

DOCKET NO. 228-SE-0518

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, STUDENT, b/n/f PARENT and PARENT (“Petitioner” or “Student”) brings this action against the Houston Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (IDEA) and its implementing state and federal regulations. The main issues in this case are whether the school district failed to provide Student with a free, appropriate public education (FAPE) and whether Student needs placement at ***, a residential treatment center.

The hearing officer concludes Student was not denied FAPE by the school district during the relevant time period and is therefore not entitled to a residential placement at school district expense. Student needed additional evaluations to determine if Student’s Individualized Education Plan (IEP) needed revision.

II. PROCEDURAL HISTORY

A. Continuances and Extension of Decision Due Date

There were three continuances in this case and four extensions of the decision deadline. The hearing was originally scheduled for June 15, 2018, with the decision due July 16, 2018. The first continuance was granted at the request of both parties to allow them to resolve the issues

through informal settlement negotiations. The hearing was continued to September 4-7, 2018, and the decision due date was extended to October 9, 2018. The parties agreed to a second continuance to continue informal settlement negotiations and the hearing was rescheduled for December 4-7, 2018, with the decision due date extended to January 7, 2019. At the close of the hearing, both parties requested an extension of the decision due date to February 4, 2019, to allow the parties time to prepare and submit written closing arguments after receipt of the hearing transcripts. A second continuance was requested to extend the deadline to file closing briefs as well as the decision due date. Both parties timely filed closing briefs and the extended decision due date is February 9, 2019.

B. Legal Representatives

Student was represented throughout this litigation by Student's legal counsel Dorene Philpot with the Philpot Law Office. The school district was represented throughout this litigation by Hans Graff, Deputy General Counsel for the school district.

C. Resolution Session and Mediation

The parties conducted a resolution session on May 18, 2018, but were unsuccessful in reaching an agreement. The parties did not attempt mediation, but they participated in informal settlement negotiations throughout the pendency of this case.

D. Preliminary Motions

There were two preliminary motions resolved prior to the due process hearing. Petitioner's objections and motions related to Respondent's untimely answer was denied by Order No. 3 on June 6, 2018. Petitioner's requested corrections to Order No. 2, which set forth Petitioner's issues, which was granted by Order No. 4 on June 15, 2018.

III. DUE PROCESS HEARING

The due process hearing was conducted on December 4-7, 2018. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel Dorene Philpot and Kevin Shields of the Shields Law Firm also represented Student at hearing. Parents *** and *** attended the hearing each day.

Respondent continued to be represented by its legal counsel Hans Graff. In addition, ***, Senior Manager of Special Education Services for the school district, attended the hearing as the party representative.

IV. ISSUES

A. Petitioner's Issues

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

1. FAPE: Whether the school district failed to provide Student with a free, appropriate public education (FAPE) within the meaning of the IDEA from May ***, 2017, through the proposed Individualized Education Plan (IEP) for the 2018-2019 school year.
2. FAPE: Whether the school district failed to devise and implement an appropriate IEP for Student from May ***, 2017 through the proposed IEP for the 2018-2019 school year.
3. PROCEDURAL: Whether the school district violated Student's and Student's parents' procedural rights under the IDEA.
4. EVALUATION: Whether the school district timely and appropriately evaluated Student in all areas of suspected disability.
5. FAPE: Whether the school district failed to protect Student from bullying, harassment, discrimination, and/or retaliation.
6. Other causes of Action: Whether the school district violated Student's rights under § 504 of the Rehabilitation Act of 1973 (504), the Americans with Disabilities Act (ADA), the Americans with Disabilities Act Amendments Act (ADAAA), the No

Child Left Behind Act (NCLBA), Section 1983 of the Civil Rights Act of 1964, and Title VI of the Civil Rights Act of 1964.

B. Respondent's Legal Position and Additional Issues

Respondent contends that Student was provided FAPE with an appropriate placement in general education classes because Student was performing with grade level work.

The school district raises the following additional issues:

1. Whether the school district's Full Initial Evaluation (FIE) is an appropriate assessment and whether the Student is entitled to an Independent Educational Evaluation (IEE) or Functional Behavioral Assessment (FBA) at school district expense.
2. Whether the hearing officer should enter an order overriding the refusal of parents to consent to a new FIE in all areas of suspected disability and whether parents should be ordered to produce Petitioner for evaluation.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. The hearing officer determine the Student was denied FAPE.
2. The school district develop an appropriate IEP.
3. If the school district cannot provide appropriate services, the school district reimburse the parents for private school placement, therapeutic services, evaluations, and mileage.
4. The school district fund a private placement, therapeutic services, evaluations, and mileage prospectively for the time period determined by the hearing officer to be appropriate.
5. A determination that Student is the prevailing party.
6. Any other and further relief the hearing officer deems just and proper.

B. Respondent's Requested Relief

1. Dismiss any claims arising outside the one year statute of limitations rule as applied in Texas;
2. A finding that the school district timely and appropriately identified, evaluated and provided educational services to Petitioner; and
3. An order overriding parents' refusal to consent to reevaluation.

VI. STATUTE OF LIMITATIONS

Petitioner limited the relevant time period for the Complaint to May 2017 through the proposed IEP for the 2018-2019 school year. The Complaint was filed in May of 2018. Therefore, the time period falls within the one year statute of limitations period as applied in Texas.

VII. CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

All of Petitioner's claims arising under law other than the IDEA were dismissed for want of jurisdiction on May 30, 2018, in Order No. 2.

VIII. FINDINGS OF FACT

1. Student is *** years old and eligible for special education services from the school district as a student with Autism.¹ Autism Spectrum Disorder (ASD) is a developmental disability significantly affecting verbal and nonverbal communication and social interactions that adversely affects a child's educational performance.²
2. Student first attended the school district and qualified for special education services as a student with Autism as a *** grader at *** in August of the 2010-2011 school year.³ Student has attended school in the school district since *** grade.⁴

¹ Joint Exhibit 4 p. 82 (referred to hereafter as JE ___ or JE ___ at ___).

² JE 4 at 96.

³ JE 5 at 107.

⁴ JE 21 at 646.

3. Student has struggled with socializing with peers, misreading social situations leading to physically aggressive behavior, and apparent antagonistic behavior since age ***.⁵ Student has engaged in hitting, biting, and kicking.⁶ Student holds grudges and plots vengeance against those Student feels have harmed Student.⁷ Student attended several private therapeutic schools and was asked to leave them due to behavioral problems prior to enrolling in the school district.⁸ In 2010, Student was ***.⁹
4. Student was first referred for a Full and Individual Initial Evaluation (FIE) in 2010 because Student's parents were concerned about Student's difficulty staying in a regular school setting due to aggressive behaviors, odd/inappropriate behaviors, poor frustration tolerance, and rigid thinking.¹⁰ The FIE was completed by the school district on June ***, 2010.¹¹
5. Prior to the referral for an FIE, student received a psychological evaluation at the *** and was diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD) and Pervasive Developmental Disorder not otherwise specified.¹² Student's parents provided third party private therapy to Student since 2010 with various therapists and psychiatrists.¹³
6. In the June ***, 2010 FIE, Student met the criteria for Autism under the IDEA.¹⁴ Student was observed at school to have rigid, inflexible thinking and struggled to control Student's emotions. Student often made poor interpretations of others' behavior that led to aggression.¹⁵ Student's parents and teachers reported significant problems with anger control, bullying, emotional self-control, and negative emotionality.¹⁶ Student showed poor resiliency at school and home, which suggested Student often fights and is aggressive towards others and does not react well to minor set-backs.¹⁷
7. The 2010 FIE recommended the overall focus of Student's educational program should be on the development of skills to facilitate functioning in both school and non-school

⁵ JE 1 at 2.

⁶ Petitioner's Exhibit 1 p. 2 (referred to hereafter as PE ___ or PE ___ at ___).

⁷ PE 1 at 2.

⁸ JE 1 at. 1-2, PE 1 at 10.

⁹ PE 1 at 9.

¹⁰ JE 2 at 15.

¹¹ JE 2 at 15.

¹² JE 1 at 1, 10.

¹³ Respondent's Exhibit 1 p. 3 (referred to hereafter as RE ___ or RE ___ at ___).

¹⁴ JE 2 at 31.

¹⁵ JE 2 at 20.

¹⁶ JE 2 at 23.

¹⁷ JE 2 at 23.

- settings.¹⁸ It recommended direct instruction in pragmatics and social skills, a structured environment with clear limits, praise when appropriate behavior is shown, and participation in social skills groups with peers should be provided to Student.¹⁹ It also concluded Student's pragmatic language should be addressed across settings in structured and non-structured situations.²⁰
8. As a *** grader, student was placed in the *** (***) class.²¹ The Admission, Review, Dismissal (ARD) committee discussed the need for a FBA.²² A Behavior Support and Intervention Plan (BSIP) is included in the 2010 IEP and all IEPs from 2010 to present.²³ In 2010, Student's problematic behaviors included: off-task, noncompliance, disruption inside the classroom, disruption outside the classroom, emotional outbursts/tantrums, destruction of property, defiance of authority, negative verbalizations, verbal aggression, physical aggression, and social isolation/withdrawal.²⁴
 9. Parents were given the procedural safeguards at the 2010 initial ARD meeting and Student's mom signed the paperwork indicating receipt.²⁵ The school district provided procedural safeguards to parents at every ARD meeting from 2011-2018.²⁶ Parent received Prior Written Notice (PWN) in May 2017 and August 2017 as evidenced by mother's signature on the ARD documents.²⁷
 10. In the initial 2010 FIE, Student's behavior impeded Student's learning and the learning of others, specifically, Student's interpretations of others' behaviors that lead to anxiety and anger.²⁸ Student often reacts with aggression when Student feels threatened or cannot get over inflexible thinking.²⁹ In a 2013 FIE, Student's behavior did impede Student's learning, but not the learning of others.³⁰ Student's behavior did not impede Student's

¹⁸ JE 2 at 32.

¹⁹ JE 2 at 32.

²⁰ PE 1 at 39.

²¹ JE 5 at 151.

²² JE 5 at 151.

²³ JE 5 at 123, JE 6-18.

²⁴ JE 5 at 123.

²⁵ JE 5 at. 136, 138.

²⁶ JE 6 at 182; JE 7 at 223, 226; JE 8 at 251, 253; JE 9 at 291; JE 10 at 309; JE 11 at 345; JE 12 at 387; JE 13 at 424; JE 14 at 462; JE 15 at 515; JE 16 at 557; JE 17 at 596; JE 18 at 632.

²⁷ JE 15 at 528, JE 16 at 567.

²⁸ JE 2 at 26.

²⁹ JE 2 at 26.

³⁰ JE 3 at 48.

learning or the learning of others by the 2016 FIE. Student did not exhibit significant emotional, behavioral, or attentional problems.³¹

11. Student has an average IQ and in 2010 had a Wechsler Intelligence Scale for Children (WISC) full scale IQ of ***.³² Student enjoys school and wants to do well in that environment.³³ Student's self-esteem is tied to schooling and Student responds well to positive feedback.³⁴
12. The 2010 IEP had goals for all subjects.³⁵ Student's academic goals were eventually removed and only behavioral goals remained because Student was advancing from grade to grade and not showing any academic needs.³⁶ Student was in all general education classes by *** grade in the 2013-2014 school year.³⁷ Student remained full-time in the general education setting until Student stopped attending school in February 2018.³⁸
13. The most recent FIE conducted in April of 2016 confirms Student's identification as a student with Autism enrolled in all general education classes with support facilitation.³⁹ ***.⁴⁰ Student has seen a psychiatrist for over *** years. At the time of the FIE, Student saw two therapists, one specializing in nutrition and one to address the emotional and behavioral issues.⁴¹
14. The 2016 FIE reviewed the previous evaluation from June 2010. The evaluation was conducted in Student's native language, English. To assess emotional and behavioral issues, the evaluation used the following sources: behavior rating checklist, parent information form, observation, and teacher interviews.⁴² The following measures and assessments were used: Autism Spectrum Rating Scale (ASRS); Gilliam Asperger's Disorder Scale; Behavior Assessment System for Children, 2nd edition – teacher and parent report and student report profile; Children's Depression Inventory, 2nd edition; and the Revised Children's Manifest Anxiety Scale, 2nd edition.⁴³

³¹ JE 4 at 93.

³² JE 2 at 26, PE 1 at 20.

³³ PE 1 at 38, Transcript Volume I at 212-13 (referred to hereafter as T ___ at ___).

³⁴ JE 18 at 609.

³⁵ JE 5.

³⁶ JE 5 at 18.

³⁷ JE 4 at 91.

³⁸ JE 18.

³⁹ JE 4 at 82.

⁴⁰ JE 4 at 82, 91.

⁴¹ JE 4 at 92.

⁴² JE 4 at 84.

⁴³ JE 4 at 84-93.

15. The Achievement/Development/Functional Section of the evaluation obtained data from state assessments; the parent information form; grades; a review of school records; and the Kaufman Test of Educational Achievement, 3rd edition.⁴⁴ The Cognitive/Adaptive Behavior section of the evaluation obtained data from Woodcock-Johnson-IV – test of cognitive abilities; the parent information form; and a review of school records.⁴⁵
16. In the 2016 FIE, the ASRS was used to quantify observations of behavior associated with ASD. Student's *** (***) teacher indicated Student had relatively few behavioral characteristics similar to other youth diagnosed with ASD while in *** class. Parent indicated Student displayed many characteristics of ASD at home. The *** teacher noted Student had a hard time with peer socialization in *** class, but overall indicated Student's behaviors were not a major issue. Parent indicated a higher level of concern with Student's behaviors at home.⁴⁶
17. Student's *** teacher stated Student is compliant and has more than adequate attention. She stated Student seems content and Student's thinking is concrete. She said Student is not isolated from others, but Student has no friends. Student's *** teacher indicated Student is usually in a positive or "good" mood in *** class. Student is intelligent and does not need redirection because Student was 100% focused since the first day of school in *** class. Student's *** teacher described Student as respectful and an "excellent" student.⁴⁷
18. Parent reported Student exhibited significant behavior issues related to ASD.⁴⁸ At home Student has significant difficulty using appropriate verbal and nonverbal communication and struggles to provide appropriate emotional responses to other people in social situations. Student overreacts to certain sensory experiences and does better when the environment is unchanged.⁴⁹
19. Student's reading composite score fell within the above average range (***), Student's math composite score fell within the above average range (***), and Student's written language composite fell within the average range (***)⁵⁰ Student has difficulty with the following pragmatic skills: understanding slang expression, identifying when Student is

⁴⁴ JE 4 at 93.

⁴⁵ JE 4 at 95.

⁴⁶ JE 4 at 85-86.

⁴⁷ JE 4 at 92.

⁴⁸ JE 4 at 86.

⁴⁹ JE 4 at 97.

⁵⁰ JE 4 at 95.

being put down or made fun of, and pretending.⁵¹ Student has difficulty in abstract thinking, Student is rigid and concrete in Student's thinking.⁵²

20. The 2016 FIE stated Student is able to stay on task for adequate periods of time and is making good progress academically. It recommended Student might benefit from small group instruction focused on "small talk" or social conversation to allow Student to learn nuances in types of verbal exchanges common for children Student's age. Student needs direct teaching of conversational rules with clear expectations and review of rules for behavior in new settings or situations. Student needs metaphors and words with double meanings explained with examples of abstract concepts. A teacher should be as concrete as possible when presenting new or abstract concepts. Tasks need to be broken down into smaller steps or presented in another way.⁵³
21. Every IEP from 2011-2018 included the Autism supplement and recommended Student's student-to-teacher ratio should be 1:2 or 1:5. In each IEP, the communication interventions section of the Autism supplement stated Student needs interventions in the areas of syntax, semantics, and pragmatics.⁵⁴ Language pragmatics refers to social skills and social elements of communications. These include tone of speech, understanding and utilizing verbal feedback from other people, and differentiating between literal language and more abstract types of communication like irony or humor.⁵⁵ Student needs education in pragmatics to help Student understand social situations, to understand boundaries in relationships, and to develop reasonable expectations for ***self and others in order to behave more appropriately.⁵⁶
22. The Autism supplements from 2011-2018 indicated Student needed a daily schedule reflecting minimal unstructured time and active engagement in learning activities.⁵⁷ Student needed positive reinforcement along with direct and indirect teaching strategies.⁵⁸
23. Every IEP from 2011-2018 included a BSIP with a list of challenging behaviors for Student: off-task, disruption inside of classroom, emotional outburst/tantrum, leaves assigned area, negative verbalization, verbal aggression, negative physical, and physical aggression.⁵⁹

⁵¹ JE 4 at 96.

⁵² PE 1 at 22.

⁵³ JE 4 at 98.

⁵⁴ JE 16 at 543-44.

⁵⁵ T II at 302.

⁵⁶ PE 1 at 39.

⁵⁷ JE 16 at 543-44.

⁵⁸ JE 16 at 544.

⁵⁹ JE 6 at 173, JE 7 at 210, JE 8 at 244, JE 9 at 279, JE 10 at 302, JE 11 at 332, JE 12 at 371, JE 13 at 414, JE 14 at 450, JE 15 at 497, JE 16 at 549, JE 17 at 585, JE 18 at 621.

24. The 2011 – 2018 BSIPs stated Student will ***. Student does it one to two times per week. Student will do it during any activity. Sometimes ***. If not intervened Student can seriously hurt peers.⁶⁰ The antecedents to this behavior were listed as structured activity, unstructured activity, independent seat work, group work, changing classes, lack of social attention, negative peer interactions, interruption in routine, changing tasks, task type/subject, and anytime.⁶¹
25. A formal FBA was not completed anytime between 2011-2018.⁶² One school district Licensed Specialist in School Psychology (LSSP), who participated in the Manifestation Determination Review (MDR) in February of 2018, stated an FBA is not performed on a Student who is easily redirected unless the behavior persists.⁶³ Another LSSP from the school district had a different opinion, she stated she would recommend an FBA for a student removed from the educational environment for a cumulative period of over 10 days or after a single serious incident that caused a Disciplinary Alternative Education Placement (DAEP) placement.⁶⁴
26. Counseling as a related service offered in Houston ISD is designed to aid a student in meeting his or her educational goals, not cognitive therapy. The school may provide social skills training, anger management, or self-regulation strategies.⁶⁵ These are typically provided when the behavior interferes with academics, such as, in cases where a student shuts down or stops working.⁶⁶
27. Parents have struggled with Student's behavior at home. Student has been physically aggressive to Student's mother, father, *** on multiple occasions. ***.⁶⁷ ***.⁶⁸ ***.⁶⁹ ***.⁷⁰ Student's father thinks Student needs someone watching Student at all times.⁷¹ Parents provided private tutoring to Student because doing homework with Student was a

⁶⁰ JE 6 at 174, JE 7 at 211, JE 8 at 245, JE 9 at 280, JE 10 at 303, JE 11 at 333, JE 12 at 372, JE 13 at 415, JE 14 at 451, JE 15 at 498, JE 16 at 547, JE 17 at 586, JE 18 at 622.

⁶¹ JE 6 at 174, JE 7 at 211, JE 8 at 245, JE 9 at 280, JE 10 at 303, JE 11 at 333, JE 12 at 372, JE 13 at 415, JE 14 at 451, JE 15 at 498, JE 16 at 547, JE 17 at 586, JE 18 at 622.

⁶² T I at 146.

⁶³ T III at 590-91.

⁶⁴ T III at 810-11.

⁶⁵ T III at 637-38.

⁶⁶ T III at 670.

⁶⁷ RE 11 at 75.

⁶⁸ T I at 115.

⁶⁹ T I at 161.

⁷⁰ T I at 86.

⁷¹ T I at 170.

- “huge battle”. Parents did not inform the school district of the difficulties with homework.⁷²
28. Student was diagnosed with *** in 2017.⁷³ Student has refused to ***.⁷⁴ ***.⁷⁵ ***.⁷⁶ ***.⁷⁷ ***.⁷⁸
29. In *** and *** grade, Student performed well academically and did not have significant behavior issues. Most of Student’s issues were controlled by the teachers in the classroom; however, Student exhibited difficulty with impulse control and would make inappropriate comments ***. Typically Student was contrite afterwards.⁷⁹
30. During *** grade, ***. ***. ***. The principal stated Student always admitted wrong doing. Student received detentions for Student’s behavior.⁸⁰ Student generally got along with other students except for once every several weeks.⁸¹
31. Student exceeded the maximum number of tardies in *** grade and Student received lunch detentions and Saturday detentions for those.⁸² The principal would speak to the parents when there was an issue with Student and they were supportive of the school’s handling of the issues.⁸³
32. Parent testified Student refused to go to school after a ***. Student refused to go to school three times in the 2017-2018 school year: once for a day, ***. Parent spoke to Student’s *** two or three times regarding this issue. The school did not do a home assessment to address the issue.⁸⁴
33. Student’s *** grade *** teacher described Student as intelligent and using vocabulary not typically used by *** year old.⁸⁵ This teacher described Student as needing more interventions than the average student; however, he had a good relationship with Student

⁷² T I at 168.

⁷³ PE 1 at 9.

⁷⁴ RE 1 at 2, RE 2 at 28.

⁷⁵ T I at 50.

⁷⁶ T I at 51.

⁷⁷ PE 1 at 2.

⁷⁸ T I at 42.

⁷⁹ T IV 944-947.

⁸⁰ T IV 947-49.

⁸¹ T IV 951.

⁸² T IV 954-61.

⁸³ T IV 942-61, PE 9 at 21.

⁸⁴ T I at 46-48.

⁸⁵ T II at 479.

and was able to redirect Student easily.⁸⁶ Student had difficulty interacting with other students. ***.⁸⁷ This teacher would address the issues by giving Student time to cool down, giving the other student time to cool down, and conferencing with Student.⁸⁸ This teacher, at times, would give preferential seating to Student and have Student sit by the door or the teacher.⁸⁹

34. Student's *** grade *** teacher described Student as a good student and a strong student academically.⁹⁰ This teacher indicated working on a team with other students is challenging for any *** student. She coached Student on tone and connotation with the way Student spoke to others and how others perceive you. Student was always very receptive to the coaching.⁹¹ Student was redirected with eye contact, tapping on Student's desk, or tapping on Student's shoulder.⁹² She stated Student's handwriting was no worse than any other *** grader and Student's off-task behavior was sporadic.⁹³
35. Student's *** grade *** teacher knew handwriting was something Student struggled with and was coaching Student on how Student could improve.⁹⁴ Student was usually respectful and compliant with redirection. This teacher's redirection was typically verbal.⁹⁵ She described Student's behavior as on par with other *** ***.⁹⁶
36. In the 2014-2015 through 2016-2017 school years, Student passed all Student's classes in *** with mostly As and Bs. Student took *** grader.⁹⁷ Student was in the *** at ***, which is ***.⁹⁸ Student also passed the Reading and Mathematics State of Texas Assessments of Academic Readiness (STAAR) in April ***.⁹⁹ ***.¹⁰⁰

⁸⁶ T II 487-88, TR II at 518-19.

⁸⁷ T II at 493.

⁸⁸ T II at 493.

⁸⁹ T II at 525-26.

⁹⁰ T IV at 883.

⁹¹ T IV 883-84.

⁹² T IV 886.

⁹³ T IV 906.

⁹⁴ T IV 917.

⁹⁵ T IV 918.

⁹⁶ T IV 919.

⁹⁷ JE 20 at 642.

⁹⁸ T III at 686-87.

⁹⁹ JE 4 at 94.

¹⁰⁰ JE 4 at 95, RE 26 at 203, RE 27 at 204.

37. As *** grader in March ***, Student met the performance level expectations in reading and mastered them *** on the STAAR test.¹⁰¹ Student accomplished academic performance on the *** STAAR in *** grade.¹⁰² Student was supposed to take the STAAR test for *** in the Spring of ***, but was not in the school district.¹⁰³
38. In the May ***, 2017 IEP for the 2017-2018 school year, Student had three measureable annual goals in social skills and one measureable annual goal in general education. The first social skills goal was: when interacting with peers during a small group academic work session in the classroom, Student will demonstrate at least (3) attributes of a positive attitude: smile at least one time, make at least 1 positive comment (e.g. Student will say “that’s a good idea”), and maintain attentive posture while refraining from negative work behaviors (e.g. ***). Student’s baseline score was ***% of the time on April ***, 2017 with a goal of ***% by April ***, 2018.¹⁰⁴ This goal was to be implemented by special education teacher and general education teacher. The schedule of evaluation for progress was every 6 weeks. The IEP stated this goal was designed to support the student with transition.¹⁰⁵
39. The second social skills annual goal was: when presented with change, Student will transition to the next scheduled setting or activity by being given the signal or directive with no maladaptive behaviors (e.g. crying, arguing, tantruming, noncompliance). Student’s baseline score was ***% of the time on April ***, 2017 with a goal of ***% of the time by April ***, 2018.¹⁰⁶ This goal was to be implemented by a general education teacher. The schedule of evaluation for progress was every 6 weeks. The IEP stated this goal was designed to support the student with transition.¹⁰⁷
40. The third social skills annual goal was: when interacting with Student’s peers, Student will independently use coping strategies (e.g. walk away, find an adult to help, take a break, ignore, self-talk) to remain calm and on-task when other students are acting differently than Student’s expectations (e.g. talking during silent reading). Student’s baseline score was ***% of the time on April ***, 2017 with a goal of ***% of the time by April ***, 2018.¹⁰⁸ This goal was to be implemented by a special education teacher and an assistant. The schedule of evaluation for progress was not listed. The IEP stated this goal was designed to support the student with transition and academic and functional concerns.¹⁰⁹

¹⁰¹ JE 23 at 658.

¹⁰² JE 18 at 609.

¹⁰³ JE 18 at 611.

¹⁰⁴ JE 15 at 486.

¹⁰⁵ JE 15 at 486.

¹⁰⁶ JE 15 at 486.

¹⁰⁷ JE 15 at 486-87.

¹⁰⁸ JE 15 at 487.

¹⁰⁹ JE 15 at 487.

41. Student's only academic goal for the 2017-2018 school year was: during the school year, when provided with appropriate accommodations deemed necessary by the ARD committee and assistance from a Special Ed case manager, Student will demonstrate a mastery of grade level Texas Essential Knowledge and Skills (TEKS) by earning an average of at least ***% in all general education classes. Student's baseline score was ***% with goal of ***% by April ***, 2018.¹¹⁰ This goal was to be implemented by special education teacher and general education teacher. The schedule of evaluation for progress was every 6 weeks. The IEP stated this goal was designed to address academic and functional concerns.¹¹¹
42. The May ***, 2017 ARD described how Student's disability affects Student's involvement in the general education classroom as it affects Student socially because Student prefers to be isolated from Student's fellow peers. Student has poor organizational skills and handwriting. Student's disability adversely affects Student's behavior and ability to interact with others.¹¹² Student's only accommodations were visual, verbal, or tactile reminders to stay on task and teach skills in several settings/environments.¹¹³
43. The May ***, 2017 ARD committee reviewed report card grades, progress report grades, attendance records, current FIE, medical records, STAAR results, and teacher/student/parent input to develop the IEP.¹¹⁴ *** services were included in the May 2017 IEP. ***.¹¹⁵ The ARD committee determined that it was appropriate to integrate *** and objectives into Student's educational plan.¹¹⁶
44. The *** services stated the IEP should integrate the appropriate student involvement in the student's ***. The IEP stated Student will work toward *** through academic skills, ***.¹¹⁷

¹¹⁰ JE 15 at 487.

¹¹¹ JE 15 at 488.

¹¹² JE 15 at 484.

¹¹³ JE 15 at 484.

¹¹⁴ JE 15 at 520.

¹¹⁵ JE 15 at 491, RE 27 at 1-2.

¹¹⁶ JE 15 at 491.

¹¹⁷ JE 15 at 492.

45. Student *** for the 2017-2018 school year.¹¹⁸ ***.¹¹⁹ ***.¹²⁰ ***.¹²¹ ***.¹²²
46. ***.¹²³ The students participate in cross curricular learning, group work, changing of schedules, rotations, and field trips.¹²⁴ Student had some struggles working with other students in collaborative groups on projects.¹²⁵ According to Student's teachers, this is common with ***.¹²⁶
47. The August ***, 2017 IEP removed the social skills goal of transitioning to the next scheduled activity with no maladaptive behaviors. All other social skills goals and academic goals remained the same as in the May ***, 2017 IEP with the same present level of academic achievement and functional performance (PLAAFPs), same dates to achieve goals, same implementation, and schedule of evaluation.¹²⁷
48. The most recent IEP from April ***, 2018, for the 2018-2019 school year listed only one social skills goal of independently using coping strategies. Student's baseline score was ***% as of April ***, 2018 with a goal of ***% by April ***, 2019.¹²⁸ This IEP listed no general education goals.¹²⁹ The same accommodations of visual, verbal, and tactile reminders to stay on task were included.¹³⁰
49. At the completion of the first semester of Student's *** year, Student received the following grades: ***. Student did not complete the spring semester of Student's *** year.¹³¹ At the end of Student's *** year, Student had *** unexcused absences.¹³²

¹¹⁸ JE 16 at 531.

¹¹⁹ T III at 727.

¹²⁰ T III at 731.

¹²¹ T II at 480.

¹²² T II at 418.

¹²³ T II at 480.

¹²⁴ TR II at 480.

¹²⁵ T III at 734.

¹²⁶ T IV at 885.

¹²⁷ JE 16 at 536-38.

¹²⁸ JE 18 at 612.

¹²⁹ JE 18.

¹³⁰ JE 18 at 611.

¹³¹ JE 19 at 641.

¹³² JE 22 at 650.

50. The IEPs from May 2017 – February of 2018 stated progress of Student’s goals would be measured every six weeks.¹³³ Parents did not receive progress reports for the 2017-2018 school year.¹³⁴ The April 2018 IEP stated progress reports every 9 weeks.¹³⁵
51. Student has made several threatening statements towards many people, including doctors, Student’s immediate family, and Student’s extended family.¹³⁶ In December 2017, Student’s parents discussed with Student’s therapist the idea of a Residential Treatment facility or a boarding school for Student to help with Student’s issues related to being a child with Autism.¹³⁷
52. During the 2017-2018 school year, Student was involved in *** instances where a discipline referral form was completed by a teacher.¹³⁸ During this time, the teachers at *** did not see Student as an aggressive child, but rather a Student with a tendency to say inappropriate things.¹³⁹
53. *** in November 2017 Student was inappropriate with other students. ***. ***, a discipline referral form was completed, the teacher did not call home, and student was reminded to make the right decision.¹⁴⁰
54. On ***, 2017, Student was suspended for 2 days for ***.¹⁴¹ At a meeting after this incident, Student was talked to by Student’s *** about thinking about Student’s actions before doing them. ***.¹⁴² ***.¹⁴³ Because of this incident and prior ones, ***.¹⁴⁴ The *** was aware of Student’s school refusal ***.¹⁴⁵
55. Student had *** discipline referrals forms completed in December 2017. ***.¹⁴⁶ Student was redirected for both behaviors.¹⁴⁷

¹³³ JE 6 - 17.

¹³⁴ T I at 48.

¹³⁵ JE 18 at 624.

¹³⁶ RE 1 at 5.

¹³⁷ RE 1 at 7 and 8.

¹³⁸ RE 22 at 191.

¹³⁹ T III at 595-96.

¹⁴⁰ RE 22 at 191.

¹⁴¹ PE 12 at 1, RE 22 at 192.

¹⁴² RE 22 at 195.

¹⁴³ RE 22 at 195.

¹⁴⁴ RE 22 at 187.

¹⁴⁵ PE 10 at 3.

¹⁴⁶ RE 21 at 183.

¹⁴⁷ RE 21 at 183.

56. Student had an incident referral in *** class in January 2018. Student was not ***. The *** attempted to speak with Student about the incident; however, Student avoided her.¹⁴⁸
57. Student received a discipline referral form on ***, 2018, for ***.¹⁴⁹ Student was given a verbal warning and removed from the room.¹⁵⁰
58. On ***, 2018, teachers were worried about Student's behavior the previous day and were concerned Student was "headed down the same road as before" so the *** reached out to the parents by email on the same day.¹⁵¹
59. On ***, 2018, Student ***. ***.¹⁵² ***.¹⁵³ ***. Student was suspended from ***, 2018 for these incidents.¹⁵⁴
60. On ***, 2018, Student ***. Student mentioned Student's parents are looking at alternative schools and programs to help Student with Student's behavior issues.¹⁵⁵ Student stated on this day Student did not want to return to school.¹⁵⁶ During a discipline meeting on ***, 2018, with the principal, ***, the special education coordinator, and parents, parents stated they are looking at other schools for Student, but they are expensive.¹⁵⁷
61. A MDR was held on ***, 2018. Student, parents, teachers, and principal were in attendance. During the meeting parents stated they believed sending Student to the DAEP would make Student behave worse.¹⁵⁸ Student, principal, and teachers devised a safety plan for Student where Student would ***.¹⁵⁹ The MDR committee discussed Student returning to school the next day and changes to Student's schedule.¹⁶⁰ After the MDR, Student never returned to HISD.¹⁶¹

¹⁴⁸ PE 10 at 1, 11.

¹⁴⁹ RE 20 at 182, PE 11 at 6.

¹⁵⁰ RE 20 at 182, PE 11 at 6.

¹⁵¹ PE 10 at 13.

¹⁵² RE 19 at 172.

¹⁵³ PE 19.

¹⁵⁴ RE 19 at 172.

¹⁵⁵ RE 19 at 177, 180.

¹⁵⁶ RE 19 at 180.

¹⁵⁷ PE 13 at 7.

¹⁵⁸ RE 19 at 179, T I at 158.

¹⁵⁹ RE 19 at 179, T II at 494.

¹⁶⁰ JE 17 at 595.

¹⁶¹ RE 19 at 179.

62. On March ***, 2018, Student's parents received an email with the Notice of the DAEP assignment attached. The email informed them of Student's 45 day assignment to the DAEP and the 5 day deadline to appeal the decision.¹⁶² There was a miscommunication between the administration of *** and the parents regarding whether or not Student had to attend the DAEP. The principal thought she verbally communicated with parents Student did not have to attend the DAEP. A letter was never sent to the parents officially saying Student did not have to attend DAEP.¹⁶³
63. ***.¹⁶⁴ ***.¹⁶⁵ ***.¹⁶⁶
64. Student was *** for impulsivity, aggression, and danger to others.¹⁶⁷ ***. ***. Student admitted difficulty in integrating techniques to avoid losing Student's temper in the moment.¹⁶⁸ *** in order to address Student's oppositional behaviors and allow Student's parents time to receive the support and treatment necessary to successfully reintegrate Student into the home.¹⁶⁹
65. ***.¹⁷⁰ Student has limited ability for empathy and recognition of the perspective of others.¹⁷¹
66. Student was ***. Student's goals at *** were to increase in flexibility towards change and new experiences, learn new coping skills for dealing with anxiety and challenging social situations, and demonstrate improvement and increased awareness of communication skills and the impact on significant relationships in Student's life.¹⁷² Another goal was to decrease manipulative behavior and experience empathy towards others. Student was also to focus on how poor impulse control affects Student socially, academically, emotionally, cognitively, and with Student's family and improve Student's working memory.¹⁷³

¹⁶² PE 10 at 20., T IV at 887, PE 28-2.

¹⁶³ T III at 775.

¹⁶⁴ PE 1 at 8, 9.

¹⁶⁵ PE 1 at 8.

¹⁶⁶ PE 1 at 8.

¹⁶⁷ PE 21 at 3, RE 12 at 101.

¹⁶⁸ RE 11 at 85.

¹⁶⁹ RE 11 at 90.

¹⁷⁰ RE 11 at 75, PE 1 at 31.

¹⁷¹ RE 11 at 77.

¹⁷² RE 13 at 103.

¹⁷³ RE 13 at 105,106.

67. Student made relatively minimal progress while at *** and still needed more intervention.¹⁷⁴ Student had difficulty managing Student's feelings and would ***. This occurred at least a couple of times a week.¹⁷⁵
68. On April ***, 2018, parents sent an email to the *** principal notifying the school district of Student's placement at *** and their intent to seek reimbursement for the private services from the school district.¹⁷⁶ Parents sent an email on May ***, 2018, which stated they are not withdrawing Student from the school district.¹⁷⁷
69. On April *** 2018, parent requested an IEE to determine present levels in reading, oral reading fluency, comprehension, phonemic awareness, phonics and vocabulary, math skills, expressive and receptive speech, sensory issues, social thinking, occupational therapy, assistive technology, ***, written language, pragmatic language, ***, physical therapy, parent training, parent counseling, in-home training, therapeutic counseling for the student, and other areas of alleged need.¹⁷⁸
70. Student went to *** before an IEE could be completed ***. Parent requested the school district pay for the provider to travel *** to conduct the IEE, but the school district declined to do so.¹⁷⁹ During the April ***, 2018 ARD meeting, the school district proposed to have Student reevaluated including a psychological evaluation, once Student returned from ***, enrolled, and the school district had parental consent.¹⁸⁰ Mother is unsure if she returned the consent form.¹⁸¹
71. Student was admitted to *** on July ***, 2018.¹⁸² *** is a residential treatment center where Student is in the *** program.¹⁸³ The *** program is for students on the Autism spectrum and it focusses on the key areas of: executive functioning, sensory, self-care, emotional regulation, communication, and empathy.¹⁸⁴ While at ***, Student ***. ***.¹⁸⁵ Student is better behaved in school than in ***.¹⁸⁶

¹⁷⁴ T. I. p. 201.

¹⁷⁵ T I p. 203.

¹⁷⁶ RE 18 at 158.

¹⁷⁷ RE 18 at 171.

¹⁷⁸ PE 22 at 1, PE 10 at 50.

¹⁷⁹ PE 10 at 55, 59-60.

¹⁸⁰ JE 18 at 629-630, 634.

¹⁸¹ Transcript Vol. 1 p. 88.

¹⁸² RE 15 at 113.

¹⁸³ T I at 260.

¹⁸⁴ PE 5 at 1.

¹⁸⁵ T II at 560.

¹⁸⁶ T II at 562, T I at 285-86.

72. ***'s major concern with Student is Student's lack of empathy and how it will affect Student's ability to function in society, get along with family, and *** others.¹⁸⁷ Student will do things just to create chaos because Student finds it personally fulfilling and entertaining.¹⁸⁸ Typically, students leave within a year of being at ***. However, *** staff suggested Student needed approximately an additional year before Student would be ready to leave ***. Student had been in the program for *** months at the time of the hearing.¹⁸⁹
73. An independent psychologist performed an IEE on Student and issued a report on November ***, 2018.¹⁹⁰ He indicated Student is challenged with executive control, which leads to problems with regulating emotions, regulating Student's impulses, cognitive rigidity, and a distrustful and oppositional stance. Student tends to have more appropriate behavior in educational settings due to Student's high-to-desperate level of motivation to perform well academically.¹⁹¹ Student tends to do better in a more structured environment and in situations where Student is motivated to perform.¹⁹²
74. Student self-reported to the independent psychologist Student does not handle consequences well and does not accept discipline from authority figures.¹⁹³ Student stated Student has a strong desire to ***.¹⁹⁴ Student indicated no remorse about Student's aggression toward anyone.¹⁹⁵
75. The psychological evaluation concluded Student meets the special education criteria for a student with Autism, emotional disturbance with a primary diagnosis of mood dysregulation disorder, and ADHD.¹⁹⁶ Academically, Student has an imperfect ability with expressive writing, legibility of Student's handwriting, and math computation. The independent psychologist recommended long-term treatment in a structured and supervised setting. Student's treatment needs include ***, individual/group/family therapy, psychoeducation, exposure to therapeutic experiences, and a therapeutic milieu.¹⁹⁷ Student's educational setting needs to address the areas of Student's ability to interact

¹⁸⁷ T II at 562.

¹⁸⁸ T I at 253.

¹⁸⁹ T II at 554.

¹⁹⁰ PE 1 at 8.

¹⁹¹ PE 1 at 31.

¹⁹² PE 1 at 31.

¹⁹³ PE 1 at 17.

¹⁹⁴ PE 1 at 17.

¹⁹⁵ PE 1 at 18.

¹⁹⁶ PE 1 at 32-33.

¹⁹⁷ PE 1 at 33.

socially with others in an appropriate fashion and demonstrate appropriate self-regulation.¹⁹⁸

76. Student has limited ability to shift from one idea to another or from one perception to another. This may limit Student's ability to benefit from therapy and generalizing consequences or one experience to a similar experience.¹⁹⁹ The independent psychologist indicated the Student needs placement at a residential treatment center. Due to the chronicity, complexity, and severity of Student's challenges and the potential for problems with safety. The independent psychologist said Student's education plan needs to span home and school, have minimal unstructured time, minimize gaps of time in program breaks, and utilize trained professionals.²⁰⁰
77. Student has not spoken with Student's parents since November ***, 2018.²⁰¹

IX. 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).

¹⁹⁸ T. II. At 316.

¹⁹⁹ PE 1 at 33.

²⁰⁰ PE 1 at 36.

²⁰¹ T I at 250.

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, 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). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P.*, 582 F.3d 576, 583(5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the school district “was reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017).

C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.²⁰² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). In this case the school district was obligated to provide Student with FAPE during the 2017-2018 school year *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for the upcoming 2018-2019 school year. The burden of proof in this case is on Petitioner to show the school district did not do so. *Id.*

In addition, Petitioner seeks continued residential placement at *** at school district expense. The burden of proof is on Petitioner to show the proposed placement in the general education

²⁰² There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

classroom on a *** is not appropriate *and* that continued placement at *** is essential and primarily oriented to enable Student to obtain an education. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370(1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299 (5th Cir. 2009).

D. IEP Goals and Objectives

In developing an IEP, the ARD committee must consider the student's strengths, parental concerns for enhancing the student's education, the results of the most recent evaluation data, and the student's academic, developmental and functional needs. For a student whose behavior impedes his or her learning or the learning of others, the IEP must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a). The ARD is also required to review, at least annually, the student's IEP and make any revisions needed to address lack of expected progress or any re-evaluations, information provided by parents, or the student's anticipated needs. Consideration of the student's behavioral needs must be addressed in the annual review. 34 C.F.R. § 300.324(b).

E. FAPE

The Four Factors Test

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

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

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

1. Individualized on the Basis of Assessment and Performance

First, the evidence showed the IEP implemented during the relevant time period was somewhat individualized on the basis of assessment and performance. IEP goals and objectives were developed to address Student's area of need in how Student interacts with Student's peers. The PLAAFPs used as the basis for formulating IEP goals and objectives in this area were derived from assessments as well as observation and teacher input. These goals were important in order to help Student with Student's rigid thinking *** at times. However, the only accommodations in the IEP were visual, verbal, and tactile reminders to stay on task. Teachers indicated Student was easily redirected with these accommodations; but, these accommodations did not address the underlying issue of Student's behavior and trying to improve it. Student needed more specific instruction in social skills as recommended in Student's 2016 FIE. The 2016 FIE concluded Student needed small group instruction on using social conversation to learn how to interact with peers and how to interpret ***. Student needed to learn the conversation rules of when to jump into a conversation, what things were appropriate to say to peers, and what things were not appropriate. Student had difficulty with pragmatics. Pragmatics is the social element of conversation and Student could have benefited from training in order to understand if Student was ***. While the IEP's behavioral goals were appropriate, they did not address Student's additional needs in social skills or pragmatics or give Student practical skills to use in the future.

Each IEP from 2011-2018 included a BSIP with the same list of difficult behaviors exhibited by student and stated the behaviors happened "anytime." The BSIP was originally composed when Student was in *** classroom and has not been modified since. The list of difficult behaviors does not match the testimony of the *** principal or the *** grade teachers who indicated Student was typically well behaved. The BSIP in the IEP should be modified to

match Student's current behaviors instead having a laundry list that is no longer an accurate reflection of Student's behavior in class.

The current IEP states the Student teacher ratio should be 1:2 or 1:5. The evidence showed Student functioned well in the general education classroom with an approximate 1:25 ratio. Again, the IEP needed to change this ratio to reflect the actual situation of Student rather than use the same information year after year without revision. The BSIP states Student hits peers one to two times per week, but during the 2017-2018 school year that was not accurate. Student was only involved in *** incidents of physical aggression in the 2017-2018 school year. Again, the BSIP in the IEP should be modified to list Student's current behaviors of hitting *** a year, not *** a week.

The IEP's *** indicate Student's ***. It states the IEP should integrate Student involvement in life outside of the public school system and facilitate ***. The IEP did not have any goals or objectives specific to helping Student ***, or any involvement in life outside of the public school system. Student performed well academically so the goal of *** was appropriate. However, the IEP lacked specificity in helping Student achieve this goal and others related to ***.

2. Least Restrictive Environment

Second, the evidence showed Student was educated in the least restrictive environment. The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment." 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require the continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

Student was in all general education classes with non-disabled peers and has been since ***. On the continuum of educational settings, general education is the least restrictive and a residential treatment center is the most restrictive.

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

Third, the evidence showed Student's services were provided in a coordinated, collaborative manner by key stakeholders. Several ARD meetings occurred over Student's time in the school district. At least one parent, if not both, were present at all ARD meetings as well as a general education teacher, a special education teacher, and an administrator. Parents were in regular contact with the school district as supported by the ARD committee documents and emails between the parents and teachers and administrators. The evidence showed *** classroom teachers for Student and the *** worked together on a regular basis to discuss Student's behaviors and how to address them. The teachers collaborated together and developed a plan for Student after the *** so Student would not be alone with the other students or have an opportunity to engage in another ***. It does not appear this plan was shared with the parents. However, Student never returned to the school district for the plan to be implemented. Based on the record, Parents were in agreement with Student's IEPs and how Student was receiving Student's services. When the parents had any concerns about Student's grades or behaviors, ARDs were held or emails were exchanged with teachers and administration.

4. Academic and Non-Academic Benefits

Fourth, the evidence supports the conclusion Student received both academic and non-academic benefits from the educational program at issue. While Student may not have mastered long-term behavioral goals, Student did show improvement. The IDEA does not require the IEP to guarantee a certain level of accomplishment – only that the IEP is reasonably calculated to meet Student's needs given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. at 999. Furthermore, the school district is not required to provide Student with the best

possible education. Student does not need to improve in every academic and non-academic area to receive an educational benefit. The issue is not whether the school district could have done more. Instead, the inquiry is whether Student received an educational benefit. *V.P.*, 582 F. 2d at 590. The evidence showed Student received more than a de minimus educational benefit from the program provided given Student's unique circumstances. *Andrew F.*, 137 S. Ct at 999.

Student passed all Student's classes and all the STAAR *** exams Student took to date. It is clear from the record Student was successful academically and ***. Student made mostly As and some Bs. Student's teachers noted Student was a good student who succeeded academically and was engaged in classes.

Appropriate behavioral interventions are an important component of FAPE. A need for special education and related services is not limited to academics, but includes behavioral progress and learning appropriate social skills. *Venus Ind. Sch. Dist. v. Daniel S.*, 36 IDELR 185 (2002). Although Student's behavioral progress is difficult to determine when no progress reports were completed or sent to the parents in the 2017-2018 school year, the evidence and teacher testimony confirm Student was easily redirected in class and behaved in many ways as any other *** grader. Student behaves more appropriately in educational environments because of Student's high-to-desperate level of motivation to perform well academically.

The school district should have provided social skills training and pragmatics training to student so Student could learn skills necessary for how to interact with peers more appropriately; however, student was doing well in school and Student's behaviors did not interfere with Student's ability to be successful in the educational environment, nor did they interfere with the learning of others except for *** occasions. Student had *** discipline referral forms during the 2017-2018 school year for inappropriate behavior or comments and *** discipline referral forms for ***. Based on the evidence a total of *** discipline referral forms for the 98 days Student was present during the 2017-2018 school year, teacher testimony, and administrator testimony, Student behaved appropriately more than Student's goal of ***% in Student's IEP. Again, Student was easily redirected and behaved as well as other *** graders.

Student was provided FAPE by the school district. The courts have never specified the four factors must be considered or weighed in any particular way. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293 (5th Cir. 2009). The whole educational experience, and its adaptation to confer “benefits” on the child, is the ultimate statutory goal. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012).

The discussion above about Student’s IEP leaves a mixed result at the conclusion of the first Michael F. factor; however, the analysis does not end here. The IEP may not have addressed Student’s needs in pragmatics or social skills and it used some information from previous years that was no longer correct, but teachers and administrators testified that student was easily redirected and typically well behaved in class. While the IEP need not be the best possible one nor must it be designed to maximize Student’s potential the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *V.P.*, 582 F. 3d at 583; *Andrew F.*, 137 S. Ct. at 988.

The IEP may not have been as individualized as it should have been, but given the evidence, the lack of individualization did not impede Student in receiving an educational benefit and in fact Student was highly successful academically. Even when the IEP factor is weighed in the petitioner’s favor due to lack of individualization, the court looks at all relevant factors together to determine FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 814–15 (5th Cir. 2012). Whether a student demonstrates positive academic and non-academic benefits is “one of the most critical factors in this analysis.” *Id.* (citing *V.P.* 582 F. 3d at 588). In this case, Student received positive academic and non-academic benefit as evidence by Student’s grades, STAAR testing, performance in class, and limited inappropriate behaviors in class.

F. Evaluation

Either a parent of a child or a school district may initiate a request for an evaluation to determine if the child is a child with a disability. 34 C.F.R. § 300.301 (b). The parent must provide consent for the evaluation. 34 C.F.R. § 300.300. Public agencies must ensure children are assessed in all areas related to the suspected disability including, if appropriate, social and emotional status. 34

C.F.R. § 300.304(c)(4).

The evidence showed Student had difficulties in handwriting, pragmatics, and social skills. The school district was aware of these issues since ***, yet the school district never performed evaluations in the following areas: assistive technology, speech therapy for pragmatics, or social skills. Student's *** grade *** teacher testified Student's handwriting was similar to other *** graders and not an issue. There is no evidence to suggest Student's handwriting caused difficulties receiving an educational benefit; therefore, an assistive technology evaluation is not necessary. The 2016 FIE noted Student can have difficulty in pragmatic skills and that Student could benefit from instruction on social conversation. This area is tied to social skills as well because it relates to how Student interacts with Student's peers. The school district's own LSSP testified after a student is removed from school for over 10 days or assigned to the DAEP, she would recommend an FBA. The school district never performed an FBA.

Parents did struggle with Student's behavior at home and felt as if they were walking on egg shells with Student. The emails between parents and school staff touched on the difficulty Student had at school and getting to school on time in the mornings during *** grade. A school district may provide related services that address parental needs. 34 C.F.R. § 300.34(a). Parents testified they wanted a home assessment to address tardy or school refusal behaviors. The tardies occurred in the *** grade and were addressed by detentions. Student only missed *** days of school prior to the *** incident in the 2017-2018 school year. Student was suspended from ***, 2018, and never returned to school. ***. Six days is not a reasonable time period for the school district to be expected to become aware of a school refusal issue and attempt to conduct an in-home assessment. The parents never requested an in-home assessment to help with Student's school refusal or behaviors until April 2018 when Student was no longer attending school in the district.

There is some evidence as to the issues at home due to mother's responses to the assessment in the 2016 FIE and some evidence of times in the *** grade of Student's resistance to going to school on time; however, even if true, it did not affect Student's progress, so no rationale exists for the school district to offer or conduct an in-home assessment. Student's issues at home with *** did not impact

Student's ability to function at school. In this case, Student's behaviors at home were much worse than Student's behaviors at school and did not impede Student's access to Student's education.

Per the 2016 FIE, the school district was aware of Student's lack of social conversational skills and Student's use of inappropriate comments or actions at times. They should have performed the following evaluations: speech therapy for pragmatics or social conversation; social skills to assist with Student's interaction with peers; and an FBA to determine the function of Student's inappropriate comments or actions. Student made significant progress in school; however, the school district under 34 C.F.R. § 300.304 should have conducted additional evaluations in these areas to consider whether Student's IEP should have been revised.

G. Bullying as a Denial of FAPE

Bullying is the unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior must be repeated, or have the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally and excluding someone from a group on purpose. *Government Accountability Office, Report on Bullying (June 2012)* (<http://www.gao.gov/assets/600/591202.pdf>).

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004) (unabated harassment and bullying of high school student made it impossible for student to receive FAPE where student became depressed, harassment continued, and student attempted suicide); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013) (bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied).

Bullying may constitute a denial of a FAPE if school personnel were deliberately indifferent to, or failed to take reasonable steps, to prevent bullying that adversely affects or results in the regression of educational benefit or substantially restricts the student with a disability from accessing educational opportunities. *T.K. and S.K. ex rel K.K. v. New York City Dept. of Educ.*, 779 F. Supp.

2d 289, 316 (S.D. N.Y. 2011) (school district's motion to dismiss denied where allegations that 12-year-old with learning disabilities was denied a FAPE due to persistent bullying by peers – student was ostracized, pushed, peers refused to touch items student touched, and student was ridiculed daily).

The bullying need not be outrageous but it must be sufficiently severe, persistent, or pervasive that it creates a hostile environment for the student with a disability. It is not necessary that Petitioner show the bullying prevented all opportunity for an appropriate education but only that it is likely to affect the opportunity of the student for an appropriate education. *T.K.*, 779 F. Supp. 2d at 317.

Student was picked on at times *** and Student picked on others. The evidence did not show the bullying from others toward Student to be severe, persistent, or pervasive. Student did not indicate an unwillingness to go to school because Student felt Student was bullied, nor did it affect Student's ability to obtain an appropriate education. The bullying arose during ***. There is no credible evidence bullying was a behavioral issue during *** grade. Student received an appropriate education based on Student's grades and teacher testimony of Student's success. The school district did not fail to protect Student from bullying or harassment. Petitioner did not put on any evidence of discrimination or retaliation.

H. Procedural Issues

Petitioner did meet Petitioner's burden on proving the school district violated Student's or Student's parents' procedural rights under the IDEA. Under the IDEA, a denial of FAPE can only be found if the procedural violations: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i-iii).

The record reflects Petitioner's right to a FAPE was not impeded based on the facts and analysis listed above. The parents were active participants in all ARD meetings. The parents communicated with administration and teachers during the relevant time period. They also never sent any emails or raised any issues in ARD meetings stating they were unsatisfied with Student's program or requested changes to Student's program. Parents received the procedural safeguards and prior

written notice at all appropriate times.

The failure of the school district to provide progress reports for the 2017-2018 school year, failure to provide an official letter notifying parents Student did not have to attend the DAEP, or any of the alleged procedural violations did not result in the denial of FAPE. Parents were in regular contact with the school district. They sent emails to teachers and administrators and participated in all ARD meetings. The lack of IEP progress reports did not preclude them from learning of Student's progress through the emails, ARD meetings, or Student's report cards.

No procedural violations impeded Student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. §300.513 (a)(2). As the evidence showed, Student was easily redirected, behavioral incidents were not so frequent as to interfere with learning, and Student was academically successful. ***.

I. Residential Placement at School District Expense

1. Two-part Test

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

2. Test Applied to the Facts

Student received a meaningful educational benefit at HISD; therefore, the Hearing Officer need not address whether or not *** is essential or primarily oriented toward enabling Student to obtain an education. While the Hearing Officer does not negate Student's issues or need for

treatment, Student's most difficult behaviors occur at home and outside of the educational setting. In comparing testimony from staff at *** and *** with testimony from *** teachers and administrators, Student is actually behaving more inappropriately in the therapeutic settings than the educational setting. Several witnesses testified that Student is motivated by school and therefore Student behaves better in that environment.

J. Was the School District's Evaluation Appropriate or Is Petitioner Entitled to an IEE or FBA at School District Expense?

The evidence showed that overall the school district's 2016 FIE met the requirements of the IDEA. 34 C.F.R. § 300.304. The FIE included a review of existing evaluation data and many assessment tools to gather functional, academic, and developmental data as required. 34 C.F.R. § 300.305. The FIE identified Student can have difficulty in pragmatic skills and that Student could benefit from instruction on social conversation. This area is tied to social skills as well because it relates to how Student interacts with Student's peers.

A parent may request an IEE at public expense if the parent disagrees with school district's evaluation. 34 C.F.R. § 300.502(b)(1). If an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation. 34 C.F.R. § 300.502(e).

The school district offered a school district evaluation and psychological evaluation in April 2018 and planned to provide the evaluation once Student returned to the school district. The school district did not offer an FBA. At the time parents requested the IEE, Student was in *** and now Student is in ***. The school district told parents it could not pay for the independent psychologist to travel *** to conduct the evaluation. It was unclear at the time of the independent psychologist's evaluation when Student would return to the school district. The school district is allowed to set the criteria for an IEE, including location. It is within the school district's right to restrict evaluation criteria of an IEE as long as it is consistent with the school district's own criteria for evaluations. Presumably, school district FIEs and psychological evaluations occur in the same geographic area of

the school district. Unfortunately, there is no evidence of the school district's evaluation criteria except for their denial of payment for the independent psychologist to provide testing in ***. The parents unilaterally placed Student in *** and ***. The school district is willing to provide a reevaluation and psychological evaluation upon Student's return to the school district; therefore, the school district should not have to pay for the psychological evaluation conducted ***. The school district is not required to pay for an outside FBA until an FBA is conducted by the school district and Petitioner disagrees with the evaluation.

The school district's 2016 FIE was appropriate and complied with the requirements under the Federal Regulations; therefore, parents are not entitled to an IEE at public expense. The parents are entitled to an FBA provided by the school district as discussed above in regard to evaluations.

K. Override parental consent to new FIE and produce Student for evaluation

A school district may file a due process complaint to override a parent's refusal to consent to a reevaluation. 34 C.F.R. 300.300(c)(ii). The question in this case is whether or not this issue is ripe for decision. Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review. *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000).

Parent admitted she may not have signed the consent for reevaluation form. It is unclear if the parents would or would not consent to an evaluation performed by the school district or if an additional evaluation is even required because Student's most recent evaluation was completed November 2018. Ordering the parents to produce the child for an evaluation is logistically difficult as Student is in *** for an unknown period of time. The evidence showed Student does better when the environment does not change and it is recommended by *** Student stay at Student's current placement for another year. A new evaluation may be necessary when and if Student returns to the school district because Student has been working on Student's behaviors while in treatment. At this time, the issue of overriding parental consent is not ripe for decision. If Student returns to the school district, the school district should seek parental consent for a reevaluation.

X. CONCLUSIONS OF LAW

1. Student was provided FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Endrew F.*, 137 S. Ct. 988.
2. Petitioner failed to meet Petitioner's burden of proof alleging Respondent failed to protect Student from bullying. *T.K.*, 779 F. Supp. 2d at 316. Petitioner did not put on any evidence of discrimination or retaliation and therefore did not meet Petitioner's burden on these issues. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).
3. Respondent failed to timely and appropriately evaluate Student in all areas of suspected disability. 34 C.F.R. § 300.304.
4. Respondent complied with parental and student procedural rights under the IDEA. Any procedural violations did not impede Petitioner's right to FAPE, significantly impede the parent's opportunity to participate in decision-making regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. §§ 300.503(a)(c), 300.504(a)(d), 300.513(a)(2).
5. All of Petitioner's claims arising under any laws other than IDEA are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503(a); 300.507, 19 Tex. Admin. Code § 89.1151(a).
6. Respondent's June 2016 FIE was appropriate under the IDEA and, therefore, Petitioner is not entitled to reimbursement for the cost of the IEE secured at parental expense. 34 C.F.R. § 300.502(b)(3).
7. Respondent's request to override parental consent to a new FIE and produce Student for the evaluation is not ripe for decision. 34 C.F.R. § 300.300(c)(ii), *Foster*, 205 F.3d at 857.

XI. ORDERS

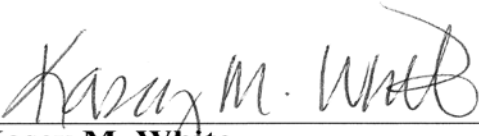
Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief is **GRANTED IN PART AND DENIED IN PART AS FOLLOWS:**

1. Respondent shall conduct evaluations on the Student in the following areas: speech therapy as it relates to pragmatics, social skills assessment, and an FBA within 30 days of Student's return to HISD. They shall complete the assessments within 45 school days of receiving parental consent;

2. Respondent shall convene an ARD meeting within 30 days of receipt of the assessments to determine if a new or revised IEP is necessary based on the evaluation reports of the speech therapy assessment, social skills assessment, and FBA.
3. Petitioner's request for residential placement at *** is **DENIED**.
4. Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are dismissed as outside the jurisdiction of the hearing officer.

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

SIGNED February 8, 2019.



Kasey M. White
Special Education Hearing Officer
For the State of Texas

XII. NOTICE TO THE PARTIES

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