *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) (hereinafter *Michael F.*); see also *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003).

<sup>174</sup> See *Kings Local Sch. Dist Bd. v. Zelazny*, 325 F.3d 724, 731 (6th Cir. 2003) (stating expert’s program showed district how to maximize student’s potential but IDEA does not require it be implemented).

<sup>175</sup> *Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 201, 102 S.Ct. 3034 (1982).

<sup>176</sup> *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 805 n.1 (5th Cir. 2012).

<sup>177</sup> *Andrew*, 137 S.Ct. at 1001.

<sup>178</sup> *Andrew F. v. Douglas County School District*, 136 S.Ct. 2405 (2016).

<sup>179</sup> 34 C.F.R. § 300.17(c).

with a disability.<sup>180</sup> “Specially designed instruction” means adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of the instruction:

- To address the unique needs of the child that result from the child’s disability; and
- To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.<sup>181</sup>

In determining whether the District has provided the requisite opportunity for Student to make educational progress in light of Student’s circumstances,” the Fifth Circuit utilizes a four part test: (1) is the program individualized on the basis of the student’s assessment and performance; (2) is the program administered in the least restrictive environment (LRE); (3) are the services provided in a coordinated and collaborative manner by the key “stakeholders;” and (4) are positive academic and non-academic benefits demonstrated.<sup>182</sup> Hearing officers and courts are not required to consider or to weigh these factors in any particular way, but take a “holistic approach” when considering the sufficiency of an educational plan.<sup>183</sup>

Applying the Fifth Circuit’s test and holistic approach, the Hearing Officer finds although Student made some academic progress the behavioral intervention plan devised by the District and implemented over the past two school years proved to be ineffective in addressing behaviors that impeded Student’s learning.

- (1) Student’s educational program during the relevant time period was not individualized on the basis of the \*\*\* 2016 reevaluation and designed to address Student’s unique circumstances. Academic PLAAPs and goals, when present, were essentially repeated from year-to-year. Student’s behavioral goals were also

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<sup>180</sup> 34 C.F.R. § 300.39(a)(1).

<sup>181</sup> 34 C.F.R. § 300.39(b)(3).

<sup>182</sup> See *Michael F.*, 118 F.3d at 247; *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).

<sup>183</sup> *Michael Z.*, 580 F.3d at 293.

recycled from one IEP to another. Student was identified as qualifying for special education for an ED – Student has emotional problems. An effective BIP that is implemented with fidelity is essential for Student to make academic and non-academic progress. Despite having a comprehensive and well-crafted BIP, the BIP itself or the manner in which the BIP was implemented did not address Student’s emotional and resulting behavioral challenges at school. The lack of an effective BIP and/or the failure to implement the BIP substantially impeded Student’s educational progress as shown by the numerous disciplinary referrals, the deterioration of Student’s relationship with the \*\*\* staff, \*\*\*, and \*\*\* To effectively individualize Student’s educational program, the ARDC should have reconvened to reconsider Student’s BIP in \*\*\* 2016 after the initial \*\*\*. The failure to devise and consistently implement an “effective” BIP resulted in an educational program for Student that was not individualized based upon Student’s unique needs and assessment.

The District’s predetermined the decision to offer Student \*\*\* (\*\*\* hours of instruction per week) while receiving homebound instruction was not supported by any educational or medical need. The decision was arbitrary and not based upon any assessment or performance data and impeded Student’s academic and non-academic progress.

Student has been medically diagnosed with ADHD and at the time of Student’s \*\*\* 2016 reevaluation, the District had reason to believe Student should be evaluated for ADHD but failed to do so. The failure to assess in all areas of suspected disability also resulted in an educational program that was not adequately based upon assessment data.

- (2) Student’s dual placement in the \*\*\* classroom and in general education classes was the least restrictive environment. The \*\*\* classroom set up, as implemented, is an acceptable placement continuum but is ripe for failure. While the District did not violate the LRE mandate with this dual placement it should have recognized that leaving Student under the care and supervision of the \*\*\* teacher was aggravating

Student's emotional disturbances; it was not a solution. The \*\*\* program has a commendable vision but proved utterly ineffective in assisting Student with Student's unique behavioral challenges.

Student's homebound placement was the LRE for the remainder of the 2016-2017 school year. After Student's \*\*\*, the District reasonably and correctly relied on Student's psychiatrist's recommendation that Student not return to school for the remainder of the 2016-2017 school year. Under the circumstances, homebound placement was the LRE.

- (3) All key stakeholders, including Parents, were actively engaged and involved in the development of Student's IEP.<sup>184</sup>
- (4) Student has demonstrated some positive academic progress as demonstrated by Student's final passing \*\*\* grade grades. All of Student's \*\*\* grade grades were higher than Student's final \*\*\* grade grades. However, Student made no significant non-academic progress. In fact, Student regressed non-academically as established by Student's dramatic behavior decline.

**B. Issue 1: Did the District fail to design, update, and implement individual education plans (IEP) as necessary to meet Student's individualized needs on the basis of Student's assessments and performance, including failing to design an IEP with a behavior intervention plan (BIP) to address Student's special education needs and behavioral issues?**

**1. Behavior**

The IDEA does not define a BIP but it is generally accepted that a BIP is a component of a child's IEP that describes positive behavioral interventions and other strategies that must be implemented to prevent and control a child's inappropriate or unacceptable behavior. Typically a BIP outlines the targeted behaviors, the behaviors that are expected, positive interventions,

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<sup>184</sup> Tr. at 76.

strategies and supports to address the behaviors, and the positive and negative consequences for identified behaviors. The IDEA requires a child's IEP team to "consider the use of positive behavioral interventions and supports, and other strategies, to address [the] behavior" of a "child whose behavior impedes the child's learning or that of others...." 34 C.F.R. § 300.324(a)(2)(i); *see also* 20 U.S.C. § 1414(d)(3)(B)(i).

The presentation of evidence in this case demonstrated District employees are educational professionals who are engaged and genuinely care about Student. Except for failing to evaluate for ADHD the District did not commit any procedural violation of consequence that denied Student a FAPE. However, as stated, Student's BIPs were developed with the assistance of a Board Certified Behavior Analyst (BCBA), were based upon assessment data, were well written with defined and measurable goals containing all the components expected in a BIP, but nevertheless proved to be completely ineffective in assisting Student with Student's emotional and behavior problems.<sup>185</sup> The District had a responsibility to recognize the BIP was not working and attempt different strategies to assist Student with Student's behavior. The standard cannot be "the District considered positive behavior interventions, devised a BIP, it failed, and that discharges the District's responsibility." Continuing to implement failed behavior strategies is reminiscent of Albert Einstein's theory of insanity: "Doing the same thing over and over again expecting a different result."<sup>186</sup> The IDEA demands more.

It is not necessary to recite all of the events that should have caused the District to reconsider its approach to assisting Student with Student's behavior. As of the \*\*\*, 2016, \*\*\* the District was on notice that its behavioral support program was not working.

Review of the ARDC documents going back to \*\*\*, 2015, while Student attended \*\*\* through Student's time at \*\*\* reveal every document contains the exact, verbatim, "cut and paste"

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<sup>185</sup> *See Cypress-Fairbanks Independent School Dist. v. Michael F. by Barry F.*, 118 F.3d 245, 252-53 (5th Cir. 1997) (noting, "Despite his recognition that the earlier IEPs developed by [the district] for [student's] 1992-93 school year represented appropriate interim steps designed to benefit [student] based on the facts and information available at that time, the hearing officer found that these IEP's had not proven successful in managing [student's] behavior.").

<sup>186</sup> Albert Einstein, available at <https://www.brainyquote.com/quotes/quotes/a/alberteins133991.html> (last visited July 20, 2017).

recitation of Student's behavior.<sup>187</sup> The IEPs generated while Student was at \*\*\* contain separate BIPs with clear goals and objectives. The IEPs from \*\*\* reference Student's BIP but the actual contents of the BIP are not found until after the ARDC meeting on \*\*\*, 2017.<sup>188</sup>

Student's \*\*\* BIP contained two goals: (1) \*\*\*, and (2) \*\*\*. Each goal covered an instructional period of thirty six instructional weeks and each goal had two objectives divided over two seventeen week instructional periods. The goals were \*\*\*. The first objectives measured progress by having no more than \*\*\* and the second objectives \*\*\*.<sup>189</sup> Behavioral progress reports were not introduced into evidence from the time Student attended \*\*\* but based upon Student's well documented behavior incidents and \*\*\* the Hearing Officer finds that Student was not progressing in Student's behavior goals, in fact Student regressed.<sup>190</sup> The District's failure to revisit the BIP and its approach to Student's behavior leads to the conclusion the IEP was not sufficiently individualized to meet Student's unique behavioral needs and denied Student a FAPE.

## 2. Homebound Instruction

Based on the recommendation of Student's psychiatrist, the District authorized \*\*\* hours per week of homebound instruction on \*\*\*, 2017<sup>191</sup> and Student started receiving homebound instruction on \*\*\*, 2017.<sup>192</sup> The stated \*\*\* need for homebound instruction was, "[Student] has continued to experience a severe deterioration of [Student's] symptoms, \*\*\*. It also appears that [Student] is not able to tolerate the school environment at this time as [Student] has frequently become \*\*\* due to [Student's] disorders. It is our recommendation that [Student] *be homebound until [Student's] disorders are better controlled and [Student] no longer poses a danger to \*\*\*self or others*"<sup>193</sup> (emphasis added).

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<sup>187</sup> JE-16-22.

<sup>188</sup> JE-26, 30.

<sup>189</sup> JE-26 at 3; JE-30 at 4.

<sup>190</sup> See e.g., PE-47 at 3-5 (\*\*\*).

<sup>191</sup> JE-31.

<sup>192</sup> RE-18.

<sup>193</sup> JE-35 at 2.

Pursuant to 19 Tex. Admin. Code § 89.63(b), the ARDC defines the regular school day for homebound students. Instructional settings *must be based on the individual needs and individualized education programs (IEPs)* of eligible students receiving special education services and shall include the following (emphasis added):

Students served on a homebound or hospital bedside basis are expected to be confined for a minimum of four consecutive weeks as documented by a physician licensed to practice in the United States. Homebound or hospital bedside instruction may, as provided by local district policy, also be provided to chronically ill students who are expected to be confined for any period of time totaling at least four weeks throughout the school year as documented by a physician licensed to practice in the United States. The student's ARD committee shall determine the amount of services to be provided to the student in this instructional arrangement/setting in accordance with federal and state laws, rules, and regulations, including the provisions specified in subsection (b) of this section.<sup>194</sup>

While the ARDC has the authority to determine the regular school day and the amount of instruction offered while homebound, the instruction must still be linked to the IEP and designed to allow a student to make educational progress.

It is reasonable to infer from the evidence the District's decision to offer only \*\*\* hours of homebound instruction was \*\*\* versus a decision based upon the educational needs of Student.<sup>195</sup> The evidence showed the \*\*\*. There is no evidence that the delivery of homebound instruction was tied to Student's educational needs or that Student's IEP was even considered when limiting homebound instruction to \*\*\* hours per week.

While the Agency has adopted a rule that permits the ARDC to define what a regular school day is and the amount of services to be provided, the rule clearly states it must be implemented in accordance with federal and state laws, rules, and regulations.<sup>196</sup> Furthermore, instructional arrangements/settings must be based on the individual needs and individualized education

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<sup>194</sup> 19 Tex. Admin. Code § 89.63(c)(2)(A).

<sup>195</sup> Tr. at 524-25.

<sup>196</sup> 19 Tex. Admin. Code § 89.63(c).



programs (IEPs) of eligible students.<sup>197</sup> There is no evidence in the record that the four hours of homebound instruction were based on Student's needs or IEP. The District rejected Father's request for \*\*\* hours per week of homebound instruction and arbitrarily approved \*\*\* hours (\*\*\*). Although the ARDC may determine the amount of homebound services that determination must be based on the unique and individualized needs of the student. The ARDC summarily rejected the father's request for more than four hours of homebound instruction per week without considering whether Student could have tolerated more."

The applicable federal rule, 34 C.F.R. § 300.39 states, "(a)(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including -- (i) Instruction conducted in the classroom, *in the home*, in hospitals, and institutions, and in other settings ... (3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction -- (i) To *address the unique needs of the child* that result from the child's disability; and (ii) To *ensure access of the child to the general curriculum*, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children" (emphasis added).

Student's psychiatrist recommended homebound to \*\*\* and to remove Student from the school environment until Student was no longer a threat of harm to \*\*\*self or others, he did not make a recommendation concerning the amount of homebound instruction Student should receive. After receiving the psychiatrist's recommendation, the District sent a preprinted form that simply asked whether Student could tolerate \*\*\* hours of homebound instruction per week – "yes" or "no." The decision to limit Student's homebound instruction to \*\*\* hours per week was not based on a medical recommendation.

Student was authorized homebound instruction on \*\*\*, 2017 and remained homebound until the end of the 2016-2017 school year. The failure to follow and implement the Student's IEP

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<sup>197</sup> *Id.*

during the approximate \*\*\* days from \*\*\*, 2017 until \*\*\*, 2017, and the failure to offer homebound instruction based upon Student's educational needs was denial of FAPE during that \*\*\* month period.

**C. Issue 2: Did the District fail to timely and comprehensively evaluate Student in all areas of suspected disability and need?**

Student's three-year reevaluation was completed on \*\*\*, 2016. The LSSP who performed the psychological reevaluation concluded, "[Student] currently demonstrates many of the behaviors commonly associated with ADHD. It should be noted that [Student's] difficulties with attention and focus may also be interfering with [Student's] academic learning *and behavior* (emphasis added). ... Further follow up in this area may be warranted."<sup>198</sup>

Districts have an ongoing obligation to "identif[y], locat[e], and evaluat[e]" "all children with disabilities residing in the State" to ensure that they receive needed special education services.<sup>199</sup> "The IDEA's Child Find obligation imposes on each District an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including "[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade[.]"<sup>200</sup> "The Child Find duty is triggered when the District has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability."<sup>201</sup> A District "must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability."<sup>202</sup>

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<sup>198</sup> JE-8 at 7-8.

<sup>199</sup> 20 U.S.C. §§ 1412(a)(3)(A), 1412(a)(10)(A)(ii).

<sup>200</sup> *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 949-50 (W.D. Tex. 2008) (quoting 34 C.F.R. §§ 300.111(a), (c)(1)).

<sup>201</sup> *Id.* at 950.

<sup>202</sup> *Id.*

A Hearing Officer must “undertake a two-part inquiry to determine whether a local educational agency has complied with its Child Find responsibilities.” First, the Hearing Officer “must examine whether the local educational agency had reason to suspect that a student had a disability, and whether that agency had reason to suspect that special education services might be needed to address that disability.” “Next, the Hearing Officer must determine if the local educational agency evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability.”<sup>203</sup>

The \*\*\* 2016 psychological reevaluation identified ADHD as a suspected area of disability and specified Student behaviors that were consistent with ADHD. The reevaluation coupled with Student’s escalating behavior issues triggered the District’s duty to evaluate for ADHD. A failure to evaluate in all areas of suspected disability is a Child Find violation.

**D. Issue 3: Did the District fail to provide Student’s educational program in an appropriate educational environment (*i.e.* both the least restrictive environment (LRE) and Student’s current at home placement).**

**1. \*\*\* (\*\*\*) Classroom**

Based on Student’s severe and escalating emotional and behavioral problems the dual placement of Student in the \*\*\* classroom and general education classes, with special education supports while in regular classes and without supports while in \*\*\*, was the LRE. The \*\*\* class arrangement was, under the existing circumstances, reasonably calculated to provide additional structure and behavioral support. The \*\*\* classroom concept provides students structure in the form of intensive behavior monitoring while a student is in general education classes or in the \*\*\* classroom. The class is supervised by a special education teacher and an aide with a very low student/teacher ratio. The \*\*\* teacher is Student’s \*\*\* and coordinates Student’s progress and challenges with the teaching and support staffs daily. These structural aspects of the \*\*\* classroom

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<sup>203</sup> *Lauren C. v. Lewisville ISD*, 2017 WL 2813935, 70 IDELR 63, 4:15-CV-00544 (E.D. Tex. Jun. 29, 2017) (mem. opinion) quoting *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008).

are positive and are reasonably calculated to permit Student to progress both academically and non-academically while simultaneously integrating Student with Student's nondisabled peers.

The issue is not whether dual placement into the \*\*\* classroom was effective (it wasn't); the issue is whether the placement was in the LRE. Student's disciplinary history reveals Student is capable of performing at grade level when Student's emotional disturbance is under control; however, for whatever reason Student's emotional problems have escalated over the last two years. Student's behavior at school has been \*\*\*. As noted by Student's psychiatrist Student posed a danger to \*\*\*self and others. As the ARDC looked prospectively into the future to devise an appropriate program to assist Student with Student's behavior, based upon what was known at the time, the \*\*\* classroom was reasonably calculated to maximize Student's integration into the general education curriculum while providing desperately needed behavioral support.

The \*\*\* classroom was a major component of the behavioral strategies devised by the ARDC. The Hearing Officer has already found that behavioral supports offered to Student, including the \*\*\* classroom, were ineffective and a denial of FAPE but the placement did not violate the LRE requirement.

## **2. LRE While Homebound**

At hearing it was undisputed that homebound placement is more restrictive than Student's dual \*\*\*/general education placement. As the name suggests homebound students receive instruction at home from a certified teacher. Homebound students generally do not have the opportunity to interact with their nondisabled peers and observe appropriate behavior modeling. Setting aside the issue of the amount of services and instruction offered while Student was homebound, under the circumstances the homebound placement was the LRE.

The ARDC was confronted with a student who exhibited escalating \*\*\* and inappropriate behaviors at school. They receive a letter from Student's psychiatrist stating Student is "a threat of harm to \*\*\*self or others" and requires homebound instruction to stabilize Student and \*\*\*. The ARDC was also informed that Student \*\*\* the same time period. The homebound placement

decision was not only reasonably calculated to permit Student to make educational progress; it was absolutely necessary and appropriate under the circumstances.

**E. Issue 4: Denied Parents meaningful participation in the ARDC / IEP process by failing to provide the Procedural Safeguards and/or Prior Written Notice?**

The evidence confirmed Parent received the Procedural Safeguards and Prior Written Notices when required. Parent fully participated in Student's educational programming and decision making. Even if there was a failure to provide the requisite Prior Written Notice, Parent was not impeded from meaningfully participating in the ARDC / IEP process. In fact, Parent's concern, engagement, and involvement at the ARDC meetings are commendable. Parent proved to be an effective advocate for Student.

**F. Issue 5: Did the District socially promote Student despite Student's lack of academic and non-academic progress?**

The District did not socially promote Student to the \*\*\* grade. The promotion from \*\*\* to \*\*\* grade at the end of the 2015-2016 school year was the only grade advancement during the relevant time period. Student passed all of Student's \*\*\* grade classes with \*\*\*, \*\*\*, and \*\*\*s. Student passed the STAAR assessments for \*\*\* and \*\*\*. Student failed the STAAR assessment for \*\*\*. \*\*\*. Student objectively met all requirements for advancement from \*\*\* to \*\*\* grade and was not socially promoted.

**G. Issue 6: Did the District retaliate against Student and family?**

Petitioner suggests that the District improperly retaliated against Student by \*\*\*. Succinctly stated, the District did not improperly retaliate against Student and this issue is beyond the jurisdiction of the Hearing Officer to resolve.

Findings of Fact were made under this issue for the limited purpose of further illustrating the ineffectiveness of Student's behavior interventions. A special education hearing officer's jurisdiction in Texas is limited to those issues arising under the IDEA, including the identification,

evaluation, or educational placement of Student or the provision of FAPE.<sup>204</sup> The issue of retaliation is more appropriately resolved through claims brought under Section 504 of the Rehabilitation Act of 1973 or Section 1983 of the Civil Rights Act which are outside of the scope of this due process hearing. Petitioner's retaliation claim is **DISMISSED** for lack of jurisdiction.

## H. Summary

Student's educational program during the relevant time period was not individualized on the basis of the 888 2016 reevaluation and designed to address Student's unique circumstances. The BIP and other behavioral interventions proved to be ineffective and resulted in Student regressing behaviorally which significantly impeded Student's non-academic progress and was a denial of FAPE. The decision to offer only \*\*\* hours of homebound instruction per week was not based upon Student's \*\*\* or educational needs and therefore resulted in a denial of FAPE. The \*\*\* 2016 reevaluation revealed Student had another suspected qualifying disability of ADHD but the District failed to evaluate and thus violated the District's Child Find obligation. Based upon the existing circumstances of Student's \*\*\*, Student's dual \*\*\*/general education and homebound placements were the LRE. Parent's received Notice of Procedural Safeguards and Prior Written Notices. Even if the District failed to provide the requisite Notices in a timely manner that failure did not impede Parent's participation in the ARD or IEP development process. Student was not socially promoted to the \*\*\* grade because Student met all academic requirements for grade promotion.

## V. RELIEF

Besides the request for attorney's fees that was previously dismissed, Petitioner seeks three items of relief for the violations identified above: (1) that Student be placed in a non-public or

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<sup>204</sup> 34 C.F.R. § 300.507(a); 19 Tex. Admin. Code § 89.1151(a).

private therapeutic day school;<sup>205</sup> (2) an IEE for assistive technology and/or any other area not provided; and (3) compensatory relief that is equal to the amount of deprivation.

#### **A. Private Therapeutic Day School Placement**

Parent requested a private therapeutic placement at \*\*\*. Student must meet a two part test in order to secure private placement at school district expense. First, Student must prove that the school district's program was not appropriate. Second, Student must prove that the proposed private placement is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school.<sup>206</sup>

The District argues that a private therapeutic day placement is unnecessary because the \*\*\* program does not offer anything that the District cannot or will not provide such as counseling, AT support, and the behavioral support provided through the \*\*\* program.<sup>207</sup> Furthermore, the District contends that \*\*\* does not provide free related services to students and does not offer counseling.<sup>208</sup> The District conceded, however, the District could pay for counseling and other necessary related services.<sup>209</sup>

##### **1. Was the District's IEP and Placement Decisions a Denial of a FAPE?**

The District's inability to devise and implement effective behavioral supports for Student and the limitation of homebound instruction to \*\*\* hours per week denied Student a FAPE. The District's behavioral program resulted in Student's behavioral regression. Over the course of two full school years the District has demonstrated they are unable to meet Student's current emotional

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<sup>205</sup> The Parties presented evidence and closing arguments on \*\*\* reimbursement from \*\*\* but \*\*\* reimbursement was not an identified request for relief prior to hearing and is beyond the scope of this final decision. *See* Order No. 8 at 4.

<sup>206</sup> *Burlington Sch. Committee v. Dept. of Educ.*; 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

<sup>207</sup> Tr. at 891.

<sup>208</sup> Tr. at 182-83.

<sup>209</sup> District's Closing Brief at 62.

and behavioral needs necessary to make educational progress. Significantly, the program was not individualized to adequately address Student's behavior and emotional problems; and Student regressed behaviorally, did not make non-academic progress, and was therefore denied a FAPE.<sup>210</sup> For these reasons, the District's placement is not appropriate.<sup>211</sup>

## 2. Is a Private Therapeutic Day School Placement Appropriate?

Because the District has been unable to provide Student a FAPE, and because of Student's unique emotional needs, a therapeutic day placement is an appropriate placement for Student to achieve a FAPE. \*\*\* can offer Student services such as AT, OT, speech therapy, etc. through private providers or the District can provide such services either through contract or directly by District personnel at a District facility.<sup>212</sup>

The District's position that \*\*\* does not offer counseling services is not entirely accurate. Parents receive \*\*\* without the student present. The \*\*\* component of \*\*\* is the program itself and the guidance given by the \*\*\* to the teachers.<sup>213</sup> The District insists that the \*\*\* program is inappropriate to meet Student's needs because Student will not receive counseling services. However, under Student's most recent IEP the District would only provide counseling as a direct service every other week for \*\*\* minutes.<sup>214</sup> Undoubtedly something is better than nothing, but for this \*\*\* Student, \*\*\* minutes per month of counseling is woefully insufficient and undermines the District's objection.

The District also objects to placement at \*\*\* because all of the students have emotional problems and therefore would deprive Student the opportunity to interact with nondisabled peers and violate the LRE mandate. The LRE mandate requires disabled students to be educated with

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<sup>210</sup> *Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

<sup>211</sup> *Committee of Town of Burlington, Mass. v. Dept. of Educ. Of Mass.*, 471 U.S. 359 (1985).

<sup>212</sup> Tr. at 183; District's Closing Brief at 58.

<sup>213</sup> Tr. at 183.

<sup>214</sup> JE-31 at 4.



their nondisabled peers, including students placed in private settings, to the “maximum degree appropriate.”<sup>215</sup> When considering Student’s unique emotional problems, placement at a school that specializes in educating students with emotional problems, with a smaller student/teacher ratio, and weekly parental involvement is Student’s LRE at this time. The benefits of placement at \*\*\* outweigh any benefit derived from education with non-disabled peers.

\*\*\* is a fully accredited school specializing in educating students with emotional problems. Counseling services are provided by \*\*\* in the form of weekly group therapy for Student and \*\*\* meetings with Parents by the \*\*\*. Other necessary support services can be offered by the District or at \*\*\* with private providers. Petitioners met their burden of showing a private \*\*\* placement at \*\*\* is appropriate.<sup>216</sup>

**B. Assistive Technology (AT) IEE and/or any other area not provided.**

Petitioner also requested an AT IEE and/or IEEs in any other area that was not provided. The AT consultation and subsequent full evaluation were thorough and appropriately administered. The evaluation used a variety of assessment tools and addressed parental concerns and assessed various devices to assist Student with reading and writing. Petitioner presented no evidence that Student’s AT evaluation was administered improperly or that Student requires any additional AT support that Student doesn’t already receive. Petitioner failed to carry Petitioner’s burden of proof on this issue.

While the AT evaluation was appropriate, the lack of an ADHD assessment for purposes of OHI eligibility was a Child Find violation. The remedy for a Child Find violation is an assessment. The District shall conduct an evaluation to determine if Student qualifies for services as a Student with OHI based on ADHD.

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<sup>215</sup> 34 C.F.R. § 300.114(a)(2)(i).

<sup>216</sup> *Schaffer v. Weast, Supra.*

**C. Compensatory Relief that is Equal to the Amount of Deprivation**

Petitioner requests unspecified compensatory relief equal to the amount of the deprivation. Based on the finding that Student was denied a FAPE the Hearing Officer has ordered specified relief in Section VII of this Final Decision. There was no other evidence to support compensatory relief beyond that which is already granted in this Decision.

**VI. CONCLUSIONS OF LAW**

1. The District is an LEA responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Student, by next friends, Parent, (collectively, Petitioner) bears the burden of proof on all issues raised in Petitioner's complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The Texas one-year statute of limitation (SOL) began running one year before the date the Complaint was originally filed—February 2, 2016. The accrual date of Petitioner's amended complaint for purposes of the Statute of Limitations (SOL) was February 2, 2016. 19 Texas Administrative Code § 89.1151(c).
4. During the relevant time period, the District failed to draft and implement an appropriate Individualized Educational Program (IEP) for Student that was effective in meeting Student's behavioral needs. Student's Behavior Intervention Plan (BIP) was ineffective, led to behavioral regression, and was not adequately individualized to meet Student's unique behavioral needs and resulted in a denial of FAPE. 34 C.F.R. § 300.324(a)-(b).
5. During the April 2016 reevaluation, the District failed to assess Student in all area of suspected need and disability. The failure to evaluate Student for ADHD was a Child Find violation. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. 300.111.
6. During all relevant time periods Student was placed in the least restrictive environment. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114.
7. During the relevant time periods Parent's right to meaningfully participate in the ARDC and IEP planning process was not impeded by a failure to timely provide Prior Written Notice or Procedural Safeguards. Any failure to timely provide Safeguards or Notices was a harmless procedural error that did not impede parental participation. 20 U.S.C. §§ 1415, 1412(a)(6); *Dallas ISD v. Woody*, 178 F.Supp.3d 443, 462 (N.D. Tex. Apr. 15, 2016)

(“Harmless procedural errors do not constitute a denial of FAPE.”) quoting *J.W. ex rel. J.E.W. v. Fresno Unified School District*, 626 F.3d 431, 432 (9th Cir.2010).

8. Student was not improperly socially promoted from \*\*\* to \*\*\* grade. Student met or exceeded all grade requirements for advancement. Tex. Ed. Code § 28.021.
9. The hearing officer lacks jurisdiction to consider Petitioner’s retaliation claims. Under the IDEA the issues for resolution in a special education due process hearing are limited to: the identification, evaluation, eligibility, or educational placement of the child, or the provision of FAPE. 34 C.F.R. §§ 300.503(a); .507(a)(1).
10. Student’s current educational program denied Student a FAPE. Placement at \*\*\* for the 2017-2018 school year is appropriate, can reasonably be expected to meet Student’s unique behavioral needs that have impeded Student’s learning, and will permit Student to meet challenging educational goals while making meaningful academic and non-academic progress. 20 U.S.C. § 1412(a)(10)(B); 34 C.F.R. § 300.326; *Sch. Committee of Town of Burlington, Mass. v. Dept. of Educ. Of Mass.*, 471 U.S. 359 (1985); *Andrew F. v. Douglas County Sch. Dist. RE-1*, \_ U.S. \_, 137 S.Ct. 988 (2017).

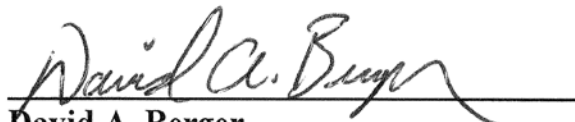
## VII. ORDER

After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders as follows:

1. Student shall be placed at \*\*\* for the 2017-2018 school year at District expense.
2. The District shall provide transportation to and from \*\*\* in the form of bus transportation or mileage reimbursement at the State rate as set by the State Comptroller, and will reimburse Parent for mileage accrued attending weekly \*\*\*.
3. To ensure adequate progress monitoring, Parent shall provide the District/ARDC with copies of Student’s report cards within one week of the report card being issued.
4. To ensure adequate progress monitoring, Parent shall provide the District/ARDC with quarterly progress reports from \*\*\* addressing both academics and behavior.
5. No later than \*\*\*, 2018, the ARDC will reconvene to review Student’s progress at \*\*\* and devise an IEP for the 2018-2019 school year.
6. The District shall invite \*\*\* to attend the \*\*\* 2018 ARDC.
7. The BCBA will be designated a member of Student’s ARDC for the 2018-2019 school year.

8. The District shall provide any necessary support services (*e.g.*, AT, OT, counseling, etc.) at public expense during the 2017-2018 school year. The District may provide necessary support services via contract or by directly providing the services at a designated District facility. If the District contracts for services, any mileage Parent incurs to access those services shall be reimbursed by the District at the applicable State rate. If the District directly offers necessary support services, mileage to and from a District facility is not reimbursable. \
9. Within 90 days from the issuance date of this Final Decision, the District shall fully evaluate Student for the OHI of ADHD.

**SIGNED August 1, 2017.**

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

#### **NOTICE TO THE PARTIES**

This Decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision 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.<sup>217</sup>

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<sup>217</sup> 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).