

**DOCKET NO. 241-SE-0518**

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

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Petitioner \*\*\* by Petitioner’s next friend \*\*\* (collectively, Petitioner or Student) brought this action (Complaint) against the Florence Independent School District (Respondent or District) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA) and its implementing state and federal regulations. Petitioner filed Petitioner’s request for hearing on May 10, 2018 with a Notice of Filing of a Special Education Due Process Hearing issued by the Texas Education Agency on May 14, 2018.

The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) by failing to develop an Individualized Education Program (IEP) reasonably calculated to allow Student to make educational progress in light of Student’s unique circumstances.

The hearing officer concludes Student was not denied FAPE by the District during the relevant time period and is therefore not entitled to a residential placement at District expense. Student’s IEP, however, was not properly implemented in the area of counseling and Student is entitled to compensatory relief, as specified below.

**A. Continuances and Extensions of the Decision Due Date**

One continuance and two extensions of the decision due date were granted in this case. The initial scheduling order (Order No. 1) set the due process hearing for June 28, 2018 with a decision due on July 28, 2018. During the initial prehearing conference on June 6, 2018 Respondent sought an opposed continuance of the hearing and extension of the decision due date. The hearing officer granted a continuance and reset the due process hearing for September 11-13, 2018 with a decision due on October 15, 2018 (Order No. 3). A second extension of the decision due date was granted at the conclusion of the hearing to allow the parties an opportunity to submit written closing arguments with the benefit of the hearing transcript with a decision due date of October 29, 2018 (Order No. 11).

**B. Legal Representatives**

Student has been represented throughout this litigation by Student's legal counsel, Devin Fletcher and Meera Krishnan, of the Cuddy Law Firm, PLLC. The District has been represented throughout this litigation by its legal counsel Kelly Shook of Walsh, Gallegos, Treviño, Russo, and Kyle, PC. Jamie Turner, of the same firm, filed a Notice of Appearance as co-counsel for the District on August 6, 2018.

**C. Resolution Session and Mediation**

The parties agreed to attempt mediation in lieu of a resolution session. The parties met in mediation on June 12, 2018. The mediation was unsuccessful.

**D. Preliminary Motions and Orders**

The hearing officer issued orders on several preliminary motions. Respondent's sufficiency challenge was denied on May 25, 2018 (Order No. 2). Petitioner's Motion for Reconsideration of the Timelines was denied on July 3, 2018 (Order No. 6). Petitioner's Amended Motion for Diagnostic Evaluation was denied on August 17, 2018 (Order No. 7).

Petitioner's Motion for Telephonic Testimony was granted on August 30, 2018 (Order No. 8). Respondent's Motion to Supplement Disclosure was granted in part and denied in part on September 10, 2018 (Order No. 10). Disputes concerning subpoenas for records were disposed of in Order No. 5 issued on June 29, 2018 and Order No. 9 issued on September 10, 2018.

## II. DUE PROCESS HEARING

The due process hearing was conducted on September 11-13, 2018 in Florence, Texas. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's legal counsel, Devin Fletcher and Meera Krishnan. Student's \*\*\*, also Student's next friend in this matter, attended the hearing.

Respondent continued to be represented by its legal counsel, Kelly Shook and Jamie Turner. The District's Superintendent, Paul Michaelawicz, attended as the party representative.

The parties filed timely written closing briefs. A decision is due on October 29, 2018.

## III. ISSUES

### A. Petitioner's Issues

Petitioner challenges Student's program of special education and related services beginning in May 2017 and continuing through the 2017-2018 school year. Petitioner raises the following legal issues for decision in this case:

FAPE: Whether the District denied Student a free, appropriate public education by failing to:

- Develop an appropriate Behavior Intervention Plan (BIP) for Student.
- Develop an IEP for Student that included Present Levels of Academic and Functional Performance (PLAAFS).

- Develop an IEP with appropriate goals and objectives to address Student's deficits in all academic and non-academic areas, including behavior.
- Provide Student with instruction that was appropriately ambitious in light of Student's circumstances.
- Consider and recommend appropriate research-based teaching methods to address Student's needs.
- Provide Student necessary related services in the areas of counseling and social skills training.
- Implement Student's IEP as to its goals and Student's progress on them, provide instruction and accommodations when Student did not attend school during the 2016-2017 school year, and follow Student's BIP.

PROCEDURAL: Whether the District impeded Student's parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student by:

- Failing to provide progress reports as required under IDEA and its implementing regulations; and
- Failing to provide Student's parent with Prior Written Notice.

PLACEMENT: Whether the District failed to educate Student in the least restrictive environment during the 2017-2018 school year.

## **B. The School District's Legal Position**

The District generally denies the allegations in Petitioner's Complaint and maintains it provided Student FAPE in the least restrictive environment at all relevant times. The District raised the following additional legal issues:

PLEA TO THE JURISDICTION: Whether the hearing officer has jurisdiction to resolve claims arising under any laws other than the IDEA and whether such claims should be dismissed.

STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued prior to May 10, 2017 should be dismissed as outside the one year statute of limitations rule as applied in Texas.

COUNTERCLAIM: Whether the District is entitled to an order overriding Student's parent's lack of consent for an evaluation.

#### IV. REQUESTED RELIEF

##### A. Petitioner's Requested Relief

Petitioner seeks the following items of relief:

1. A finding Student was denied FAPE.
2. An appropriate educational placement for Student for the 2018-2019 and 2019-2020 school years.<sup>1</sup>
3. An Independent Educational Evaluation by a licensed psychologist of the parent's choosing.
4. An Independent Educational Evaluation by a Board Certified Behavioral Analyst.
5. An order directing Student's Admission, Review, and Dismissal (ARD) Committee to convene upon receipt of the evaluation(s) in Items 3 and 4 above to develop an appropriate IEP for Student to include an identified public or private educational program in which the revised IEP will be implemented.
6. Compensatory educational services by a qualified teacher or teachers until such time as Student is on grade level in reading and math.
7. An order directing the District to provide Student with appropriate positive behavioral interventions and supports.
8. An order directing the District to provide Student social skills training multiple times a week through the end of the 2018-2019 school year.
9. An order directing the District to review its ARD Committee practices and provide notice to ARD Committee participants of their obligation to consider research-based, peer-reviewed methodologies as a component of Student's IEP.
10. All other remedies to which Petitioner may be entitled under IDEA.

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<sup>1</sup> Petitioner later clarified Student's placement request is limited to the 2018-2019 school year. Due Process Hearing Transcript at 35 (hereinafter Tr. at \_\_\_).

**B. Respondent's Requested Relief**

The District's counterclaim to override lack of parental consent for a re-evaluation was withdrawn during the initial prehearing conference on June 6, 2018 after consent was provided on June 1, 2018.

**V. FINDINGS OF FACT**

1. Student has attended school in the District since 2009 when Student enrolled in \*\*\*. Student is \*\*\* years old and in \*\*\* grade at \*\*\* in Florence, Texas.<sup>2</sup> Student has lived with \*\*\* since Student's \*\*\*.<sup>3</sup> \*\*\* is Student's primary caretaker and guardian and makes Student's educational and medical decisions.<sup>4</sup> Student's interests include \*\*\*.<sup>5</sup>
2. Student receives special education and related services in the District as a student with autism, an intellectual disability, and a speech impairment.<sup>6</sup> Student's medical diagnoses include \*\*\*, autism, \*\*\*, and \*\*\*.<sup>7</sup> Student requires \*\*\* support throughout the school day and \*\*\* assistance and support in \*\*\* classes.<sup>8</sup>
3. Student's most recent Full and Individual Evaluation (FIE) was completed in May 2015. At the time, Student was served in a special education classroom for all academics, received speech and occupational therapy, and had a Behavior Intervention Plan (BIP).<sup>9</sup>
4. The May 2015 FIE found Student continued to exhibit a language delay in the areas of expressive/receptive language and pragmatic language. Continued eligibility as a student with a speech impairment was recommended, as was continued speech therapy.<sup>10</sup> Continued occupational therapy was recommended to address delays in fine and visual motor and sensory processing skills.<sup>11</sup>

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<sup>2</sup> J. Ex. 35 at 2; P. Ex. 2 at 1; Tr. at 382.

<sup>3</sup> J. Ex. 1 at 7; J. Ex. 9 at 9; Tr. at 372, 665.

<sup>4</sup> Tr. at 372-373.

<sup>5</sup> J. Ex. 1 at 7; J. Ex. 2 at 2; J. Ex. 3 at 6, 7; J. Ex. 9 at 9; Tr. at 281, 307-308, 334, 568.

<sup>6</sup> J. Ex. 1 at 1; J. Ex. 3 at 1; J. Ex. 5 at 1, 2.

<sup>7</sup> J. Ex. 1 at 8; J. Ex. 9 at 2, 9; Tr. at 385-386, 387, 493, 640.

<sup>8</sup> Tr. at 172, 569.

<sup>9</sup> J. Ex. 1 at 1.

<sup>10</sup> J. Ex. 1 at 4, 21-22, 23, 25.

<sup>11</sup> J. Ex. 1 at 6-7, 23.

5. Student was identified as a student with an intellectual disability during Student's 2012 FIE. Achievement testing showed somewhat typical cognitive skills in verbal and nonverbal abilities (Woodcock Johnson, Third Edition: Verbal Ability - \*\*\*, Fluid Reasoning - \*\*\*, and Visual Spatial - \*\*\*). Student's short-term memory, however, was approximately \*\*\* standard deviations below average and \*\*\* low.<sup>12</sup> The May 2015 FIE found Student's cognitive skills were in the \*\*\* low range with \*\*\* low adaptive behaviors. Student continued to meet criteria as a student with an intellectual disability.<sup>13</sup>
6. Continued eligibility as a student with an autism spectrum disorder was recommended after Student was assessed using the Gilliam Autism Rating Scale, Second Edition (GARS-2) and the Social Responsiveness Scales, Second Edition (SRS-2), the latter an assessment to identify social impairments associated with autism spectrum disorders and quantify their severity. Student's \*\*\* rated Student in the severe range with regard to social awareness, cognition, and communication. Student's teacher's rating fell in the mild to moderate range in those domains, indicating clinically significant behaviors in the home and school setting.<sup>14</sup> Direct social skills instruction with reinforcement of skills across all environments was recommended.<sup>15</sup>
7. Continued classroom accommodations, modified instruction, sensory breaks, clearly defined expectations, opportunities for peer recognition, and a schedule with minimal unstructured time were recommended. The May 2015 FIE also recommended the District seek consent \*\*\* to consult with Student's physician to explore whether Student may be a student with an Other Health Impairment.<sup>16</sup> She has not consented to date.<sup>17</sup>
8. Student's \*\*\* has declined District requests to evaluate Student, limited the scope of evaluations, or declined requests to consult with or get information from Student's private medical providers.<sup>18</sup> The District provided \*\*\* Notices of Proposal to Evaluate on September \*\*\*, 2016 and again on February \*\*\*, 2017 seeking further information about Student's emotional/behavioral status, including a proposal to conduct a Functional Behavioral Assessment (FBA).<sup>19</sup> Student's \*\*\* consented to an FBA on March \*\*\*, 2017.<sup>20</sup> She revoked consent for communication between the District and Student's other

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<sup>12</sup> P. Ex. 3 at 36; Tr. at 436-437.

<sup>13</sup> J. Ex. 1 at 21, 26.

<sup>14</sup> J. Ex. 1 at 21, 27.

<sup>15</sup> J. Ex. 1 at 24; J. Ex. 3 at 2.

<sup>16</sup> J. Ex. 1 at 23.

<sup>17</sup> Tr. at 387.

<sup>18</sup> Tr. at 386, 656-657.

<sup>19</sup> J. Ex. 13; J. Ex. 14.

<sup>20</sup> J. Ex. 14 at 1-4.

providers in November 2017.<sup>21</sup> She requested further testing in November 2017 and then withheld consent at the December 2017 ARD Committee meeting.<sup>22</sup>

9. Student's \*\*\* has a qualified right under IDEA to withhold consent for evaluations proposed by the District. She also has a right to withhold consent for information from or consultation with Student's outside medical providers. Updated medical information, however, would be beneficial to inform educational planning and clarify the impact Student's \*\*\* and \*\*\* may have on Student's educational needs.<sup>23</sup>
10. Student has \*\*\* behavioral challenges at school.<sup>24</sup> Student loses Student's temper, becomes upset or frustrated \*\*\*, and is impulsive. Student has a short attention span, exhibits a high degree of distractibility, and is frequently unfocused.<sup>25</sup> Student can be defiant and \*\*\*, and refuses to follow directives from adults.<sup>26</sup> These behaviors are most present when Student is not given what Student wants or does not get Student's way.<sup>27</sup>
11. Student has social skills deficits.<sup>28</sup> Student \*\*\*.<sup>29</sup> Student \*\*\*, as opposed to being deliberately aggressive with peers.<sup>30</sup> Student \*\*\* a means of escape when a demand is made of Student.<sup>31</sup> \*\*\* Student's behaviors at school were generally manageable. Student responded to redirection and other de-escalation strategies when Student got upset.<sup>32</sup>
12. Student's behavior is an impediment to accessing academic demands.<sup>33</sup> Student may resist the individuals providing instruction because they place demands on Student.<sup>34</sup> Student engages best in preferred classes at school, such as \*\*\*.<sup>35</sup> Student may resist efforts to evaluate Student and put forth minimal or inconsistent effort during an

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<sup>21</sup> R. Ex. 2; R. Ex. 5 at 32; Tr. at 518.

<sup>22</sup> Tr. at 553-554.

<sup>23</sup> Tr. at 641-643, 656-657, 698.

<sup>24</sup> Tr. at 313, 704.

<sup>25</sup> J. Ex. 1 at 10-11, 21, 23; Tr. at 172, 594.

<sup>26</sup> R. Ex. 3 at 3; Tr. at 172, 202, 665.

<sup>27</sup> Tr. at 71, 173, 595.

<sup>28</sup> J. Ex. 1 at 24; J. Ex. 8 at 3; Tr. at 300.

<sup>29</sup> Tr. at 309-310, 348, 704.

<sup>30</sup> R. Ex. 5 at 18; Tr. at 300, 331-332, 570.

<sup>31</sup> Tr. at 309, 313.

<sup>32</sup> Tr. at 195-196, 578-579.

<sup>33</sup> Tr. at 300.

<sup>34</sup> Tr. at 313, 597-598.

<sup>35</sup> Tr. at 568, 575-576.



- evaluation, which may impact the results.<sup>36</sup> Gaining rapport with Student is important for Student to benefit from instruction and participate in testing and Student responds best to someone Student trusts.<sup>37</sup>
13. Student is frequently absent from school.<sup>38</sup> Some absences can be explained by therapy and medical appointments.<sup>39</sup> Absences cannot be explained by lack of transportation, which the District offered, and Student's \*\*\* declined.<sup>40</sup> Student's attendance impacts Student's ability to make academic and behavioral progress and Student's lack of progress is partially explained by lack of educational opportunity given Student's poor attendance.<sup>41</sup>
14. Student's \*\*\* attends all ARD Committee meetings and actively participates. She seeks and receives clarification from District personnel when she has questions.<sup>42</sup> Meetings with District leadership to discuss Student and Student's education were held at her request.<sup>43</sup> She made the District aware of the difficulties getting Student to engage in non-preferred activities and go places, including school.<sup>44</sup> Student's \*\*\* consistently expressed concerns about Student not attending school and her desire Student return.<sup>45</sup> Student's attendance was a regular subject at ARD Committee meetings.<sup>46</sup>
15. Student stopped attending school and missed most of the rest of the 2016-2017 school year after Student was \*\*\* after becoming physically aggressive in late September 2016.<sup>47</sup> Student's \*\*\* grew concerned for Student's well-being at school after this incident.<sup>48</sup> The District investigated \*\*\* and found it was warranted under the circumstances.<sup>49</sup>

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<sup>36</sup> J. Ex. 1 at 21; Tr. at 56, 500, 643-644, 655.

<sup>37</sup> J. Ex. 4 at 1, 2; Tr. at 282-283, 293, 294, 650, 651-652.

<sup>38</sup> J. Ex. 1 at 21; J. Ex. 2 at 1; J. Ex. 19 at 1, 2; R. Ex. 1; R. Ex. 3 at 5; Tr. at 71, 119, 126, 142, 275, 567, 608, 650.

<sup>39</sup> P. Ex. 9 at 55, 70, 132; Tr. at 127, 407.

<sup>40</sup> Tr. at 392.

<sup>41</sup> Tr. at 80-81, 90-91, 127, 142, 157, 644, 646, 728-729.

<sup>42</sup> J. Ex. 5 at 29; J. Ex. 8 at 1; R. Ex. 5 at 1-3; Tr. at 509, 524, 535, 714.

<sup>43</sup> R. Ex. 4 at 4; R. Ex. 5 at 40; R. Ex. 9 at 2; Tr. at 73, 77-78, 520, 713-714.

<sup>44</sup> Tr. at 80, 280-281.

<sup>45</sup> J. Ex. 3 at 4, 7; P. Ex. 9 at 84; Tr. at 314, 315.

<sup>46</sup> J. Ex. 5 at 2; Tr. at 511, 741-742, 771-772.

<sup>47</sup> J. Ex. 5 at 2; J. Ex. 3 at 4; Tr. at 723, 724, 745

<sup>48</sup> Tr. at 356.

<sup>49</sup> Tr. at 726-727.

16. Student has a history of escape motivated and attention/tangible seeking behaviors.<sup>50</sup> An FBA conducted by a Board Certified Behavior Analyst (BCBA) from the Region 13 Educational Service Center in March 2016 found Student's behavior was multiply controlled. Another FBA by a Region 13 Behavior Interventionist conducted in November 2016 concluded the function of Student's behavior was escape. Specifically, when Student becomes frustrated Student resorts to increasingly disruptive and aggressive behavior to make a task/demand go away.<sup>51</sup>
17. Student frequently attempted to leave school on the days Student attended.<sup>52</sup> This elopement behavior satisfied Student's desire to escape when unwelcome demands are placed on Student.<sup>53</sup> When Student eloped from school, Student was intent on returning home.<sup>54</sup> The District developed an elopement plan to address how to intervene when Student left the classroom or school building to ensure Student arrived home safely and someone was home.<sup>55</sup> Student may or may not return to school after leaving during the day.<sup>56</sup>
18. On December \*\*\*, 2016, at which time Student had not attended school in almost three months, Student's ARD Committee met and recommended a parent needs assessment to help facilitate Student's return to school.<sup>57</sup> The District contracted with an experienced BCBA to conduct the assessment, which was completed in January 2017. The BCBA recommended in-home and parent training, an FBA in the home setting, and a new BIP with family training on its implementation.<sup>58</sup> The ARD Committee discussed doing Student's three year evaluation, due in May 2018, early to obtain further information about Student's needs. Student's \*\*\* wanted to discuss evaluations at a later date.<sup>59</sup>
19. The District contracted with the same BCBA who conducted the parent needs assessment to do an FBA of Student, which was completed in April 2017. The BCBA reviewed Student's educational records, including Student's May 2015 FIE, current BIP, interviewed Student's \*\*\*, and conducted behavioral observations of Student in the home.<sup>60</sup>

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<sup>50</sup> J. Ex. 2 at 2; J. Ex. 5 at 29; Tr. at 338.

<sup>51</sup> J. Ex. 2 at 2; J. Ex. 5 at 3.

<sup>52</sup> Tr. at 183.

<sup>53</sup> J. Ex. 2 at 2.

<sup>54</sup> Tr. at 337-338, 588.

<sup>55</sup> R. Ex. 6; Tr. at 128-134.

<sup>56</sup> Tr. at 135.

<sup>57</sup> J. Ex. 2 at 1; Tr. at 745.

<sup>58</sup> J. Ex. 2 at 2-3; R. Ex. 14 at 6.

<sup>59</sup> J. Ex. 5 at 30.

<sup>60</sup> J. Ex. 3 at 1; Tr. at 275, 276-277.

20. Student's \*\*\* completed two behavior rating scales. Access to tangibles was rated as Student's highest reinforcer (6), with attention and escape/avoid rated next highest (5). Sensory was rated the lowest (1).<sup>61</sup> She completed the Functional Analysis Screening Tool, Second Edition (FAST-2). Attention and access to tangibles were rated as Student's highest reinforcers. Escape maintained behaviors were rated as one of the higher possible functions. The results indicated Student's behaviors are multiply controlled.<sup>62</sup> The BCBA observed verbal protesting or non-compliance when a demand was placed on Student, attention was given to others, or Student was denied access to items. Observed consequences of these behaviors at home included attention, being given what Student wanted, or access to preferred activities.<sup>63</sup>
21. Variables operating to maintain Student's challenging behaviors, including \*\*\* appeared to be reinforced by escape from demands and attention. Escape, access to tangibles, and attention negatively reinforce Student's challenging behaviors.<sup>64</sup> Because escape from demands is a main function of Student's behaviors, interventions should not allow Student to escape non-preferred tasks. To promote extinction of Student's desire to escape, demands of Student must be followed through until the demand is met, even in the face of strong protest. Student's other attention seeking behaviors should be ignored.<sup>65</sup>
22. The BCBA made comprehensive recommendations for addressing Student's behaviors, including a preference assessment with regular updates to determine Student's current reinforcers, a higher density schedule of reinforcement during the day, scheduled breaks and predetermined choices of activity, a token economy system, clear and consistent behavioral expectations, and direct social skills instruction. Recommended behavior intervention strategies included predictable consequences when Student leaves the classroom, behavioral interventions aimed at not allowing Student to escape a demand or non-preferred tasks, utilization of a cool down area, and loss of tokens/preferred items. Power struggles and negotiating consequences should be avoided.<sup>66</sup>
23. The BCBA, also a certified special education teacher, recommended teaching strategies to address Student's escape/avoidance behavior when making academic demands, including frequent reinforcement, mixing/varying instructional demands, interspersing easy and hard demands, fast-paced instruction, and use of prompts. Instructional strategies to address Student's tangible/attention seeking behavior were offered with the goal of finding competing reinforcers for elopement and aggression. The BCBA also

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<sup>61</sup> J. Ex. 3 at 5.

<sup>62</sup> J. Ex. 3 at 6; Tr. at 284-285.

<sup>63</sup> J. Ex. 3 at 8; J. Ex. 5 at 3.

<sup>64</sup> J. Ex. 3 at 8.

<sup>65</sup> J. Ex. 3 at 9; Tr. at 310.

<sup>66</sup> J. Ex. 3 at 9.

recommended data collection strategies, staff training on Applied Behavioral Analysis strategies, and family training on Student's BIP.<sup>67</sup>

24. Student's ARD Committee met on May \*\*\*, 2017 for Student's annual review and to review the BCBA's FBA.<sup>68</sup> The Speech and Language Pathologist, Licensed Specialist in School Psychology (LSSP), and Occupational Therapist each reported they were unable to consistently work with Student due to poor attendance.<sup>69</sup> Student was absent most of the 2016-2017 school year, so Student's PLAAFPs were based on information from when Student came to school. The ARD Committee reviewed Student's PLAAFPs in Reading, Speech/Related Services, Written Expression, Math, and \*\*\*, \*\*\*, and Other (\*\*\*)<sup>70</sup>.
25. Student's proposed IEP for the 2017-2018 school year included three Behavioral goals, two goals in Reading, and goals in Math, Writing, \*\*\*, Speech Therapy, Counseling, and \*\*\*. In addition to occupational therapy, Student's IEP called for \*\*\* services in the special education setting \*\*\* minutes per week for seven out of nine weeks per grading period.<sup>71</sup> The proposed IEP did not include a specific goal to address attendance.<sup>72</sup>
26. Student had last attended school on \*\*\*, 2017 and attended approximately \*\*\* primarily partial days of school during the 2016-2017 school year. Student's behaviors when in attendance were generally not aggressive in nature, with only one instance of physical aggression. Off task and non-compliant behaviors were more prevalent.<sup>73</sup>
27. The May 2017 ARD Committee discussed Student's instructional setting when Student returned to school in the fall and established Student's schedule of services for the 2017-2018 school year. Student's proposed placement for the 2016-2017 school year was a combination of the general education classroom with supports for \*\*\*, and \*\*\* and instruction in a resource classroom for \*\*\*, Math, and Reading. Student's IEP classified Student's instructional setting as \*\*\* at least \*\*\*% and less than \*\*\*%.<sup>74</sup>
28. The ARD Committee considered and rejected placement only in a general education classroom because Student required individualized instruction and Student's competencies were well below grade level, so Student's instructional needs would eliminate essential components of the general education curriculum or activity. Student's related services also required a small group setting and less distracting environment than

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<sup>67</sup> J. Ex. 3 at 9-11.

<sup>68</sup> J. Ex. 5.

<sup>69</sup> J. Ex. 5 at 2.

<sup>70</sup> J. Ex. 5 at 2-4, 30.

<sup>71</sup> J. Ex. 5 at 27.

<sup>72</sup> Tr. at 733-734.

<sup>73</sup> J. Ex. 5 at 3.

<sup>74</sup> J. Ex. 5 at 26-28.

- a general education classroom. A \*\*\* classroom was considered, but rejected. Harmful effects of removal from the general education environment, including lack of opportunity for appropriate social interaction and role models, stigmatization, and reduced access to the full range of curriculum and instructional opportunities were considered. The ARD Committee found benefits of removal from the general education classroom outweighed the potential harmful effects.<sup>75</sup>
29. Student's IEP called for periodic reports on Student's progress towards meeting Student's annual goals to be provided concurrent with the issuance of report cards.<sup>76</sup> The District uses software to generate progress reports.<sup>77</sup> Student's case manager and individual instructors, including later Student's \*\*\* teacher, prepared Student's progress reports.<sup>78</sup>
30. Student's ARD Committee recommended ESY (ESY) services during the summer of 2017 to facilitate Student's return to school and target behavioral goals. The District again contracted with the BCBA who conducted the January 2017 parent needs assessment and April 2017 FBA to provide Student's ESY services.<sup>79</sup>
31. The May 2017 ARD Committee reviewed the BCBA's FBA and Student's current BIP, which targeted two behaviors – reduction of aggression and increased time in scheduled instructional areas through use of the same strategies and interventions. The BIP provided extensive guidance to staff on appropriate interventions to reduce Student's motivation to escape demands and request unavailable items.<sup>80</sup> Student's ARD Committee, which included the same BCBA who conducted the April 2017 FBA and who would provide Student's ESY services, found Student's BIP was appropriate for ESY and to transition back to school in the fall, subject to any needed changes identified over the summer.<sup>81</sup>
32. The District provided Prior Written Notice of Student's continued need for special education and related services and its intent to implement the IEP developed at the May 2017 ARD Committee meeting.<sup>82</sup>
33. The BCBA provided Student's ESY services over \*\*\* approximately two hour long sessions between \*\*\*, 2017 and \*\*\*, 2017 in the home and clinic settings. The home sessions helped build rapport with Student and gain Student's trust. The clinic sessions focused on some reading and math instruction, tolerating longer work sessions, and

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<sup>75</sup> J. Ex. 5 at 23-25.

<sup>76</sup> J. Ex. 5 at 7-16.

<sup>77</sup> Tr. at 67.

<sup>78</sup> Tr. at 121.

<sup>79</sup> J. Ex. 4; J. Ex. 5 at 26, 30; Tr. 276, 282, 292.

<sup>80</sup> J. Ex. 5 at 34-37.

<sup>81</sup> J. Ex. 5 at 30.

<sup>82</sup> J. Ex. 5 at 32.

- complying with requests from adults.<sup>83</sup> Student responded to the intensive instruction and interventions provided by the BCBA. With proper reinforcement, over time Student could work on some academic tasks and complied with requests and Student's behavior did not impede Student's progress.<sup>84</sup> The BCBA also worked with Student's \*\*\* to learn which behaviors to ignore and offered her strategies on getting Student up in the morning.<sup>85</sup>
34. In a report dated July \*\*\*, 2017 the BCBA made extensive recommendations for Student's transition back to school and instruction, including use of preferential reinforcers and a high density schedule of reinforcement, building choice into activities, and clear and consistent behavioral expectations and consequences. Escape was again noted as a main function of Student's behavior. The BCBA recommended family training on Student's BIP to help Student begin to attend school regularly.<sup>86</sup>
35. A staffing was held on August \*\*\*, 2017 to plan for Student's transition back to school.<sup>87</sup> Academic demands would be lessened initially so Student would feel successful.<sup>88</sup> Training was undertaken to prepare the District personnel who would work with Student. The BCBA trained Student's \*\*\* and staff on the functions of Student's behavior and appropriate interventions. The BCBA and District LSSP trained staff on basic Applied Behavioral Analysis strategies.<sup>89</sup> The District LSSP provided training and direction to staff on Student's BIP, elopement plan, and data collection.<sup>90</sup>
36. Student's \*\*\* gave Student a cell phone for safety and to reach her if Student is having a difficult time. School policy allows students to have phones at school, but their use is restricted to certain times.<sup>91</sup> Student would \*\*\*. Student would \*\*\*.<sup>92</sup> Student's teachers did not take Student's phone away to avoid escalating the situation.<sup>93</sup>
37. Student's cell phone use at school and Student's \*\*\* response when called to pick Student up is a point of contention between the parties. The District made efforts to

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<sup>83</sup> J. Ex. 4 at 1, 2; Tr. at 282.

<sup>84</sup> J. Ex. 4 at 1.

<sup>85</sup> Tr. at 279, 310, 315.

<sup>86</sup> J. Ex. 4 at 2-3.

<sup>87</sup> J. Ex. 6; Tr. at 513-514.

<sup>88</sup> Tr. at 286, 319.

<sup>89</sup> Tr. at 288-289, 316, 318.

<sup>90</sup> R. Ex. 5 at 11-13, 17-18.

<sup>91</sup> J. Ex. 8 at 3; Tr. at 356, 357, 408.

<sup>92</sup> J. Ex. 8 at 3; Tr. at 153, 605, 653, 659, 685.

<sup>93</sup> Tr. at 341, 604.

- create shared expectations on phone use and the need for consistency and attendance, but continues to view Student's \*\*\* as an impediment to consistent attendance. \*\*\*.<sup>94</sup> \*\*\*.<sup>95</sup>
38. Student began to exhibit increased aggression soon after the 2016-2017 school year began, particularly with staff, \*\*\*, both events without clear antecedents. On September \*\*\*, 2017 \*\*\*. Student was involved \*\*\*.<sup>96</sup>
39. Student's ARD Committee convened on October \*\*\*, 2017 to consider changes to Student's program and educational placement. As of the meeting date, Student was attending school and had missed \*\*\* full days and \*\*\* half days since the beginning of the school year.<sup>97</sup>
40. Student's school elopement behavior continued at the beginning of the school year, but was improving. The ARD Committee discussed Student's current behavior of \*\*\*. Student was fairly compliant in the mornings, \*\*\*, and the loud, unstructured environment. Student's behavior interfered with Student's work on academics, \*\*\*. Student produced some work, though an inconsistent amount every day, and Student's engagement in class declined as the day went on. Student required a teacher to student ratio of \*\*\* during instruction in the general education classroom.<sup>98</sup>
41. The District LSSP recommended a more restrictive \*\*\* educational placement on the \*\*\* campus for Student with \*\*\* adults, a certified special education teacher and an instructional aide. The BCBA seconded the proposal because Student was choosing to leave the larger educational environment and a more restrictive setting may help reduce Student's escape-motivated behaviors. A higher density reinforcement schedule would also be available in a \*\*\* setting.<sup>99</sup>
42. The ARD Committee recommended Student receive instruction in a \*\*\* classroom given Student's lack of success in the general education setting with supports.<sup>100</sup> The \*\*\* classroom was referred to as \*\*\*.<sup>101</sup> The District LSSP and Student's \*\*\* prepared the classroom, \*\*\*.<sup>102</sup> The room is sufficient size for \*\*\* desks and has an attached \*\*\*

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<sup>94</sup> Tr. at 79-80, 340, 351, 591, 659-660, 715-716, 742-743.

<sup>95</sup> Tr. at 704.

<sup>96</sup> P. Ex. 15; J. Ex. 8 at 2, 3; Tr. at 188-189.

<sup>97</sup> J. Ex. 8 at 1-2.

<sup>98</sup> J. Ex. 8 at 2.

<sup>99</sup> J. Ex. 8 at 2; Tr. at 297, 336.

<sup>100</sup> J. Ex. 8 at 3.

<sup>101</sup> P. Ex. 7 at 8; P. Ex 9 at 17.

<sup>102</sup> P. Ex. 9 at 19-24; Tr. at 298, 319.

room, bathroom, and supply closet. \*\*\*.<sup>103</sup> Student's \*\*\* accepted the ARD Committee's recommendation of parent training \*\*\* minutes once per week.<sup>104</sup>

43. A \*\*\* instructional setting is recommended for some students with disabilities. One method of \*\*\* instruction involves the student \*\*\* after meeting behavioral expectations.<sup>105</sup> The program was based on four concepts: data-based decision-making using a Daily Behavior Report Card, direct social skills instruction, check-in/check-out, and a daily system of reinforcement based on Student's current reinforcers. The goal was to \*\*\* Student back into the \*\*\* after successful completion of a tiered system where Student would earn "\*\*\* classes," or \*\*\* time, through behavioral improvement.<sup>106</sup> Behavioral strategies used included a Daily Behavior Report Card and token economy system where Student could earn out classes, lunch with friends, or food items.<sup>107</sup> To encourage attendance, Student's teachers did not penalize Student for incomplete work and instead graded the work Student was able to do.<sup>108</sup>
44. The District developed a method of tracking Student's behavior and behavioral progress called the Daily Behavior Report Card.<sup>109</sup> Student's behavior was rated each period on a five point scale from 0 (regression) to 4 (goal was met). This helped capture Student's behavior for purposes of earning \*\*\* time and evaluating progress on Student's behavioral goals and objectives.<sup>110</sup> As recommended by the April 2017 FBA, the District conducted a preference assessment to determine what is reinforcing to Student, and the results helped inform the food items Student could earned with Student's daily points.<sup>111</sup> Each period represented a new chance to earn points towards preferred reinforcers such as \*\*\*. \*\*\* was provided copies of Student's Daily Behavior Report Card.<sup>112</sup>
45. The October 2017 ARD Committee adopted a new BIP specifically targeting the escape function of Student's behavior when presented with an undesirable task or situation, including antecedent and consequence interventions, and reinforcement strategies.<sup>113</sup> The ARD Committee discussed Student's social skills needs, including a need for continued direct instruction in \*\*\* class. Student would also participate in a campus-

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<sup>103</sup> Tr. at 154.

<sup>104</sup> J. Ex. 8 at 4.

<sup>105</sup> Tr. at 297, 747-748.

<sup>106</sup> J. Ex. 26 at 1.

<sup>107</sup> J. Ex. 26 at 6; R. 13; Tr. at 140-141, 318-319, 336.

<sup>108</sup> Tr. at 157.

<sup>109</sup> J. Ex. 10; Tr. at 87.

<sup>110</sup> R. Ex. 5 at 11-12; Tr. at 88-89.

<sup>111</sup> Tr. at 335-336.

<sup>112</sup> R. Ex. 13; Tr. at 180, 329-330, 339.

<sup>113</sup> J. Ex. 8 at 11-13.



wide social skills program called \*\*\*. Use of a restorative circle to help Student understand how Student's behavior impacts other students was discussed.<sup>114</sup>

46. Student requires \*\*\* breaks throughout the day to calm down and numerous evaluations recommend this strategy.<sup>115</sup> Student's \*\*\* needs were considered in designing the \*\*\* classroom, which has an attached \*\*\* room. The District LSSP and Occupational Therapist set up the \*\*\* room and a \*\*\*. The Occupational Therapist trained Student's instructional aide on the use of the \*\*\* and provided direct instruction to Student on it.<sup>116</sup>
47. The District provided \*\*\* Prior Written Notice dated October \*\*\*, 2017 of its intent to educate Student in a \*\*\* classroom due to Student's escalating behavior during the first few weeks of school.<sup>117</sup>
48. Staffing in the \*\*\* classroom included a special education teacher and a certified instructional aide at all times.<sup>118</sup> The BCBA trained Student's instructional aide on strategies for working with Student and de-escalation strategies.<sup>119</sup> The District LSSP also provided training to staff working with Student in the \*\*\* classroom, including Student's case manager and instructional aide.<sup>120</sup> Student's teachers and instructional aides are also trained in a de-escalation tool \*\*\* and these strategies were generally effective with Student.<sup>121</sup>
49. Student had four different special education teachers during the 2017-2018 school year. The District had difficulty finding a full-time teacher when \*\*\* was first implemented so it contracted with the BCBA, also a certified special education instructor, to provide direct instruction \*\*\* until the end of November 2017.<sup>122</sup> The District LSSP would work with Student in the classroom when other teachers were not available.<sup>123</sup> The District hired an experienced certified special education teacher \*\*\* starting on January \*\*\*, 2018. Student's special education teacher at the time continued working with Student until the end of January so the new teacher observed him work with Student and he observed her provide instruction before his contract ended.<sup>124</sup>

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<sup>114</sup> J. Ex. 8 at 2; Tr. at 337, 516, 589-590.

<sup>115</sup> J. Ex. 1 at 23; J. Ex. 8 at 4; J. Ex. 17 at 6; R. Ex. 3 at 1.

<sup>116</sup> P. Ex. 7 at 17; R. Ex. 3 at 1-2; Tr. at 298-299.

<sup>117</sup> J. Ex. 8 at 6-7.

<sup>118</sup> Tr. at 172.

<sup>119</sup> Tr. at 174, 197.

<sup>120</sup> R. Ex. 5 at 11-13; Tr. at 124, 140, 175.

<sup>121</sup> Tr. at 154, 181, 195-196.

<sup>122</sup> P. Ex. 8 at 6; Tr. at 204-205, 291, 299.

<sup>123</sup> P. Ex. 9 at 135, 145.

<sup>124</sup> P. Ex. 9 at 142; Tr. at 585-586.

50. The District LSSP was in close communication with Student's \*\*\* after Student's placement changed. She checked in with \*\*\* almost daily to see whether to expect Student at school and encourage Student to attend.<sup>125</sup> Within approximately one month of beginning instruction in \*\*\*, behavioral data was reviewed and Student earned an \*\*\* of Student's choice. Student chose \*\*\*.<sup>126</sup> Student earned a second \*\*\* just before the holidays in December 2017.<sup>127</sup> Student is encouraged to participate in \*\*\* Student earns, but it is not required. Student may or may not avail \*\*\*self \*\*\* in the \*\*\* setting and at times declined \*\*\* classes in favor of staying in \*\*\*.<sup>128</sup>
51. Student's cell phone use to call Student's \*\*\* to \*\*\* continued to be an issue after Student moved to a \*\*\* classroom. Student would \*\*\* when asked to do other things and resist requests from staff to put it away.<sup>129</sup> The LSSP asked Student's \*\*\*, which she declined to do.<sup>130</sup>
52. Not long after Student began receiving instruction in a \*\*\* classroom, Student's \*\*\* expressed concerns with the program and the \*\*\* nature of the setting. She raised concerns that some of the BCBA's recommendations were not being implemented in the \*\*\* classroom and with the size of the \*\*\* room. In communications with the District, she described the classroom as \*\*\* and a punishment. She asked that Student be taken out of the \*\*\* classroom and educated with peers.<sup>131</sup> Student's \*\*\* first asked the District to explore residential placement if it were unable to meet Student's educational needs in November 2017.<sup>132</sup>
53. An ARD Committee meeting was held on December \*\*\*, 2017 at Student's \*\*\*'s request to discuss her concerns with Student's educational program and placement.<sup>133</sup> At the time, Student had been in \*\*\* for \*\*\* days with \*\*\* absences and was making progress on behavioral and attendance goals. Behavioral data for the first and second grading periods was shared, with some progress towards behavioral goals noted.<sup>134</sup> No changes to Student's PLAAFs were made because Student's levels were the same as discussed at the May 2017 ARD Committee meeting.<sup>135</sup>

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<sup>125</sup> P. Ex. 9; Tr. at 356, 395-396.

<sup>126</sup> P. Ex. 9 at 98; Tr. at 575-576.

<sup>127</sup> P. Ex. 9 at 125.

<sup>128</sup> Tr. at 140-141, 749.

<sup>129</sup> P. Ex. 9 at 87.

<sup>130</sup> Tr. at 341-342, 358-359.

<sup>131</sup> J. Ex. 9 at 3; J. Ex. 15; P. Ex. 9 at 3, 39, 59, 63, 103, 130; R. Ex. 9 at 2, 5; Tr. at 103, 757.

<sup>132</sup> J. Ex. 15.

<sup>133</sup> J. Ex. 9.

<sup>134</sup> J. Ex. 9 at 2, 3, 4, 18-24.

<sup>135</sup> Tr. at 117-118.

54. The District gave Notice of Proposal to Evaluate in December 2017, recommending assessments in the areas of speech/language, behavioral/emotional, intellectual/adaptive behavior, achievement, and motor skills.<sup>136</sup> The December 2017 ARD Committee conducted a Review of Existing Evaluations and discussed the need for current information to inform programming.<sup>137</sup> Student's \*\*\* declined further testing. She also requested no further communication between the District and Student's providers apart from the BCBA.<sup>138</sup> The ARD Committee meeting ended in disagreement.<sup>139</sup>
55. The ARD Committee reconvened on January, \*\*\*, 2018. Student had been successful in \*\*\* five out of six days Student attended school since the December \*\*\*, 2017 meeting. The ARD Committee declined Student's \*\*\*'s request to discontinue the \*\*\* program, but proposed a "\*\*\*\*" where Student could choose \*\*\* to give Student more time with peers.<sup>140</sup> Student's \*\*\* declined to consent to additional testing apart from achievement testing.<sup>141</sup>
56. The District provided \*\*\* Prior Written Notice dated January \*\*\*, 2018 of its intent to continue services as set forth in Student's October 2017 IEP.<sup>142</sup>
57. Student continued to attend school more regularly after Student began receiving instruction in a \*\*\* classroom, though Student still missed a significant amount of the 2017-2018 school year. Student missed \*\*\*, with \*\*\* absences during the first grading period and \*\*\* absences during the second grading period. Student missed the least amount of \*\*\* with \*\*\* absences during the first grading period and \*\*\* absences during the second grading period, for a total of \*\*\* absences.<sup>143</sup>
58. Student's IEP called for \*\*\* of the State of Texas Assessment of Academic Readiness (STAAR) \*\*\*.<sup>144</sup> For the 2017-2018 school year, Student passed the STAAR \*\*\* test. Student's performance level in Reading and Writing was \*\*\* (\*\* out of 40 points in both areas) and \*\*\* in Mathematics (\*\* of 40 points).<sup>145</sup>
59. Student received \*\*\* disciplinary referrals between \*\*\*, 2018 and \*\*\*, 2018. The referrals, tracked to monitor behavior rather than apply a disciplinary consequence, were also tracked by the District to determine when changes to Student's BIP may be

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<sup>136</sup> J. Ex. 9 at 13-16.

<sup>137</sup> J. Ex. 9 at 2, 8-12.

<sup>138</sup> J. Ex. 9 at 2.

<sup>139</sup> J. Ex. 9 at 3.

<sup>140</sup> J. Ex. 9 at 4; Tr. at 587.

<sup>141</sup> J. Ex. 9 at 3.

<sup>142</sup> J. Ex. 9 at 6-7.

<sup>143</sup> R. Ex. 1.

<sup>144</sup> J. Ex 5 at 19.

<sup>145</sup> J. Ex. 20; J. Ex. 35 at 2; Tr. at 68.

- warranted, a practice instituted by the District's new Director of Special Education when she started in March 2018.<sup>146</sup>
60. Student again did not finish the 2017-2018 school year. Student stopped coming to school on April \*\*\*, 2018 after Student was \*\*\* because Student's \*\*\* was concerned to send Student to school.<sup>147</sup>
61. An ARD Committee meeting was held on May \*\*\*, 2018 at Student's \*\*\*'s request to discuss the \*\*\*.<sup>148</sup> The District investigated \*\*\* and found it was warranted under the circumstances. The District declined Student's \*\*\*'s request to remove the aide.<sup>149</sup> Student's \*\*\* also raised concerns about District employees encouraging \*\*\* of Student for the incident. The District disputes this, but asserts it cannot prevent an employee from \*\*\*.<sup>150</sup>
62. Student's \*\*\* again requested residential placement at \*\*\* at the May 2018 ARD Committee meeting, which the District declined.<sup>151</sup> \*\*\* is a Texas Education Agency approved nonpublic school and residential program serving children with a broad range of disabilities and severe behaviors \*\*\*. The facility offers residential placement and day school services, behavioral consulting, and short-term intensive behavior training. A residential placement is the most restrictive instructional setting available to students with disabilities along the continuum of placements.<sup>152</sup>
63. The District provided Prior Written Notice dated May \*\*\*, 2018 in which it explained its refusal to place Student at \*\*\*.<sup>153</sup> Student's \*\*\* declined ESY services for the 2018 summer.<sup>154</sup>
64. Student's FIE was due on May \*\*\*, 2018. Consent was first requested on January \*\*\*, 2018 and the District sent a written request to proceed with Student's FIE on May \*\*\*, 2018. Student's \*\*\* consented to the FIE on June \*\*\*, 2018. The District contracted with an LSSP to conduct the FIE. Areas of evaluation include an FBA, Psychoeducational Evaluation, Autism Evaluation, and Psychological Evaluation.<sup>155</sup>

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<sup>146</sup> J. Ex. 12 at 2; P. Ex. 7 at 18; Tr. at 89-90, 185, 761-763.

<sup>147</sup> R. Ex. 4 at 29; Tr. at 724.

<sup>148</sup> J. Ex. 35 at 1; Tr. at 400.

<sup>149</sup> Tr. at 725, 726-727.

<sup>150</sup> R. 4 at 29, 31.

<sup>151</sup> J. Ex. 35 at 1, 2, 3; Tr. at 64, 400, 519-520, 528, 546, 726.

<sup>152</sup> P. Ex. 10 at 2; Tr. at 211.

<sup>153</sup> J. Ex. 35 at 6-7.

<sup>154</sup> Tr. at 91.

<sup>155</sup> J. Ex. 16; R. Ex. 5 at 45; R. 10 at 1; R. Ex. 19; Tr. at 615, 648, 690-691.

The District and the LSSP conducting the evaluation sought consent from \*\*\* for the LSSP to consult with Student's private medical providers. She declined.<sup>156</sup>

65. Student's \*\*\* obtained a psychoeducational evaluation of Student by an experienced LSSP and Licensed Psychological Associate in August 2018. The private evaluation raised the prospect Student is not properly classified as a student with autism and a student with an intellectual disability under the IDEA and may instead qualify as a student with an emotional disturbance.<sup>157</sup>
66. As of the date of the due process hearing, the contract LSSP has conducted classroom and lunchtime observations and approximately three hours of assessment of Student. Because Student has not regularly been in school, Student showed low frustration tolerance for challenges and low attention span during testing. Student refused additional testing in the afternoon and called Student's \*\*\* to pick Student up when a demand was placed on Student. Further testing is required to get a complete picture of Student's educational needs.<sup>158</sup>
67. An ARD Committee meeting was held on September \*\*\*, 2018. When Student finished the 2017-2018 school year, Student had earned two \*\*\* classes from the \*\*\* classroom. Student's current placement therefore includes two classes in the general education setting with supports.<sup>159</sup> As of the due process hearing, Student had attended \*\*\* full and \*\*\* partial days of the 2018-2019 school year.<sup>160</sup>
68. On September \*\*\*, 2018 District personnel visited \*\*\* to evaluate its appropriateness as a placement for Student. The consensus of these professionals is that Student's behavior is not severe enough to warrant residential placement.<sup>161</sup>

## VI. DISCUSSION

### A. Duty to Provide a Free Appropriate Public Education

All children with disabilities are entitled to a free, appropriate public education 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).

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<sup>156</sup> Tr. at 386, 656, 695.

<sup>157</sup> P. Ex. 3; Tr. at 643.

<sup>158</sup> Tr. at 649, 650-651, 654, 656, 659, 680, 681-682, 686, 688, 690.

<sup>159</sup> Tr. at 552.

<sup>160</sup> Tr. at 590-591, 599.

<sup>161</sup> Tr. at 65, 83-84, 97, 303, 343-344, 531, 549, 661, 664.

A school district must provide FAPE to all enrolled children with disabilities between the ages of 3 and 21. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). The school district must provide these students specially designed, personalized instruction with sufficient support services to meet their unique needs in order to receive an educational benefit. Instruction and services must be at public expense and comport with the IEP developed by the Student's ARD Committee. 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. Individualized Education Program**

A school district must have in effect an IEP at the beginning of each school year to meet its obligation to provide a student with a disability FAPE. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured, and must instead include a description of related services, supplementary supports and services, instructional arrangement, program modifications, supports from school personnel, designated staff to provide the supports and services, and the duration, frequency and location of the services that will be provided. 34 C.F.R. §§ 300.22; 300.323(a).

### **C. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the IEP and placement.<sup>162</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof is therefore on Petitioner to show the District did not provide Student FAPE. *Id.*

Petitioner seeks residential placement at \*\*\* at District expense. The burden of proof is on Petitioner to show Student's placement at \*\*\* is not appropriate and placement at \*\*\* is essential and primarily oriented to enable Student to obtain an education. *Burlington Sch. Committee v.*

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<sup>162</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 (5th Cir. 2009).

*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. Individualized Education Program Goals and Objectives**

In developing an IEP for a student with a disability, the ARD Committee must consider his or her strengths, parental concerns for enhancing the student's education, results of the most recent evaluation data, and academic, developmental, and functional needs. A student's IEP must include a statement of present levels of academic and functional performance, including how a student's disability affects his or her involvement and progress in the general education curriculum. 34 C.F.R. 300.320(a)(1)(i). For students whose behavior impedes his or her learning or the learning of others, the IEP must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i).

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

#### **E. Free Appropriate Public Education**

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 assessment and performance;
- The program is delivered in the least restrictive environment;
- 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).

The above are indicators of an appropriate program intended to guide the fact-intensive inquiry required in evaluating a school district's educational program for reimbursement purposes and need not be accorded any particular weight or applied in any particular way. *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 Student's program was individualized on the basis of assessment and performance.

Student's most recent FIE was conducted in May 2015. Student continued to be eligible for special education under the Speech Impairment, Intellectual Disability, and Autism Spectrum Disorder classifications. At the time, Student's received all academic instruction in a special education classroom, received speech therapy, occupational therapy, and had a BIP.

The May 2015 FIE recommended continued speech therapy because Student continued exhibit delays in the areas of expressive/receptive and pragmatic language. Continued occupational therapy was also recommended to address delays in fine and visual motor and sensory processing skills. Social skills instruction, both direct instruction and reinforcement across all environments to increase appropriate social interactions, was recommended. The District sought consent from \*\*\* to seek information from Student's physician for the purpose of evaluating whether Student may be a student with an Other Health Impairment due to Student's \*\*\*. As of the date of the hearing, Student's potential eligibility in this area has not been explored because Student's \*\*\* has not provided the requisite consent.

In December 2016, at which point Student had not attended school in more than two months, an ARD Committee convened and recommended a parent needs assessment to help Student return to school. The District contracted with an experienced BCBA to conduct the assessment, which was completed in February 2017 and recommended an FBA and ESY services. The District implemented these recommendations.



Student has \*\*\* behavioral challenges at school, including school avoidance, and the District explored ways to identify and address them. Between March 2016 and April 2017, Student has had three FBAs at District expense – two by BCBA's and a third by a Behavioral Interventionist. The consistent conclusion of each FBA is that Student's behavior is primarily escape motivated.

Student's BIP was individualized on the basis of the behavioral needs identified in the three FBAs. The BIP in Student's May 2017 IEP targeted two behaviors, physical aggression and increasing time spent in scheduled instructional areas. This BIP was determined appropriate for ESY services with the BCBA and to transition Student back to school. Student's ARD Committee adopted a new BIP at the October 2017 ARD meeting that addressed only escape-motivated behaviors, which is somewhat incongruent with the recent increase in physical aggression discussed by the October 2017 ARD Committee. However, the October 2017 BIP's focus on Student's escape-motivated behaviors is consistent with the primary function of Student's behavior identified in all three FBAs – escape from demand. The clearly identified need to extinguish Student's desire to escape supports this change to Student's BIP.

Student's May 2017 IEP included three Behavioral goals addressing physical aggression, compliance with requests from adults, staying in Student's instructional area and \*\*\* when seeking the attention of staff and peers. Student's IEP also included goals and objectives for \*\*\*, Reading, \*\*\* consistent with a need for content modification given the cognitive deficits identified in Student's May 2012 and May 2015 FIEs.

Student has significant social skills deficits. The May 2015 FIE recommended social skills instruction, both direct instruction and reinforcement of skills across all environments. The April 2017 FBA by the BCBA also recommended direct social skills instruction. In the area of Social Skills, the May 2017 ARD Committee developed a goal aimed at appropriate social interactions with short-term objectives in the areas of turn taking, understanding the impact of Student's words and behavior on others, and working with peers in small group settings. One of the core tenets of Student's \*\*\* educational program was direct social skills instruction.

The direct social skills instruction called for in Student's May 2017 IEP was provided during \*\*\* class, which was added to Student's schedule when Student returned to school in the fall of 2017 to accommodate this goal. Student also participated in a campus-wide social skills program called \*\*\*. A restorative circle where Student would hear from peers to better understand the effect of Student's behavior was recommended by the ARD Committee, but it is not clear from the record whether this was implemented.

Student's IEP assessed Student's present levels of academic and functional achievement. The May 2017 ARD Committee reviewed Student's PLAAFS in the following areas: Reading, \*\*\*, Math, and \*\*\*, and Other. Due to Student's poor attendance, PLAAFS in academic areas were based on previous information from when Student came to school. No changes were made to Student's PLAAFS at the October 2017 ARD Committee from those discussed at the May \*\*\*, 2017 ARD Committee meeting as there were not changes from when they were reviewed in May 2017. When the ARD Committee convened in December 2017, no changes were made to Student's PLAAFS because again Student's levels were the same as discussed at Student's May 2017 ARD Committee meeting. Though changes to Student's PLAAFS were not made after Student's annual review in May 2017, the ARD Committee considered Student's PLAAFS at that time and also considered changes at subsequent meetings in December 2017 and May 2018 as required by the regulations. 34 C.F.R. 300.320(a)(1)(i).

Finally, Petitioner complains Student's program was inadequate while declining District requests to explore Student's educational needs. Except in limited circumstances, the parent of a student with a disability may withhold consent to assessment and evaluations a school district recommends. 34 C.F.R. §§ 300.300(a)(3); 300.300(c)(1). The parent of a student with a disability also has a right to deny or limit access to outside medical providers. Tex. Family Code § 151.001(6). Student's \*\*\* asserted these rights and declined requests for further evaluation and communication with outside medical providers the District believed was important to ascertain the nature and extent of Student's educational needs, leaving it with an incomplete picture of the student they are obligated to serve. The District developed and implemented a program with the assessment and medical information it had given the constraints imposed by Student's \*\*\*'s failure to provide consent.

Petitioner's expert witness who conducted a psychoeducational evaluation of Student in August 2018 raised the prospect Student is not properly classified under the IDEA. This theory deserves due consideration and, at a minimum, points to a need for further testing to determine the nature and scope of Student's educational needs and deficits. After obtaining consent after the instant litigation was filed, the District contracted with an LSSP to conduct Student's FIE.

Finally, an IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to a student with a disability to advance toward attaining the annual goals, be involved in and make progress in the general education curriculum, and to be educated with other children with and without disabilities. 20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. 300.320(a)(4). Identification in the IEP of a particular educational methodology is not required and the decision to include one belongs to the ARD Committee. 71 Fed. Reg. 46,665 (2006).

Student's May 2015 FIE called for continuation of research-based strategies specific to autism spectrum disorders including reinforcement, training, prompting, structured work systems, and a sensory diet. Each of these interventions was part of Student's program. While the District does not cite a specific piece or body of research underpinning Student's program, one is not required. Appropriate research-based teaching methods to address Student's needs were considered and recommended by the ARD Committee.

## **2. Least Restrictive Environment**

The evidence showed Student was educated in Student's least restrictive environment.

### **a. Inclusion of Students with Disabilities**

The IDEA expresses a strong preference for inclusion and requires students with disabilities be educated in the least restrictive environment appropriate to their needs. To the maximum extent appropriate, children with disabilities must also be educated with children without disabilities. Special classes, separate schooling, or other removal from the regular

educational environment can occur only when the nature or severity of the student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(1)(2)(i)(ii); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009). Least restrictive environment is not only freedom from restraint, but freedom of the child to associate with his or her family and persons without disabilities to the maximum extent possible. *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 128 n.2 (5th Cir. 1993) (quoting *Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.23 (5th Cir. 1992)).

#### **b. Least Restrictive Educational Environment**

In this jurisdiction, students with disabilities must be educated with students without disabilities to the fullest extent possible and consideration of a student's least restrictive environment must include an examination of the degree of benefit the student will obtain from an included education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989). A presumption in favor of the educational placement established by a student's IEP exists, and the party challenging it bears the burden of showing why the educational setting is not appropriate. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991).

The IDEA's implementing regulations require a school district to ensure the availability of a continuum of instructional placements to meet the needs of students with disabilities. This includes instruction in regular classes, special classes, special schools, homes, hospitals, and institutions. 34 C.F.R. § 300.115. 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, \*\*\* – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c). A residential treatment facility is the most restrictive placement on the continuum available instructional settings.

In *Daniel R.R.*, the Fifth Circuit affirmed IDEA's presumption in favor of inclusion of students with disabilities, articulating a two-part test and factors to consider when determining

whether removal from the general education setting is appropriate. First, whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for the student. If not, second, whether the school district has included the student to the maximum extent appropriate. *Id.* Consideration of several factors is required to resolve these inquiries, including:

- The nature and severity of the student's disabilities;
- Student's academic achievement;
- The non-academic benefits of regular classroom placement;
- The overall experience in the mainstreamed environment balancing the benefits of regular education and special education to the student; and
- The effect of the student's presence on the regular class, specifically whether the student's behavior so disruptive in the regular classroom that the education of the other students is significantly impaired and whether the student requires so much attention the needs of other students will be ignored. *Id.* at 1048-49.

No single factor in this non-exhaustive list is dispositive. *Id.* at 1048. The analysis must be an individualized, fact-specific inquiry and requires careful examination of the nature and severity of the student's disabilities, his or her needs and abilities, and the school district's response to those needs. *Id.* The issue of whether the IEP was provided in the least restrictive environment is a relevant factor in making the overall determination whether the school district's program provided the student FAPE. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *R.H. v. Plano Ind. Sch. Dist.*, 607 F. 3d 1003, 1012-1013 (5th Cir. 2010).

### **c. Student's Initial Educational Placement**

Student's May \*\*\*, 2017 IEP established Student's initial schedule of services for the 2017-2018 school year. Student requires adult supervision at all times at school and would be accompanied by \*\*\* in the general education classroom. Student's schedule focused on smaller classes in the general education environment. Academic demands were lessened so Student would feel successful and not become overwhelmed. When Student returned to school in the fall of 2017 after missing most of the 2016-2017 school year, Student's placement was a mixture of general education with supports for \*\*\*. Student would also receive instruction in a resource

classroom for \*\*\*, Math, and Reading. The IEP classified Student's instructional setting as \*\*\* at least \*\*\*% and less than \*\*\*%.

**d. Student's Placement Change**

Student was attending school most days, but continued to have behavioral challenges when Student returned to school. On September \*\*\*, 2017 Student \*\*\*. Student was involved in \*\*\* incident with another student in September 2017. Student was calling Student's \*\*\* to pick Student up from school with some regularity. Student's ARD Committee convened on October \*\*\*, 2017 to consider changes to Student's IEP, and specifically, whether a change in instructional setting was necessary.

The District LSSP and the BCBA who provided Student's ESY services both recommended a more restrictive \*\*\* going forward. The BCBA's recommendation was based on Student's current choice to leave the larger educational environment. A more restrictive setting might help reduce Student's escape-motivated behaviors. A higher density reinforcement schedule that had proven successful during summer instruction in reducing behaviors would also be more available in a \*\*\* classroom. A recent behavioral challenge was Student calling Student's \*\*\* to pick Student up from school during the day. The ARD Committee did not conduct a Review of Existing Evaluations and Data.

The ARD Committee recommended Student receive instruction in a \*\*\* classroom with \*\*\* to include a certified special education teacher and an instructional aide. In the program proposed by the District, Student would \*\*\* setting and other \*\*\* opportunities after meeting certain behavioral expectations. This is a recognized method of encouraging behavioral improvement in students whose behavioral challenges impede progress in the general education setting. \*\*\* classroom where Student received academic and behavioral instruction.

Because the school year began only a few weeks earlier, the District had limited time to determine whether the supplementary aids and services prescribed by Student's May 2017 IEP would work to support Student in the general education classroom. However, Student's

behaviors were interfering with Student's instruction and, even with \*\*\* support, Student produced minimal work in the general education classroom. Student also frequently left the instructional setting. Finally, Student was being increasingly \*\*\* with staff and there were safety concerns. The general education classroom, even with the use of supplementary aids and services, was not appropriate for Student.

Even when removal from the general education setting is appropriate, students with disabilities have a right to be included with peers to the maximum extent appropriate. The nature and severity of Student's numerous disabilities impact Student's ability to be educated with Student's peers. Student requires extensive behavioral and academic supports at school that proved difficult to provide in the general education setting. Student was attending school more regularly, but was producing little work in the general education classroom and making minimal \*\*\* academic progress. With regard to non-academic progress, Student was frequently leaving the classroom and Student's escape-motivated continued to undermine Student's ability to undertake academic demands. Student required a teacher to student ratio of \*\*\* or \*\*\* during instruction in the general education classroom, though this level of support did not appear to significantly impair other students' ability to receive instruction.

In the first few months after Student's educational placement changed to a \*\*\* classroom, Student's attendance continued to improve. Within one month, Student earned Student's first \*\*\*. Within two months, Student earned a second \*\*\*. Peers are an identified reinforcer for Student and Student's ARD Committee responded to Student's \*\*\*'s concern about lack of access to peers by instituting a \*\*\* where Student could \*\*\*. Balancing the competing factors, Student was included to the maximum extent possible.

The hearing officer finds Student was educated in the least restrictive setting and Petitioner did not meet Petitioner's burden of showing why the educational setting established by Student's IEP was inappropriate. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991).

### **3. Services Provided in a Coordinated and Collaborative Manner by Key Stakeholders**

Third, the evidence showed Student's services were provided in a coordinated and collaborative manner by key stakeholders with the exception of counseling as a related service.

Student's ARD Committee met numerous times between May 2017 and September 2018 and was comprised of the required individuals. 34 C.F.R. § 300.321(a). Student's \*\*\* attended all ARD Committee meetings and actively participated. District leadership and administrators met with her outside of the ARD process to clarify her questions about Student's program.

Student's April 2017 FBA recommended Student receive instruction from persons trained in Applied Behavioral Analysis. The BCBA and District LSSP trained staff and Student's instructional aides on Applied Behavioral Analysis strategies when Student returned to school in the fall of 2017. The BCBA also trained \*\*\* and staff on the functions of Student's behavior and strategies for responding.

Student's IEP called for occupational therapy. The occupational therapist provided both direct instruction and consultation to staff working with Student. She also worked with the District LSSP to design a setting that met Student's sensory needs, including Student's sensory needs in the \*\*\* classroom. The District LSSP and the BCBA who recommended a \*\*\* setting for Student were instrumental in its implementation and staff training.

Student had four different instructors during the 2017-2018 school year. The District had difficulty finding a full time teacher after \*\*\* was implemented. To meet the staffing needs, the District contracted with the BCBA to provide \*\*\* instruction. The District LSSP and other certified educators provided direct instruction until an experienced full-time special education teacher was hired in January 2018. Student's contract special education teacher helped train her. This teacher worked with Student on the days Student was in attendance from January \*\*\*, 2018 for approximately three months until Student ceased attending school altogether in \*\*\*-April 2018. The District ensured an instructional aide was always assigned to work with Student.



These efforts by the District personnel show considerable collaboration and cooperation between the key stakeholders, including efforts to work with Student's family. However, the evidence showed Student's IEP was not implemented as to counseling.

Related services, including counseling services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel may be required to assist a student to benefit from special education. 34 C.F.R. § 300.34(a); 34 C.F.R. § 300.34(c)(2). State regulations require that related service personnel, including school counselors, have proper certification and training. 34 C.F.R. 300.156(b); Tex. Educ. Code § 21.003(a); 19 Tex. Admin. Code § 89.1131(a).

Student's 2015 FIE did not indicate Student received counseling at the time of the evaluation, did not recommend a counseling evaluation, and did not recommend counseling. Student's May 2017 IEP did not reflect Student received counseling during the 2016-2017 school year. Student's proposed IEP for the 2017-2018 school year developed at the May 2017 ARD Committee meeting, however, included a Counseling goal focused on appropriate communication with staff of a need to take a break with short-term objectives on use of physical cues when stressed, identifying coping skills, and verbalizing challenging emotions as they occur. In addition to occupational therapy as a related service, Student's May 2017 IEP called for \*\*\* minutes of individual counseling services in the special education setting \*\*\* minutes per week for 7 out of 9 weeks grading period. Despite Student's IEP's directive Student receive counseling, there is no evidence student received counseling by a school counselor or other qualified related service personnel. Student is entitled to compensatory services in this area. *Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005).

#### **4. Academic and Non-Academic Benefits**

Fourth, the evidence supports the conclusion Student's program was reasonably calculated to provide meaningful educational benefit. However, Student's poor attendance and school avoidance behavior and Student's \*\*\*'s reinforcement of that behavior \*\*\* were major obstacles impeding Student's progress. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v.*

*Rowley*, 458 U.S. 176 (1982). The evidence also showed Student's program was appropriately ambitious in light of Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).

The IDEA does not require a student's IEP guarantee a certain level of accomplishment. An IEP must instead be reasonably calculated to meet a student's educational needs given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). A school district is not required to provide a student the best possible education and improvement in every academic and non-academic area is not required to receive an educational benefit. The issue is not whether the school district could have done more, but whether the student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.*, 582 F. 2d 576, 590 (5th Cir. 2009).

Appropriate behavioral interventions are important components 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). Student's escape-motivated behavior is longstanding and significantly impacts Student's attendance and greeting academic demands. Behavioral progress is perhaps more important than academic progress in this case.

Student's poor attendance is a tremendous barrier to Student's education and undermined Student's ability to make consistent behavioral and academic progress. Student's attendance issues are longstanding. Student attended approximately \*\*\* days of the 2016-2017 school year. Student's attendance improved somewhat during the 2017-2018 school year, and continued to improve for a period after Student's placement changed to \*\*\*, but Student still missed a significant amount of school.

The District made successive efforts to facilitate Student's attendance. In December 2016, at which point Student had not been at school for approximately three months, Student's ARD Committee requested a parent needs assessment by an experienced BCBA to facilitate Student's return to school. The BCBA recommended an FBA and ESY services with a trained

behavior specialist aimed at helping Student return to school. The District implemented these recommendations. The District again contracted with the BCBA to consult with the District and train staff when the school year started. The District LSSP communicated almost daily with Student's \*\*\* after Student's instructional setting changed to encourage Student to come to school.

Student can make behavioral progress with consistent instruction by persons with whom Student has gained rapport. During the summer of 2017, the BCBA slowly gained rapport with Student, and with consistency and instructional control, Student showed increased behavioral control and began to accept some academic demands. Student's attendance continued to improve after \*\*\* was introduced and Student began to meet certain the behavioral milestones set for Student. Within one month, Student earned Student's first \*\*\*. Within two months, Student earned a second \*\*\*. Student passed the STAAR \*\*\* test given in April 2018, achieving \*\*\* out 40 points in Reading and Writing (\*\*\*) and \*\*\* of 40 points in Math (\*\*\*)

Student's behaviors at school during the 2017-2018 school year, while present, were largely manageable by staff. However, incidents of \*\*\* precipitated long periods of absence from school during the 2016-2017 school year and Student did not finish the 2017-2018 school year after being \*\*\* on April \*\*\*, 2018.

State regulations prescribe when and how \*\*\* of students with disabilities may occur in schools and mandate training \*\*\*, to include prevention and de-escalation techniques \*\*\*. \*\*\* in Texas is limited to behavioral emergencies, situations where a student's behavior poses a threat of imminent, serious physical harm to self or others, or imminent, serious property destruction. \*\*\*. When a student with a disability is \*\*\*, his or her ARD Committee should consider the impact of the student's behavior on learning and whether revisions to his or her BIP are necessary. \*\*\*.

The District convened an ARD Committee meeting at Student's \*\*\*'s request in May 2018 in part to discuss the use of \*\*\*, whom Student's \*\*\* believed was \*\*\*. \*\*\* indicated Student wanted to return to school, but she would not send Student if \*\*\* with Student. The

District confirmed conversations with the \*\*\* about her work with Student, but maintained staffing decisions are not made by an ARD Committee. Student's \*\*\* was invited to discuss the request outside of the ARD Committee process. The instant litigation was filed one week later and there is no evidence another meeting occurred.

The \*\*\* Student had worked with Student since October 2017 and was trained in de-escalation strategies, which were generally effective with Student. The District investigated the \*\*\* and found it was warranted under the circumstances. Student's \*\*\*'s concern about the \*\*\* at school is understandable. Her refusal to send Student to school altogether after these events is, however, inconsistent with her stated goal Student attend school and contributed to Student's attendance problems. Speculation the District sought or encouraged \*\*\* is not supported by the record and, as of the hearing date, \*\*\* in connection with the event \*\*\*.

The 5th U.S. Circuit Court of Appeals found the basic floor of opportunity standard set forth in *Rowley* does not require a district to remediate a student's disability. When the four requirements set forth in *Cypress-Fairbanks v. Michael F.*, are met, a District satisfies its FAPE obligation. The hearing officer concludes Student's program was individualized on the on the basis of assessment and performance, delivered in the least restrictive environment; services were provided in a coordinated, collaborative manner by the key stakeholders; and Student made more than minimal behavioral progress even considering Student's poor attendance. Despite the failure to implement Student's IEP in the area of counseling, when Student's program is considered as a whole, Student was provided FAPE by the District during the relevant time period despite this shortcoming. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

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

### **a. The Residential Placement Test**

Petitioner must prove the District's program was not appropriate under the IDEA and residential placement is appropriate. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993). In this jurisdiction, a two-part test

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

Despite the District's failure to implement Student's IEP in the area of counseling, Student's program as a whole offered and provided Student a Free, Appropriate Public Education. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012). Petitioner will receive compensatory education in the area of counseling, as ordered below. Petitioner, however, is not entitled to residential placement at \*\*\* at District expense.

#### **F. Procedural Issues**

Petitioner raised two procedural issues, including:

1. Whether the District impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student by failing to provide progress reports as required under IDEA and its implementing regulations; and
2. Whether the District impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student by failing to provide Student's parent with Prior Written Notice.

To prevail, Petitioner must show these procedural violations significantly impeded parental opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to Student. 34 C.F.R. § 300.513(a)(2)(ii).

As to Issue 1, Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA. 34 C.F.R. § 300.320(a)(3)(ii). Periodic reports to a parent of a student with a disability on the progress he or she is making on Student's goals are required under IDEA, such as through the use of quarterly reports or other periodic reports or concurrent with the issuance of report cards. 34 C.F.R. § 300.320(a)(3)(ii).

Student's IEP called for periodic reports on Student's progress towards meeting Student's annual goals to be provided concurrent with the issuance of report cards. The District uses software to generate progress reports and Student's case manager and \*\*\* teacher prepared Student's progress reports. Student's special education teacher was responsible for tracking and reporting Student's progress and prepared them on the days Student attended school. The evidence showed Student's \*\*\* was provided progress reports as that expectation is defined under the IDEA.

As to Issue 2, Petitioner did not meet Petitioner's burden of proving the District violated parental procedural rights under the IDEA. Petitioner alleges the District failed to provide \*\*\* Prior Written Notice concerning its educational decisions for Student.

A school district must provide the parent of a child with a disability Prior Written Notice when it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE or refuses to change the educational placement of the student or the provision of FAPE. 34 CFR § 300.503(a). A student's IEP itself may be a component of Prior Written Notice if the information regarding the school district's proposal or refusal to change a student's identification, evaluation, educational placement or provision of FAPE is stated in the IEP. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008); *Assistance to States for Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,691 (Aug. 14, 2006).

The evidence showed the District provided \*\*\* Prior Written Notice on May \*\*\*, 2017 of the proposed changes to Student's program implemented at Student's annual ARD Committee meeting. The District provided Prior Written Notice of its proposal to educate Student in a \*\*\* \*\*\* due to escalating behaviors on October \*\*\*, 2017. After the December 2017 ARD Committee meeting where Student's \*\*\* disagreed with the \*\*\*, the District provided Prior Written Notice of its intent to continue Student's services as set forth in the January \*\*\*, 2018 IEP, but the notice did not address Student's \*\*\* suggestion of \*\*\*. The District, however, provided Prior Written Notice on May \*\*\*, 2018 where it explained its refusal to place Student at \*\*\*. Even though the District did not provide Prior Written Notice that it would not place

Student at \*\*\* in January 2018, this procedural violation did not significantly impede parental opportunity to participate in the decision-making process regarding the provision of FAPE. The evidence showed Student's \*\*\* was an active participant in ARD Committee meetings where her concerns and questions were addressed, she was able to offer ideas and suggestions, and the school district was responsive to her needs as a parent.

## VII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proof as the party challenging a student's IEP and educational placement. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. Student was provided a Free, Appropriate Public Education during the relevant time period and Student's Individualized Education Program was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).
3. Student did not receive the counseling services prescribed by Student's IEP and is entitled to compensatory education in the amount specified below. *Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005). Despite this deficit, the District provided Student FAPE. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).
4. Student's school avoidance behavior is a barrier to Student's education, but when Student attends, Student's behaviors are otherwise not severe enough to require residential placement at this time. *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).
5. The District did not violate Student's \*\*\*'s procedural rights under the IDEA as to progress reports or Prior Written Notice. 34 C.F.R. § 300.513 (a)(2)(ii).

## VIII. ORDERS


Based upon the foregoing findings of fact and conclusions of law, Petitioner's request for relief is **GRANTED IN PART and DENIED IN PART**.

The District is **ORDERED** to conduct a counseling evaluation by a qualified professional as identified by Student's ARD Committee to determine Student's current needs in this area.

Student is entitled to 21 hours of compensatory education in the area of counseling by a qualified related service provider to address the needs identified in the counseling evaluation.

Petitioner's request for residential placement is **DENIED**.

**SIGNED October 29, 2018.**

  
**Kathryn Lewis**  
**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. A party disputing 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).