

**DOCKET NO. 218-SE-0517**

<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>NORTHSIDE INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	
<b>Respondent</b>	§	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

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

The main issue in this case is whether the school district’s placement of Student in a special education class in a self-contained special education setting was, and continues to be, appropriate and in the least restrictive environment (LRE) for the 2016-2017 and 2017-2018 school years or whether Student needs a residential placement. A corollary issue is whether the school district provided Student with a free, appropriate public education (FAPE) during the 2016-2017 school year and whether the Individualized Education Program (IEP) proposed for the 2017-2018 school year is reasonably calculated to provide Student with FAPE.

The hearing officer concludes Student’s placement in a special education class in a self-contained special education setting was, and continues to be, appropriate and the LRE for Student. The hearing officer also concludes the school district provided Student with FAPE during the 2016-2017 school year and the IEP proposed for the 2017-2018 school year is reasonably calculated to provide Student with FAPE.

**A. Continuances and Extension of Decision Due Date**

There were two continuances of the hearing in this case and three extensions of the decision due date. The hearing was initially scheduled for June 20-23, 2017, with the decision due July 26, 2017. Respondent's request to continue the hearing to August 1-4, 2017, and extend the decision due date to August 23, 2017 was granted for good cause. The decision due date was extended for good cause to September 11, 2017 to allow the parties the opportunity to file post-hearing briefs.

On July 20, 2017, the hearing was continued to August 30, 31, and September 1, 2017, and the decision due date extended by joint request and for good cause to October 20, 2017, so a \*\*\* (\*\*\*) meeting could convene in an ongoing effort to resolve the case informally. The \*\*\* meeting was not successful in resolving the issues in this case.

The decision due date was extended by joint request to October 27, 2017 so the hearing officer could consider additional evidence and the respective arguments of the parties after Petitioner's Motion to Permit Additional Evidence was granted.

**B. Legal Representatives**

Student was represented throughout this litigation by Student's legal counsel Elizabeth Angelone with the Cuddy Law Firm. The school district was represented throughout this litigation by its legal counsel Elvin Houston with the law firm of Walsh, Gallegos, Trevino, Russo & Kyle, P.C.

**C. Resolution Session and Mediation**

The parties met in a Resolution Session on May 25, 2017, but it was not successful. The parties convened mediation on June 13, 2017, and although no settlement was reached the parties agreed to hold mediation open until July 20, 2017, pending completion of an agreed upon Independent Educational Evaluation (IEE). However, the parties did not reconvene mediation

after the IEE was completed.

## II. DUE PROCESS HEARING

The due process hearing convened August 30, 2017 through September 1, 2017. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's legal counsel Elizabeth Angelone. Idris Motiwala, also with the Cuddy Law Firm, entered an appearance as Petitioner's co-counsel on September 5, 2017.

Respondent continued to be represented by its legal counsel Elvin Houston. In addition \*\*\*, Assistant Director of Special Education – \*\*\*, attended the hearing as the school district's party representative. Both parties filed written closing arguments in a timely manner. The Decision in this case is due October 27, 2017.

## III. ISSUES

### A. Petitioner's Issues

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

1. Free appropriate public education (FAPE): 2016-2017 school year. Whether the school district failed to:
  - a. include proper and timely present levels of performance and/or meaningful and measurable goals and objectives in Student's Individualized Educational Program (IEP);
  - b. include appropriate IEP goals and programming for Student's behavioral counseling, and social skills needs, including the need for in-home services;
  - c. track Student's progress towards mastery of IEP goals during the 2016-2017 school year;
2. FAPE: IEP Proposed for 2017-2018 school year: Whether the school district's proposed IEP is reasonably calculated to provide Student with the requisite

educational benefit within the meaning of the IDEA for the upcoming 2017-2018 school year;

3. Placement: Whether the school district's change in Student's placement from a special education/general education setting to a self-contained special education setting was the LRE for Student for the 2016-2017 school year;
4. Placement: Whether the school district's proposed continued placement in a self-contained special education setting for the upcoming 2017-2018 school year is the LRE for Student or whether Student needs a therapeutic residential placement for the 2017-2018 school year;
5. Evaluation: Whether the school district failed to conduct timely and appropriate evaluations of Student, including but not limited to, the failure to conduct a timely and appropriate Functional Behavior Assessment (FBA) during the 2016-2017 school year; and
6. Procedural: Whether the school district failed to comply with IDEA procedural requirements, including specifically whether the school district:
  - a. failed to provide Student's mother with timely IEP progress reports;
  - b. failed to provide Student's mother with the requisite Prior Written Notice (PWN) at all relevant times, including specifically when it proposed a change in Student's educational placement; and
  - c. failed to provide Student's mother with an opportunity to provide meaningful parental input in the development of Student's IEP.

## **B. Respondent's Legal Position**

The school district contends it evaluated Student in all areas of suspected disabilities. The school district argues it offered Student an individualized education program that provided Student with FAPE, the requisite educational benefit, and in the LRE. Furthermore, the school district argues it was under no obligation to conduct a FBA because Student was not subject to a disciplinary change in placement during the period at issue. Even so, the school district contends it completed a FBA on February \*\*\*, 2017.

The school district argues the placement under IDEA transfer provisions at a self-contained separate campus was comparable to the educational placement \*\*\* and therefore

appropriate. The school district argues the LRE for Student continues to be at the school district's self-contained special education campus and not in a residential placement.

Finally, the school district argues it provided Student's mother with IEP progress reports and the requisite PWN through Admission, Review & Dismissal Committee (ARD) reports that addressed the subject matter of Student's Complaint. The school district further contends Petitioner's mother had an opportunity to provide meaningful input into the development of Student's IEP.

#### **IV. REQUESTED RELIEF**

Petitioner confirmed the following items of requested relief:

1. Placement and services at a residential therapeutic school with appropriate and additional supports Student needs at school district expense for the 2017-2018 school year;
2. Full-time 1:1 direct instruction with behavioral, therapeutic, and special education supports;
3. A Functional Behavior Assessment (FBA) conducted by a Board Certified Behavior Analyst (BCBA);
4. A behavior intervention plan designed by the same BCBA who conducted the FBA;
5. On-going staff training for all school district staff who work with Student on the implementation of the BIP by a BCBA or a Master's program student with at least two years of experience of instruction in a behavior analytic environment;
6. Revise and design Student's IEP to include all necessary related and support services;
7. A formal Assistive Technology (AT) evaluation conducted by the school district in order to determine Student's need for AT to facilitate skill acquisition, capture images of notes written on the classroom board, and for the use of dictation and voice recognition programs for written assignments;
8. The school district provide up to eight hours per month of parent training and

counseling;

9. Reimbursement to the parent for out-of-pocket expenses and mileage and any prospective payments and/or direct funding for any un-paid amounts;
10. Compensatory educational services for Student; and
11. Any other relief to which Student may be entitled in law or equity.

## V. FINDINGS OF FACT

1. Student is eligible for special education services as a student with an emotional disturbance (ED), Other Health Impairment (OHI) and a speech impairment (SI).<sup>1</sup> Student's speech impairment is in expressive language and pragmatic/social language. Student falls within the below average range in intellectual ability and Student's adaptive behavior is commensurate with Student's intelligence. However, in testing situations Student's behavior interfered with test administration so formal cognitive profile results may not be valid measures and may underestimate Student's true cognitive abilities. Student becomes easily fatigued during formal assessments.<sup>2</sup>
2. Student lives with Student's \*\*\*. \*\*\*. \*\*\*.<sup>3</sup>
3. Student was first identified as eligible for special education by the \*\*\* (\*\*\* ) as a student with an ED based on \*\*\* and OHI based on severe ADHD and \*\*\*. In \*\*\* Student received services at the \*\*\* – a self-contained campus.<sup>4</sup>
4. Over the years Student has received multiple diagnoses from a variety of professionals including: language disorder; ADHD Combined, Severe; \*\*\*, \*\*\*; tentative Autism Spectrum Disorders; \*\*\*; and, \*\*\*.<sup>5</sup>
5. \*\*\*. \*\*\*. \*\*\*. \*\*\*.<sup>6</sup>
6. Within the past year Student \*\*\*.<sup>7</sup> The school district has never disputed Student has been diagnosed with \*\*\*.<sup>8</sup> Some of the \*\*\* during the 2016-2017 school year occurred around

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<sup>1</sup> Respondent's Exhibit 7, pp. 1-1 (R. I.: \_\_\_).

<sup>2</sup> R.5:1,3-4, 5-6,11, 13, 14

<sup>3</sup> R.5:8, 12.

<sup>4</sup> Petitioner's Exhibit 64a; (P. \_\_\_: \_\_\_); R.1:1; R.5:1, 7.

<sup>5</sup> P. 8; P. 17:1; P.26:1; P. 29:8; R. 5:1; R. 10:1; Transcript Volume II, p. 359 (II: \_\_\_: \_\_\_).

<sup>6</sup> I; 217-218, 219, 223-224.

<sup>7</sup> III: 644.

<sup>8</sup> III: 670.

- \*\*\*. Student was also \*\*\* in the summer of 2017.<sup>9</sup> Behaviors at home that precipitated \*\*\*.<sup>10</sup>
7. \*\*\*.<sup>11</sup> \*\*\*.<sup>12</sup> \*\*\*.<sup>13</sup>
  8. Student is very oppositional and avoidant of task demands.<sup>14</sup> \*\*\*. \*\*\*.<sup>15</sup> Student's ADHD can also result in difficulties with behavior regulation and impulsive behavior.<sup>16</sup> Student \*\*\* and lacks coping and decision-making skills.<sup>17</sup> Student's \*\*\* may have an impact on Student's ability to participate in cognitive testing or to process information.<sup>18</sup>
  9. Behaviors such as \*\*\* may be consistent with any number of disorders including: \*\*\*, \*\*\*, ADHD, \*\*\*, or oppositionality.<sup>19</sup> \*\*\*.<sup>20</sup> However, school district staff did not observe Student \*\*\*.<sup>21</sup>
  10. A student may be \*\*\*.<sup>22</sup> A student's oppositionality can be increased or lessened by the response of the adults in the situation.<sup>23</sup> A student's oppositional behavior may be different across environments or depending on the individuals a student interacts with.<sup>24</sup>
  11. It is useful to identify the function of a student's oppositional behavior in developing the student's IEP.<sup>25</sup> An IEP should never be developed on the basis of a single, individual instance of a behavior. Instead it is important to look at the whole picture in order to create an effective program for a child.<sup>26</sup> An ARD Committee should consider behaviors

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<sup>9</sup> I: 102-103.

<sup>10</sup> P.32:2; P.73.

<sup>11</sup> I: 220; II: 359.

<sup>12</sup> I: 153; III: 621.

<sup>13</sup> I: 169.

<sup>14</sup> P. 28; II: 358.

<sup>15</sup> III: 620-621, 630.

<sup>16</sup> II: 360.

<sup>17</sup> P.38:4.

<sup>18</sup> I: 156.

<sup>19</sup> P. 21; III: 641-642, 669-670.

<sup>20</sup> P. 14; P. 21; II: 360-361, 362-363.

<sup>21</sup> II: 440-441.

<sup>22</sup> III: 625.

<sup>23</sup> III: 626-627.

<sup>24</sup> III: 627-628.

<sup>25</sup> III: 669.

<sup>26</sup> III: 670-671.

demonstrated by a student as opposed to using a diagnostic category in developing a set of behavioral interventions.<sup>27</sup>

12. Student first enrolled as \*\*\* grader in the school district \*\*\*,<sup>28</sup> A 30 day temporary placement meeting was held on \*\*\*. Student's mother attended the transfer meeting. The group agreed on Student's placement at \*\*\* – \*\*\* setting comparable to the \*\*\* placement.<sup>29</sup> \*\*\*, \*\*\*,<sup>30</sup> There is a smaller staff to student ratio at \*\*\*, \*\*\*,<sup>31</sup>
13. An annual permanent placement ARD convened on \*\*\*. Student's eligibility for special education services as a student with ED and OHI was confirmed.<sup>32</sup> An IEP was designed for implementation for one year – from \*\*\*,<sup>33</sup> Student's mother attended the ARD.<sup>34</sup> PWN and a copy of Procedural Safeguards were provided to Student's mother at the \*\*\* ARD.<sup>35</sup>
14. Student's placement was changed from \*\*\* to a self-contained \*\*\* at \*\*\* - a \*\*\* because Student did not exhibit many inappropriate behaviors during the 30 day transfer period. Student's home \*\*\* campus did not have the intensive specialized support program Student needed.<sup>36</sup>
15. Student attended \*\*\* until Student withdrew on May \*\*\*, 2015. \*\*\*. Student began \*\*\* grade at \*\*\* and attended school there from August 2015 to December 2015.<sup>37</sup> In January 2016 Student enrolled at \*\*\* where Student completed \*\*\* grade. Student had \*\*\* absences in \*\*\* grade.
16. An Annual ARD was held on February \*\*\*, 2016. Student's mother attended the ARD. Notice of Procedural Safeguards was presented at the ARD. PWN was sent to Student's mother the next day. The IEP designed by the February 2016 ARD included daily specialized support for behavior goals for \*\*\* hours per week per course in a self-contained setting. Student was placed in a general education classroom for \*\*\* and \*\*\* for \*\*\* hours per week. In addition, Student received \*\*\*-minute sessions of occupational therapy (OT) during the \*\*\*-week grading periods.<sup>38</sup>

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<sup>27</sup> III: 672.

<sup>28</sup> R.5:12.

<sup>29</sup> R.1:2; R.2:18.

<sup>30</sup> I:43, 100.

<sup>31</sup> I:101.

<sup>32</sup> R.2:1, 18.

<sup>33</sup> R. 2:6-10.

<sup>34</sup> R.2:18, 20.

<sup>35</sup> R.2:21-22.

<sup>36</sup> R.2:17-18, 19.

<sup>37</sup> R.5:12.

<sup>38</sup> R.3:1, 33, 43, 45, 47.



17. Student's present levels of academic achievement and functional performance (PLAAFPs) as well as Student's strengths and weaknesses in all areas were used to develop a new IEP. Other sources of data used by the ARD to design the IEP included: \*\*\* eligibility reports, an OT evaluation, a February 2016 FBA, other educational records, information from teachers, and parent concerns. The ARD developed IEPs with measureable goals and objectives for all academic subjects, functional skills and a BIP. Targeted behaviors were task avoidance and \*\*\*. OT was provided to address Student's fine motor needs and support \*\*\* in the classroom.<sup>39</sup>
18. The school district offered Student's mother \*\*\* hours of parent counseling. Student's mother declined the offer. Student's mother did accept \*\*\*." \*\*\*." The \*\*\* provided services for almost \*\*\* hours out of an approved total of \*\*\*. Although the \*\*\*, Student's mother did not find the service particularly helpful although the \*\*\* did provide \*\*\*.<sup>40</sup>
19. Student began \*\*\* grade in the 2016-2017 school year at \*\*\* The IEP developed at the February 2016 ARD was implemented at \*\*\*.<sup>41</sup> Student was initially placed in \*\*\* classroom. \*\*\* is typically for students working at a prerequisite level – with access to the Texas Essential Knowledge and Skills (TEKS) but working below grade level.<sup>42</sup>
20. The school district initiated a Reevaluation Review or a Review of Existing Evaluation Data (REED) of Student on October \*\*\*, 2016 at \*\*\*. Student's mother and her parent advocate attended this meeting.<sup>43</sup> The purpose of the meeting was to review Student's prior re-evaluation from \*\*\* and Student's current levels of functional performance. The group discussed a parental request for an evaluation for specific learning disabilities and assessments in speech, OT and a psychological. At the conclusion of the review meeting Student's mother agreed to formal speech testing, behavioral observations, teacher and parent rating scales, cognitive, and academic testing.<sup>44</sup>
21. An ARD convened on October \*\*\*, 2016 to revise the schedule of services and IEP designed at the February 2016 ARD. PWN was provided to Student's mother the same day. The ARD invitation also referenced the Notice of Procedural Safeguards provided on October \*\*\*, 2017. In response to parental concerns about behavior Student's placement at \*\*\* was changed to \*\*\* classroom (\*\*\*) with the support of \*\*\* beginning on October \*\*\*, 2016. Student's mother also requested a daily communication chart to track

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<sup>39</sup> R. 3.

<sup>40</sup> P.51:9; III: 676-677.

<sup>41</sup> R.5:12.

<sup>42</sup> I: 95-96.

<sup>43</sup> P.15; R.4; R. 5:1; I: 103.

<sup>44</sup> R. 5:1.

- Student's behavior at school.<sup>45</sup> \*\*\*. Students receive academic instruction but the \*\*\* classroom also focuses on behavioral needs.<sup>46</sup>
22. Student received specialized instruction in \*\*\* and \*\*\* for \*\*\* hours per day in the \*\*\* special education class and \*\*\* of \*\*\* instruction per week. In addition, Student received in-class support for \*\*\* in a general education setting for \*\*\* minutes per day. The teacher collected and documented Student's response to instruction and anecdotal behavior data as Student worked toward mastery of IEP goals.<sup>47</sup>
23. In early November 2016 Student received \*\*\* from \*\*\* (\*\*\*).<sup>48</sup> \*\*\*. \*\*\*.<sup>49</sup>
24. The REED was completed on November \*\*\*, 2016.<sup>50</sup> The ARD met on November \*\*\* to review the REED. Behavioral data collected by the teacher from August to November 2016 was reviewed. The evaluation confirmed Student's language delay in the area of expressive and pragmatic language.<sup>51</sup> The school district conducted an evaluation to determine whether Student met eligibility as a student with a specific learning disability (SLD) but Student did not meet the criteria.<sup>52</sup> Another ARD convened on December \*\*\*, 2016. Student's mother was unable to participate in the ARD but gave permission for the ARD to proceed without her. \*\*\*.
25. The December 2016 ARD added Speech Impairment (SI) as an eligibility classification in the areas of expressive and pragmatic language. Measureable and objective communication goals and speech/language services were added to Student's program. Present levels of academic achievement and functional performance (PLAAFPs) were updated to reflect Student's current progress in all areas. Although Student made progress towards mastery of Student's February 2016 IEP goals the ARD deferred to a parental request not to revise them. A set of accommodations were added for academic instruction and for the State of Texas Assessments of Academic Readiness (STAAR) and benchmark testing.<sup>53</sup> PWN was sent to Student's mother on December \*\*\*, 2016.<sup>54</sup>
26. \*\*\*. \*\*\*. The \*\*\* evaluation diagnosed Student with \*\*\* and \*\*\*. The \*\*\* evaluator concluded that although Student met some of the clinical criteria for an Autism Spectrum

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<sup>45</sup> R.5:20; I: 97.

<sup>46</sup> P. 19; I: 97.

<sup>47</sup> P.19; R.13:513; I: 103.

<sup>48</sup> R.7:46.

<sup>49</sup> P. 73.

<sup>50</sup> Stipulations of Fact 3 and 4 (SOF).

<sup>51</sup> P.24:1,3; I:104

<sup>52</sup> R.6:2-5, 6-7, 40.

<sup>53</sup> R. 7:1, 7-8, 19-20, 23.

<sup>54</sup> R.7:25.

- Disorder, Student's social difficulties were primarily due to Student's \*\*\* as well as Student's ADHD and \*\*\*. The evaluator recommended placement in \*\*\* so Student could be evaluated for \*\*\*, and to provide \*\*\*.<sup>55</sup>
29. Student attended \*\*\* (\*\*\*) at the \*\*\*.<sup>56</sup> The \*\*\* IEP was based on a set of comparable services to those provided by the school district. \*\*\* minutes per week of OT and \*\*\* minutes per week of speech were also provided at \*\*\*.<sup>57</sup>
30. Before Student \*\*\* Student and Student's mother met a special education teacher in the main office at \*\*\* on January \*\*\*, 2017. Student was scheduled to \*\*\* with Student's mother and the teacher.<sup>58</sup> \*\*\*.<sup>59</sup> \*\*\*. \*\*\*. \*\*\*.<sup>60</sup>
31. \*\*\*. \*\*\*.<sup>61</sup> Student calmed down a few minutes later and was able to verbalize why Student was upset. Student did not want to \*\*\* because Student was already \*\*\*. \*\*\*.<sup>62</sup>
32. A transfer meeting at \*\*\* convened on January \*\*\*, 2017. Participants in the meeting included Student's mother, an administrator, a campus coordinator, a special education teacher, and a licensed specialist in school psychology (LSSP). The January \*\*\*, 2017 meeting was to facilitate \*\*\*. The group agreed that beginning on January \*\*\*, 2017 Student's placement would be in the \*\*\* program at \*\*\* instead of \*\*\* because \*\*\* was the closest comparable placement to the \*\*\*, self-contained setting of \*\*\*.<sup>63</sup>
33. The group reviewed the \*\*\* IEP and created a \*\*\* IEP and BIP. The IEP at \*\*\* included academic instruction for \*\*\* hours per day and behavioral support in \*\*\* and "\*\*\*\*" i.e., \*\*\* – for \*\*\* minutes per day. In addition Student received \*\*\* minutes per day of support toward Student's behavior goals, as well as \*\*\* and \*\*\* for \*\*\* minutes per day.<sup>64</sup>
34. The IEP goals and BIP from Student's last annual ARD at the school district were reviewed. A few IEP goals were revised. The plan was to be implemented until \*\*\* and \*\*\* could be reviewed and a follow up ARD could convene. Two behavior goals were added to Student's plan and approved by the group.<sup>65</sup>

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<sup>55</sup> P. 29:1, 9.

<sup>56</sup> P. 32:1-2.

<sup>57</sup> R. 8.

<sup>58</sup> III: 487-489.

<sup>59</sup> III: 490-491.

<sup>60</sup> P. 60; III: 493, 596.

<sup>61</sup> SOF 5; P. 60; III: 494-495, 677-678.

<sup>62</sup> P. 60; III: 495-497.

<sup>63</sup> P. 32:1-2, 10; III: 499.

<sup>64</sup> SOF 7; P. 32:3; R. 8; III: 497- 499.

<sup>65</sup> P.32:2.

35. IEP goals addressed communication, \*\*\*, functional skills and behavior.<sup>66</sup> A BIP targeting \*\*\* and \*\*\* was a component of \*\*\*.<sup>67</sup> Student's mother requested a Functional Behavior Assessment (FBA).<sup>68</sup>
36. The BIP included classroom environmental features such as setting well-defined limits, removing distractions, a consistent routine, providing a quiet space to regain control, and a structured classroom environment. A set of specific consequences was also an aspect of the BIP including a graduated series of interventions to address \*\*\*.<sup>69</sup> The BIP also included a set of specific classroom strategies to meet Student's behavioral needs and the use of a reward system.<sup>70</sup>
37. Daily social skills training and \*\*\* were also provided at \*\*\* for \*\*\* minutes per day. Student received OT and speech/language therapy as related services.<sup>71</sup> The \*\*\* adopted the OT and speech therapy schedule of services provided at \*\*\*.<sup>72</sup>
38. An extensive set of accommodations were included in the IEP. These included: \*\*\*.<sup>73</sup>
39. From January 2017 to March 2017 Student received services in a special education classroom at \*\*\*. The classroom was staffed with a special education teacher and \*\*\*.<sup>74</sup> \*\*\*.<sup>75</sup> The classroom was organized and structured. There were \*\*\* posted for the \*\*\*.<sup>76</sup>
40. \*\*\*, \*\*\*. The special education teacher collaborated with another special education teacher in a classroom across the hall. The special education teachers provided academic instruction to different groups -- students from one classroom were grouped with students from the other classroom depending on grade level.<sup>77</sup> The daily routine also included

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<sup>66</sup> P. 32: 5-9.

<sup>67</sup> P. 32:13-14.

<sup>68</sup> P.32:2

<sup>69</sup> P. 32:13-14.

<sup>70</sup> P. 32:13.

<sup>71</sup> P. 32:3-4.

<sup>72</sup> P. 32:4.

<sup>73</sup> P.32:18.

<sup>74</sup> P.32;III: 484, 499, 500, 589, 596, 599.

<sup>75</sup> III: 595, 599.

<sup>76</sup> III: 595.

<sup>77</sup> III: 510-511, 596-598.

\*\*\*.<sup>78</sup>

41. The teacher and \*\*\* collected data on Student's behavior each day through the \*\*\*.<sup>79</sup> Data collection in combination with teacher input and teacher observation are necessary in formulating IEP goals and monitoring a student's academic achievement and functional performance.<sup>80</sup> Student \*\*\* for exhibiting \*\*\*.<sup>81</sup>
42. Student could not \*\*\*.<sup>82</sup> Student did not \*\*\* in the classroom from January to March 2017 although Student did \*\*\*. By the \*\*\* day Student was engaged in the classroom, followed directions, and was on task for the whole day. The teacher noticed Student's \*\*\* behavior often occurred after Student \*\*\*. Student would \*\*\*.<sup>83</sup>
43. \*\*\* was not noted as a negative behavior on \*\*\* because it was not distractive or harmful to others.<sup>84</sup> However, Student's \*\*\* behavior was also task avoidance behavior.<sup>85</sup> Student's behavior at \*\*\* included \*\*\*, and being inattentive at times.<sup>86</sup> \*\*\*.<sup>87</sup>
44. Student adjusted quickly to the classroom and got along well with Student's classmates. Student responded well to the routine. \*\*\*.<sup>88</sup> \*\*\*.<sup>89</sup> Student generally demonstrated appropriate behavior in the classroom at \*\*\*.<sup>90</sup>
45. Student exhibited appropriate \*\*\*.<sup>91</sup> The special education teacher never had concerns that Student \*\*\*.<sup>92</sup> The special education teacher is familiar with \*\*\*. The teacher never saw Student engage in anything that suggested Student was \*\*\*.<sup>93</sup> The teacher never

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<sup>78</sup> III: 595-596, 597.

<sup>79</sup> R. 14:16; III: 500, 503.

<sup>80</sup> I: 26.

<sup>81</sup> R. 14:19; III: 504-507.

<sup>82</sup> III: 507.

<sup>83</sup> R. 14:16, 18; III: 501, 503, 509, 586.

<sup>84</sup> R. 14:20; III: 506.

<sup>85</sup> P. 41; P.51:6.

<sup>86</sup> III: 580-581.

<sup>87</sup> III: 585.

<sup>88</sup> III: 509-510.

<sup>89</sup> III: 512-513.

<sup>90</sup> III: 519; III: 519.

<sup>91</sup> III: 513.

<sup>92</sup> III: 514.

<sup>93</sup> III: 515.

- \*\*\*. Student never appeared to be \*\*\*.<sup>94</sup>
46. Student participated appropriately in \*\*\* social skills lessons. Student gave good solutions to social problems discussed in the lessons.<sup>95</sup> The teacher used a social skills curriculum to provide the training.<sup>96</sup> The social skills training supported Student's use of language to label and communicate feelings, teach alternative behaviors, coach problem-solving and role play the consequences of behavior.<sup>97</sup>
47. The speech therapist also worked with Student on social skills for the development of language under the IEP.<sup>98</sup> Student was resistant to participating in \*\*\*. The speech therapist then \*\*\*.<sup>99</sup>
48. Student worked independently and engaged in the academic activities of the classroom.<sup>100</sup> At times, particularly with \*\*\* tasks, Student required prompting. Student asked for help appropriately. The \*\*\* provided support.<sup>101</sup> Student had difficulty with \*\*\*. The teacher \*\*\*. \*\*\*.<sup>102</sup> The OT provided Student with training on \*\*\*.<sup>103</sup> Student responded well to the \*\*\*.<sup>104</sup>
49. Student improved Student's ability to \*\*\*.<sup>105</sup> \*\*\*. Student enjoyed using \*\*\*.<sup>106</sup> Student also had access \*\*\* in the classroom.<sup>107</sup> Student made progress \*\*\* from 2016 to 2017.<sup>108</sup>
50. The teacher used a \*\*\* to assess Student's \*\*\* skills.<sup>109</sup> By March 2017 Student was

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<sup>94</sup> III: 586-587.

<sup>95</sup> III: 511-512.

<sup>96</sup> III: 594.

<sup>97</sup> P.32:14

<sup>98</sup> P.32: 5-6; III: 578-579.

<sup>99</sup> III: 579.

<sup>100</sup> III: 518

<sup>101</sup> III: 519-520.

<sup>102</sup> III: 531, 561.

<sup>103</sup> III: 561.

<sup>104</sup> III: 531.

<sup>105</sup> R. 16:8; III: 519-520, 589-590.

<sup>106</sup> III: 530-531.

<sup>107</sup> I: 296, 298.

<sup>108</sup> R. 3:7; III: 533-534.

<sup>109</sup> III: 521-522, 523.

\*\*\* at a grade equivalent to the beginning of \*\*\* grade. Student worked on mastering \*\*\* and made progress.<sup>110</sup> Student's \*\*\* were a weakness.<sup>111</sup> Student made one year of progress in \*\*\* as measured from February 2016 to March 2017.<sup>112</sup>

51. Student was performing between a \*\*\* and \*\*\* grade level in \*\*\* for the period of time from January through March 2017. Student was provided with accommodations for \*\*\*. Student did well in small group \*\*\* lessons. Student was often able to demonstrate how to \*\*\* to Student's classmates.<sup>113</sup> Student made progress in \*\*\* from 2016 to 2017.<sup>114</sup>
52. Student was a good student behaviorally in the special education classroom from January to March 2017. Student appeared happy and comfortable in the structured nature of the classroom. Student was doing well in the classroom during this time period. Student rarely demonstrated behavioral needs.<sup>115</sup> Student's behavior was better than most of the other students at \*\*\*.<sup>116</sup> Student did not have difficulty with changes to Student's routine.<sup>117</sup> Student's behavior was effectively managed by the behavioral interventions implemented at \*\*\*.<sup>118</sup> Student's teacher described Student as a "very easy" student – the teacher's experience with Student contrasted with the description of Student's behavior at home by Student's mother as extremely difficult.<sup>119</sup>
53. Student had \*\*\* in the classroom on \*\*\*, 2017. Student was working independently learning \*\*\*. Student had trouble \*\*\*. \*\*\*.<sup>120</sup> A single restraint was implemented as a result of this incident.<sup>121</sup> All together there were \*\*\* during the spring of 2017 at \*\*\*.<sup>122</sup> The \*\*\* were not noted on the data collection sheets.<sup>123</sup>
54. An annual ARD convened on March \*\*\*, 2017. Student's mother attended the ARD. Notice of Procedural Rights was provided to Student's mother at the ARD. The ARD agreed continued placement in the self-contained setting at \*\*\* was appropriate for Student.

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<sup>110</sup> III: 523-524.

<sup>111</sup> III: 524-525, 594.

<sup>112</sup> R.3:7; III: 526, 528, 530, 591.

<sup>113</sup> III: 534-535.

<sup>114</sup> P. 34: 3, 11; R. 16: 3-525-29, 41, 45, 49-52, 55, 63-64; III: 536-537.

<sup>115</sup> III: 537-538.

<sup>116</sup> III: 539.

<sup>117</sup> III: 586.

<sup>118</sup> III: 637.

<sup>119</sup> II: 431; III: 541.

<sup>120</sup> III: 517-518, 538.

<sup>121</sup> III: 678-679.

<sup>122</sup> P. 60; R. 14: 78, 140; II: 383.

<sup>123</sup> II: 385; R. 41.

Student continued to need the structure and support available at \*\*\*.<sup>124</sup> New \*\*\* goals developed at the March 2017 ARD were based on Student's needs.<sup>125</sup> The special education teacher used the results of the \*\*\* to prepare the PLAAFPs for \*\*\*.<sup>126</sup> Every IEP goal was discussed at the ARD.<sup>127</sup>

55. Measureable and objective IEP goals in \*\*\*, behavior, speech/language therapy, and functional skills were designed at the March \*\*\*, 2017 ARD based on Student's PLAAFPs. The IEP was to be implemented beginning on March \*\*\*, 2017 through March \*\*\*, 2018 -- the date for Student's next annual ARD.<sup>128</sup> An extensive set of accommodations were also included in Student's IEP.<sup>129</sup>
56. The FBA requested by Student's mother at the January 2017 transfer meeting was completed.<sup>130</sup> The LSSP reviewed the results of the FBA at the March \*\*\*, 2017 ARD. The sources of data for the FBA included written documentation and classroom assessments by teachers, a classroom observation by the LSSP, and, parent information. The FBA identified a set of behaviors observed at home, at school, and in both settings.
57. The FBA also identified the antecedents and consequences of the behaviors. At school antecedents included being engaged in an academic activity, sensory overload, or being emotionally upset or anxious. Positive reinforcers and a set of consequences were also identified as effective in supporting appropriate behavior.<sup>131</sup> Student's mother disagreed with the documentation used in the FBA.<sup>132</sup>
58. A BIP based, in part, on the results of the FBA was designed at the March \*\*\*, 2017 ARD.<sup>133</sup> The BIP targeted behaviors noted at school: \*\*\* task avoidance. As before, the BIP included classroom environmental features, classroom strategies, \*\*\*, social skills training, and a set of consequences to support continued development of appropriate behavior.<sup>134</sup> The strategies outlined in Student's BIP addressing Student's \*\*\* and implemented during the 2016-2017 school year were appropriate for Student.<sup>135</sup>

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<sup>124</sup> P. 34:1, 20, 25, 27.

<sup>125</sup> P. 34: 2, 10; III: 525.

<sup>126</sup> P.34:27; III: 521-522, 523.

<sup>127</sup> III: 526; III: 526.

<sup>128</sup> P. 34: 10-14.

<sup>129</sup> P. 34:15.

<sup>130</sup> P.34:27.

<sup>131</sup> P.34:33-37.

<sup>132</sup> P.34:27; P. 35:28.

<sup>133</sup> P. 34:31-36; II: 435.

<sup>134</sup> P. 34:31-33.

<sup>135</sup> P. 28:7; II: 372.



59. OT and speech/language therapy services were proposed at the March \*\*\*, 2017 ARD. The proposed schedule of the related services was from March \*\*\*, 2017 to March \*\*\*, 2018.<sup>136</sup> OT and speech were provided through collaborative sessions in the classroom and in integrative sessions through conferences, modeling, and/or observation. Student's mother agreed with the continued placement at \*\*\* but disagreed with the proposals for OT and speech. The parties also disagreed as to whether Student needed Extended School Year Services (ESY).<sup>137</sup>
60. Sometime around \*\*\*, 2017 Student transitioned into another special education classroom at \*\*\*.<sup>138</sup> The second classroom included \*\*\* other students and was also staffed by a special education teacher and \*\*\*.<sup>139</sup> The IEP designed at the March \*\*\* ARD was implemented in the second classroom.<sup>140</sup> The second classroom also followed a very structured daily routine.<sup>141</sup> Social skills training through the use of a social skills curriculum continued to be part of the daily routine.<sup>142</sup>
61. Student responded well to changes in routine in the second classroom.<sup>143</sup> At times Student \*\*\*.<sup>144</sup> \*\*\*.<sup>145</sup> \*\*\*.<sup>146</sup>
62. \*\*\* was noted by the special education teacher on the daily communication log.<sup>147</sup> It is possible Student's \*\*\* is reinforced when task demands are removed.<sup>148</sup> However, Student was on task for the majority of every school day for the remainder of the 2016-2017 school year.<sup>149</sup>
63. Assessments confirmed Student demonstrated some fine motor deficits.<sup>150</sup> Student was

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<sup>136</sup> P. 34:22-23.

<sup>137</sup> P. 34:27.

<sup>138</sup> III: 588.

<sup>139</sup> I: 258-259, 310.

<sup>140</sup> P.34; I: 322.

<sup>141</sup> I: 260-261.

<sup>142</sup> I: 261, 319.

<sup>143</sup> I: 269.

<sup>144</sup> I: 266-267.

<sup>145</sup> P.41; I: 266, 316.

<sup>146</sup> I: 286-287, 288.

<sup>147</sup> P. 41.

<sup>148</sup> II: 358-359, 366-367.

<sup>149</sup> R.14; II: 383.

<sup>150</sup> R.5:7-8; R.6:1; R.7:1.

- able to \*\*\*. Student continued to exhibit issues with \*\*\* in class \*\*\*.<sup>151</sup> Student had access to \*\*\* for the remainder of the school year.<sup>152</sup> Student's grades were calculated on the basis of academic assignments and class work participation.<sup>153</sup>
64. The March \*\*\*, 2017 ARD reconvened on March \*\*\*, 2017. Student's mother received Notice of Procedural Safeguards.<sup>154</sup> Student's mother agreed to the proposed OT and speech goals and schedules but requested OT and speech be revisited when Student \*\*\*. Student's mother continued to disagree with the source of data used in the most recent FBA and the denial of ESY services.<sup>155</sup>
65. Student's program was revised at an ARD on April \*\*\*, 2017 adding three weeks of ESY. The ARD concluded that even though Student did not demonstrate severe regression in critical skills over the summer of 2016, Student would benefit from extra support over the summer of 2017 \*\*\*.<sup>156</sup>
66. The school district conducted a counseling evaluation in April, 2017. An LSSP conducted the counseling evaluation. The counseling evaluation utilized a wide variety of data sources including a review of records and prior evaluations, Student's current IEP and BIP, and student and parent interviews.<sup>157</sup> In the student interview Student self-reported \*\*\*.<sup>158</sup> Student told the LSSP Student was open to and would participate in counseling.<sup>159</sup> The counseling evaluation report was issued on April \*\*\*, 2017. The counseling evaluation recommended counseling as a related service beginning with \*\*\* sessions for \*\*\* minutes per session.<sup>160</sup>
67. The school district conducted a dyslexia assessment and issued a report on April \*\*\*, 2017. Student scored in the average range for listening comprehension but in the very low range for \*\*\* and \*\*\*. Student scored in either the low or very low range in the academic skills section, including \*\*\*.<sup>161</sup>
68. Student's mother communicated regularly with both of the special education teachers at \*\*\* during the 2016-2017 school year sharing information back and forth about how Student

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<sup>151</sup> I: 291.

<sup>152</sup> I: 296.

<sup>153</sup> I: 294-295.

<sup>154</sup> P.35:1, 28, 41.

<sup>155</sup> P.35:28.

<sup>156</sup> P. Ex. 37.

<sup>157</sup> P.38:1; II: 400-401.

<sup>158</sup> P. 38:2; II: 409, 440, 453.

<sup>159</sup> P. 38:4.

<sup>160</sup> P. Ex. 38:4; II: 417-418.

<sup>161</sup> P. 38; R. 11.

- was doing, Student's needs, and about various issues as they arose.<sup>162</sup> The campus counselor, OT, and other school district staff also communicated with Student's mother about Student.<sup>163</sup>
69. Student's mother received IEP progress reports in June 2016, December 2016, and March \*\*\*, 2017 from the special education teachers at \*\*\* and \*\*\*.<sup>164</sup>
70. On May \*\*\*, 2017, an ARD convened to review the counseling and dyslexia assessments. The school district proposed a counseling goal directed at Student's need to learn coping strategies when Student became upset, frustrated or angry. Although the ARD agreed Student qualified for counseling it could not reach consensus on counseling goals. The ARD tabled a decision on whether Student qualified for dyslexia services pending results from an agreed upon IEE. The ARD also discussed goals to support Student's \*\*\*.<sup>165</sup>
71. The ARD re-convened on May \*\*\*, 2017. The ARD agreed Student qualified for counseling as a related service and for dyslexia services based on the recent assessments. The May \*\*\* ARD also increased summer 2017 ESY to \*\*\* weeks.<sup>166</sup>
72. The May \*\*\*, 2017 ARD discussed Student's placement for the upcoming 2017-2018 school year. The ARD agreed Student would begin the year at \*\*\*. The ARD planned to reconvene after the \*\*\* grading period to determine if Student was \*\*\*. The ARD agreed on a "\*\*\*\*" goal; i.e. Student would need to \*\*\*.<sup>167</sup>
73. The IEP developed in March 2017 and implemented thereafter continued to be proposed for Student's 2017-2018 school year up through the date of the next annual ARD in March 2018. The set of accommodations and related services, including OT and speech/language therapy designed in March 2017, were also to continue until the next annual ARD in March 2018.
74. The May \*\*\*, 2017 ARD reached consensus on a dyslexia program for the upcoming 2017-2018 school year and agreed to the proposal of \*\*\* sessions of counseling for \*\*\* minutes per session and counseling goals. The plan was to revisit Student's counseling goals at the beginning of the upcoming school year. Dyslexia and counseling services were added to the IEP for the upcoming 2017-2018 school year.<sup>168</sup>

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<sup>162</sup> P. 51.

<sup>163</sup> P.51: 28-29, 42, 44, 46, 48-49.

<sup>164</sup> R.15:1-4, 5-9.

<sup>165</sup> P. Ex. 40; II: 419-420.

<sup>166</sup> P.43.

<sup>167</sup> P.43:2, 6.

<sup>168</sup> P. 43, 22; II: 442-444.

75. An IEE was undertaken by a licensed neuropsychologist/LSSP beginning in April 2017. The purpose of the IEE was to confirm whether Student exhibited a specific learning disability. The IEE included a review of educational records, parent interview with Student's mother, review of previous testing, a school observation conducted on the first day of summer school in June 2017, behavioral observations in the IEE examiner's office, and attempted formal assessment. The IEE Report was issued on July \*\*\*, 2017.<sup>169</sup>
76. The IEE examiner attempted testing in her office. Although Student initially appeared to adjust well to the assessment environment Student's negative behaviors of task refusal and \*\*\* began to escalate after the first 25 minutes of testing. Student became \*\*\*.<sup>170</sup>
77. The IEE examiner was unable to reach a conclusion as to whether Student demonstrated a specific learning disability.<sup>171</sup> Student was oppositional \*\*\* during the attempted IEE.<sup>172</sup> A previous attempted IEE in April 2017 was also discontinued after multiple attempts due to \*\*\* off-task behaviors.<sup>173</sup>
78. The IEE examiner made a number of recommendations including counseling to work on managing impulsive behavior and emotional dysregulation. She also recommended the counselor and a speech therapist work with Student to identify and practice healthy communication strategies for expressing needs.<sup>174</sup> The IEPs implemented during the 2016-2017 school year and as proposed for the 2017-2018 school year included a number of the IEE recommendations.<sup>175</sup>
79. The school district was aware Student's mother requested a residential placement at the time the request for a due process hearing was filed.<sup>176</sup> The school district secured parental consent and contacted several residential placements for information, in general terms, on the programs and services available at each.<sup>177</sup>
80. Student was \*\*\*, \*\*\*.<sup>178</sup> The school district, with parental consent, attempted to secure information \*\*\*.<sup>179</sup> Information from Student's \*\*\* would be beneficial to the ARD in considering the parental request for residential placement.<sup>180</sup>

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<sup>169</sup> P.28:1, 7; II: 346, 349, 351, 354.

<sup>170</sup> P. 28:5-6; II: 354, 356-357.

<sup>171</sup> P. 28:6.

<sup>172</sup> II: 368.

<sup>173</sup> P. 28:5; P.36.

<sup>174</sup> P. 28:7.

<sup>175</sup> P. 34.

<sup>176</sup> I:71, 75.

<sup>177</sup> P.50; I: 77, 82-83, 84, 85-86, 87.

<sup>178</sup> P. 77.

<sup>179</sup> P.50:5, 18; I: 106-109.

<sup>180</sup> I:88,89, 113, 114-117, 118.

81. \*\*\*. \*\*\*. \*\*\*.<sup>181</sup>

## VI. DISCUSSION

### A. Duty to Provide FAPE

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

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

### B. IEP

In meeting the obligation to provide FAPE the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, and the duration and frequency of the services and the location where the services will be provided. *34 C.F.R. §§ 300.22, 300.323(a)*.

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<sup>181</sup> SOF 8.

### C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>182</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5<sup>th</sup> Cir. 1993). In this case the school district was obligated to provide Student with FAPE during the 2016-2017 school year *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for the upcoming 2017-2018 school year. The burden of proof in this case is on Petitioner to show the school district did not do so. *Id.*

### D. FAPE

#### 1. The Four Factors Test

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

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

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

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<sup>182</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5<sup>th</sup> Cir. 2009).

2009).

## **2. Individualized on the Basis of Assessment and Performance**

The evidence showed the IEP implemented during the relevant time period was individualized on the basis of assessment and performance. Petitioner complains the school district failed to utilize proper and timely PLAAFPS in formulating IEP goals for Student. Petitioner also complains the IEPs did not include measureable goals and objectives. Petitioner also argues the school district failed to track Student's progress towards mastery of IEP goals.

The evidence showed otherwise. The teachers prepared current PLAAFPS based on their review of Student's performance through teacher assessment and observation including, for example, the use of \*\*\*. The evidence showed Student's IEPs were revised to reflect Student's progress towards mastery of IEP goals. IEP goals were measureable and objective. Student's IEP was revised on the basis of the REED completed in November 2016. As part of the REED the school district conducted a speech/language assessment. Objective and measureable communication IEP goals were formulated, in part, on the basis of that assessment as well as behavioral data. An OT assessment was the basis for services and accommodations to address Student's fine motor deficits.

Behavioral data collected by the teachers was used in designing and revising, as needed, Student's BIPs. The results of the FBA were used to revise Student's BIP. Student's IEP included accommodations and supports (such as \*\*\*) based on both formal and informal assessments. Student's program was revised in April 2017 on the basis of counseling and dyslexia assessments. The evidence showed the school district did track Student's progress towards mastery of IEP goals through administration of the \*\*\*, classroom performance, and behavioral data collection.

The IEP designed and revised on the basis of assessment and performance in March, April, and May 2017 was proposed for implementation through March 2018 of the upcoming 2017-2018 school year.

### **3. Least Restrictive Environment**

The evidence showed Student's placement in the special education classrooms at \*\*\*, with a focus on Student's behavioral needs, the small teacher to staff ratio, the highly structured nature of the classroom, and the use of \*\*\* was the least restrictive environment for Student. The evidence showed Student made progress in that environment \*\*\*. The evidence showed that if Student is able to meet the behavioral criteria \*\*\* Student may be ready to return to the less restrictive environment of a special education class on a \*\*\*. Until then, the evidence showed placement at \*\*\* was Student's LRE.

The IDEA allows removal of a child from regular education to provide special education if the child cannot be satisfactorily educated in the regular classroom. The nature and severity of a student's disabilities may require full-time special education placement. *See, Daniel R.R. v. El Paso Ind. Sch. Dist., 874 F. 2d 1036, 104401045 (5<sup>th</sup> Cir. 1989)*. There was insufficient evidence to show Student's placement should have been anywhere other than at \*\*\*.

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

The record reflects that services were provided to Student in a coordinated, collaborative manner by key stakeholders. The special education teacher in the first classroom at \*\*\* worked collaboratively with the teacher \*\*\*. Related service personnel worked collaboratively with both special education teachers in implementing Student's OT and speech/language services in the classroom.

The teachers communicated frequently and regularly with Student's mother throughout the school year. Other school district staff also communicated with Student's mother in responding to her questions, requests, and concerns. Student's mother was an active participant at transfer, evaluation review, and ARD meetings. Her ideas, suggestions and requests were discussed and often included in planning assessments, designing and revising IEPs and BIPs and



with regard to related services and ESY.

## **5. Academic and Non-Academic Benefit**

The credible evidence showed that while Student faces significant challenges Student derived both academic and non-academic benefits from Student's educational program last school year. The evidence showed Student made academic progress. Although Student is certainly well below grade level, Student's progress is likely commensurate with Student's cognitive abilities and, the significant impact of Student's emotional and behavioral disabilities that impede Student's learning.

Student did exhibit some behavioral issues at school but the evidence showed school staff was able to manage those fairly well by implementing Student's BIP and the set of classroom strategies and accommodations. The severe behaviors that apparently occurred at home were not exhibited at school. Student participated appropriately during social skills training, \*\*\*, and participated well in small group academic instruction.

There is a continuing concern about Student's task avoidance behaviors – particularly \*\*\*. However, the school district's program included IEP and BIP goals to support Student's use of language to communicate feelings and teach Student coping strategies to deal with feelings of frustration, anger, or anxiety. Student's \*\*\* – even if only for short periods of time – should be addressed. There may be \*\*\* issues to explore with Student's \*\*\* related to Student's \*\*\*.

Perhaps counseling and dyslexia services could have been assessed at an earlier point in time during the school year. However, it is encouraging to see Student expressed a willingness to participate in counseling. The additional support of dyslexia services should further address Student's deficits in basic decoding skills. Student's struggles with \*\*\* and \*\*\* continue. However the evidence also showed that despite those challenges overall Student made progress

and showed improvement in the acquisition of \*\*\* this past school year.

## 6. Conclusion as to FAPE

Petitioner did not meet Student's burden of proving the school district failed to provide Student with FAPE during the 2016-2017 school year. *Schaffer v. Weast, supra*. The school district need not provide Student with the best possible program nor one that maximizes Student's potential. *Rowley 458 U.S. at 198*. Instead, the school district must offer an IEP that is reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. The adequacy of a given IEP turns on the unique circumstances of the student for whom it was created. *Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017)*. Although Student's program was not perfect the IDEA does not require it to be so. The credible evidence showed that although Student faces significant and formidable challenges the program implemented by the school district provided Student with the requisite educational benefit in light of Student's unique circumstances; *Id.*; *Michael F., supra*.

Furthermore, in this jurisdiction, the provision of FAPE must be judged by the overall educational benefits received and not solely by remediation of the student's disability. *Klein Independent School District v. Per Hovem, 690 F. 3d 390, 391 (5<sup>th</sup> Cir. 2012)*(holding high school student's IEPs enabled student to excel with accommodations for Student's severe learning disabilities in a mainstream high school curriculum – therefore school district provided student with FAPE).

The requisite educational benefit is not defined exclusively or even primarily in terms of correcting a student's disability. Remediation may be a component of a student's IEP, including for example, behavioral modifications. IEP strategies may remediate a disability while also necessary to confer educational benefits. However, it is the whole educational experience, and its adaptation to confer benefits that is the ultimate goal of the IDEA. *Klein Ind. Sch. Dist. v. Per Hovem, 690 F. 3d at 397, 398*. Although there were some weaknesses in the relevant IEPs at issue, the hearing officer nevertheless concludes the educational program provided over the 2016-2017 school year

conferred Student with the requisite educational benefit from this holistic perspective. *Id.*

For all the reasons noted above the IEP proposed for the 2017-2018 school year was reasonably calculated to provide Student with the requisite educational benefit especially with the addition of dyslexia and counseling services. Petitioner did not meet Student's burden of proof on this issue either. *Schaffer v. Weast, supra; Rowley, 458 U.S. at 198.*

## **E. Residential Placement at School District Expense**

### **1. Residential Placement Test**

If placement in a public or private residential placement is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. *34 C.F.R. § 300.104.* In this jurisdiction there is a two-part test to determine whether a residential placement is appropriate within the meaning of the IDEA. *Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d 286, 297 (5<sup>th</sup> Cir. 2009).*

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

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

are “related services” as defined by the IDEA. *Michael Z., 520 F. 3d at 300, 301.*

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

## **2. Residential Placement Test Applied to the Facts**

The evidence in this case shows that residential placement is not essential for Student to receive the requisite educational benefit under the IDEA. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, supra.; Richardson Ind. Sch. Dist. v. Michael Z., supra.* Student made progress academically and behaviorally in the special education classroom at the school district’s self-contained special education campus. Student’s behavior was manageable in the self-contained special education settings during the relevant time period. Certainly Student exhibited some challenging behaviors particularly with regard to task avoidance and a need to \*\*\*. However, the record shows the school district can and did meet those needs in the school district’s self-contained special education setting.

Furthermore, Student’s behavior was such that Student’s \*\*\* was contemplated for the upcoming school year, subject to meeting specific behavioral criteria. Student received and benefitted from the academic instruction in the school district’s self-contained special education setting as well. Therefore, it is not *essential* for Student to be placed in a residential treatment center for purposes of receiving FAPE. Although a residential placement might be helpful to Student the school district is not required to fund a residential placement when a student receives FAPE in a less restrictive placement on a school district campus. *Michael Z., 530 F. 3d at 299.*

Furthermore, a residential placement would *not* be primarily oriented towards enabling

Student to obtain an education. Instead the evidence showed a residential placement would be primarily medical in nature; \*\*\*, \*\*\*, \*\*\*.

The evidence showed the more severe forms of Student's behaviors, \*\*\*, occurred much more frequently in the home setting and not so much at school. Student's progress in a residential placement \*\*\*. In sum, Student did not meet Student's burden of proving Student needs residential placement in order to receive an educational benefit under the IDEA. *Schaffer v. Weast, supra; Michael Z., supra.*

The evidence certainly demonstrates there are significant family needs and challenges in parenting a child with Student's complex profile. It is reasonable to infer from the evidence that Student's family needs help and support in coping with Student's behavior at home. The school district did offer Student's mother parent counseling which she refused. There is virtually no evidence that she requested or indicated a need for in-home training thereafter. Perhaps that is a service she may now be willing to accept. If so, the parties should discuss conducting in-home and parent training assessments.

However, even if the school district could have offered those services, that does not prove Student needs a residential placement for educational purposes. *Michael Z, supra.* Student's mother clearly needs some help. \*\*\*.

## **F. Evaluation**

Petitioner contends the school district failed to conduct timely and appropriate evaluations; specifically, Petitioner alleges the school district failed to conduct a FBA in a timely manner during the 2016-2017 school year. The record shows the opposite. First, a FBA is only required under the IDEA in the context of a disciplinary issue. Specifically, if a parent challenges a manifestation determination after a student with a disability has been disciplined for

violating a code of student conduct, and the ARD determines the conduct at issue was a manifestation of the student's disability, the ARD must either conduct a FBA or review and revise the student's BIP. 34 C.F.R. § 300.530 (f)(1). In this case Student was never the subject of a disciplinary decision.

In practice, the use of a FBA has been extrapolated beyond the limited provision of the IDEA because of its usefulness in determining the function of a student's behavior at school and then using those results to design behavioral interventions. But the IDEA itself does not require an FBA beyond the disciplinary procedures stated in the federal regulations. *Id.*

However, the IDEA does require consideration of the use of positive behavioral interventions and other supports and strategies in the design of a student's IEP for a child whose behavior impedes Student's learning. 34 C.F.R. § 300.324 (a) (2)(i). The school district responded in a timely manner and did conduct a FBA in response to a parental request for one in January 2017. The results of that FBA were reviewed, discussed, and used in further refining Student's BIP which included the use of positive behavioral interventions and other supports and strategies as required. Therefore, Petitioner did not meet Student's burden of proof on this issue. *Schaffer v. Weast, supra.*

#### **G. Procedural Issues**

Petitioner raises three procedural issues. First, whether the school district failed to provide Student's mother with timely IEP progress reports. Second, whether the school district failed to provide Student's mother with PWN at all relevant times and, in particular, when the school district proposed a change in Student's educational placement. Third, whether the school district failed to provide Student's mother with an opportunity for meaningful parental input in the development of Student's IEP.

First, the evidence showed the school district did provide Student's mother with timely IEP progress reports. Petitioner did not meet Student's burden of proof on this issue. *Schaffer v. Weast, supra.*

Second, the evidence also showed the school district provided PWN to Student's mother as required. The school district was not required to provide PWN when Student was placed at \*\*\*. The placement at \*\*\*, as opposed to Student's prior placement at \*\*\*, was comparable to Student's prior \*\*\*.

Under the transfer provisions of the IDEA, the placement at \*\*\* was a 30 school day temporary placement until the school district could review information from the \*\*\* and convene a permanent placement ARD. *34 C.F.R. § 300.323 (e); 19 Tex. Admin. Code §89.1050(j)*. Therefore, this was not a change in placement that triggered PWN. Even if it was, Student's mother agreed to the placement at \*\*\*.

Finally, Student's mother was an active participant in all ARD meetings, shared her concerns, opinions, and asked questions. She actively and effectively advocated for her \*\*\*. The evidence showed Student's mother made suggestions and requests for evaluations, services, and participated in the development of Student's IEPs. School district representatives in the relevant ARD meetings considered her ideas, attempted to address and answer concerns, granted her requests for evaluations, and included a number of IEP goals that addressed parental areas of concern.

A disagreement between school district personnel in an ARD meeting and a parent does not mean the parent wasn't provided with an opportunity to participate in the educational decision-making process. No one member of an ARD has "veto power" over ARD decisions. Instead, the ARD is a collaborative process that aims to reach consensus. *19 Tex. Admin. Code § 89.1050 (g)*. In sum, the school district did provide Student's mother with an opportunity to provide meaningful parental input into the design of Student's IEP. *34 C.F.R. §§ 300.322; 300.513 (a)(2)(ii)*.

## VII. CONCLUSIONS OF LAW

1. Respondent provided Petitioner with a free, appropriate public education within the meaning of the IDEA for the 2016-2017 school year. Petitioner did not meet Student's

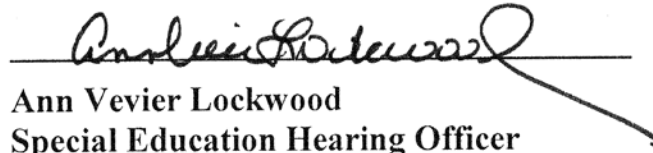
- burden of proof on this issue. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176; *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir); *Schaffer v. Weast*, 546 U.S. 49 (2006); 34 C.F.R. §300.101 (a).
2. Respondent proposed a free, appropriate public education reasonably calculated to provide Petitioner with the requisite educational benefit for the 2017-2018 school year. Petitioner did not meet Student's burden of proof on this issue. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176; *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir); *Schaffer v. Weast*, 546 U.S. 49 (2006); 34 C.F.R. §300.101 (a).
  3. Petitioner's placement in the special education classroom on the Respondent's self-contained special education campus was the least restrictive environment for Petitioner for the 2016-2017 school year. *Daniel R.R. v. El Paso Ind. Sch. Dist.*, 874 F. 2d 1036 (5<sup>th</sup> Cir. 1989); 34 C.F.R. §300.114.
  4. Petitioner's proposed placement for the 2017-2018 school year in the special education classroom on the Respondent's self-contained special education campus is the least restrictive environment for Petitioner. *Daniel R.R. v. El Paso Ind. Sch. Dist.*, 874 F. 2d 1036 (5<sup>th</sup> Cir. 1989); 34 C.F.R. 300.114. Petitioner did not meet Student's burden of proof that Student required a residential placement for an educational purpose. *Schaffer v. Weast*, *supra*; *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286 (5<sup>th</sup> Cir. 2009); 34 C.F.R. § 300.34 (a)(c)(5).
  5. Respondent conducted timely and appropriate evaluations of Petitioner, including a timely and appropriate Functional Behavior Assessment during the 2016-2017 school year. 34 C.F.R. §§ 300.303; 300.304; 300.305; 300.307; 300.530 (e)(f)(1)(i).
  6. Respondent complied with all procedural requirements under the IDEA including providing Petitioner with timely IEP progress reports, Prior Written Notice, and with an opportunity for meaningful participation in the development of Petitioner's IEP. 34 C.F.R. §§ 300.322; 300.323 (e); 300.513 (a)(2)(ii); 19 Tex. Admin. Code § 89.1050(g).

## VIII. ORDERS

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

**SIGNED October 27, 2017.**





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

### IX. NOTICE TO THE PARTIES

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