

DOCKET NO. 247-SE-0419

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, Student, b/n/f Parent (“Petitioner” or “Student”) brings this action against the Lancaster Independent School District (“Respondent” or “school district”) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et. seq, and its implementing state and federal regulations. The issues in this case are whether the school district failed to provide Student a free appropriate public education (FAPE) by failing to conduct an evaluation in all areas of suspected disability in a timely manner, failing to develop an Individualized Education Plan (IEP) that adequately addresses Student’s needs, failing to place Student in the least restrictive environment (LRE), and violating parental procedural rights. The hearing officer concludes Student failed to meet Student’s burden of proof on any of these issues.

II. PROCEDURAL HISTORY

A. Continuances and Extension of Decision Due Date

There were no continuances in this case. Respondent requested an extension of the decision due date at the end of the due process hearing to provide the parties an opportunity to submit written closing arguments with access to the hearing transcript. The hearing transcript was scheduled to be available to the parties by June 19, 2019. Petitioner made an oral closing argument at the conclusion of the hearing, but did not oppose Respondent’s request and was given the option

of also submitting a written closing argument. The parties requested a closing argument deadline of June 28, 2019, with an extension of the decision deadline to July 26, 2019, to provide the hearing officer sufficient time to consider the closing arguments in preparing the decision.

B. Legal Representatives

Petitioner was represented throughout this proceeding by Petitioner's non-attorney representative, Carolyn Morris with Parent-to-Parent Connection Advocacy. The school district was represented by its attorney, Jennifer Carroll of Walsh, Gallegos, Treviño, Russo & Kyle, P.C.

C. Resolution Session and Mediation

The parties agreed to attempt mediation instead of meeting in a resolution session. Mediation was conducted on May 7, 2019, but the parties were unable to reach an agreement.

D. Preliminary Motions

Several preliminary motions were addressed prior to the hearing. Respondent's sufficiency challenge to the Complaint was denied in Order No. 3 on April 30, 2019. Competing discovery motions were both denied in Order No. 5 on May 29, 2019.

III. DUE PROCESS HEARING

The due process hearing was conducted on June 5, 2019. Petitioner continued to be represented by Petitioner's non-attorney representative, Carolyn Morris. In addition, ***, Student's mother, attended the due process hearing. *** also attended the hearing as parent support.

Respondent continued to be represented by its legal counsel, Jennifer Carroll. ***, the Chief of Special Education for the school district, attended the hearing as the party representative.

The hearing was recorded and transcribed by a certified court reporter. Both parties filed written closing arguments in a timely manner. The Decision in this case is due July 26, 2019.

IV. ISSUES

A. Petitioner's Issues

Petitioner raised the following issues for decision:

EVALUATION:

1. Whether the school district failed to conduct Student's three-year re-evaluation in a timely manner;
2. Whether the school district should have conducted an evaluation to determine whether Student was eligible for special education services as a student with Autism;

FREE, APPROPRIATE PUBLIC EDUCATION (FAPE):

3. Whether the school district failed to provide Student with FAPE including specifically:
 - a. Whether the school district failed to adequately address Student's behavioral needs; and,
 - b. Whether the school district failed to properly implement services stated in Student's IEP, including: failing to properly implement accommodations and failing to provide Student with speech services;

PLACEMENT:

4. Whether the school district's proposed placement for Student in a self-contained behavior class on Student's current campus is an appropriate placement in the least restrictive environment (LRE) for Student;

PARENT PROCEDURAL RIGHTS:

5. Whether the school district failed to provide Student's mother proper notice of the school district's use of restraint;

6. Whether the school district failed to provide Student's mother with IEP progress reports in a timely manner;
7. Whether the school district's actions in prohibiting Student's mother from visiting the campus violate the IDEA; and,
8. Whether the school district failed to convene an Admission, Review & Dismissal (ARD) Committee upon parental request on December ***, 2018.

B. Respondent's Legal Position

The school district generally and specifically denies the allegations in the Complaint, contends it conducted all evaluations in a timely manner, and asserts Student was assessed in all areas of suspected disability. The school district argues Student was provided with FAPE in the LRE. The school district also contends it offered to conduct an updated re-evaluation of Student, proposed adding new behavioral goals to Student's IEP, and proposed a change in placement to a self-contained, special education behavior classroom to better meet Student's academic and behavioral needs. The school district reports Student's mother has not consented to the proposed set of evaluations.

The school district raises the following additional legal issues:

1. Whether the hearing officer has jurisdiction to resolve Petitioner's claim related to *** Student's mother and, as a result, whether that claim should be dismissed; and,
2. Whether Petitioner's request to move Student to another campus within the school district is within the scope of the hearing officer's authority to grant relief and, as a result, whether that request should be dismissed.

Respondent withdrew the affirmative defense of the statute of limitations issue stated in its Response given Petitioner's confirmation that all claims at issue arose during the 2018-19 school year.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. An updated Full and Individual Evaluation (FIE) including all components of the initial FIE, a psychological, an autism evaluation, a Functional Behavior Analysis (FBA), a speech assessment, and a determination as to whether Student needs a change in placement from a self-contained behavior class to a general education classroom;
2. Placement Student in a general education instructional setting with sufficient special education support (including specifically the assignment of a 1:1 paraprofessional throughout the school day) on another campus within the school district; and,
3. Compensatory services, including, specifically, counseling, speech, and tutoring services.

VI. FINDINGS OF FACT

1. Student was first identified as eligible for special education services by the *** Independent School District (*** ISD) on March ***, 2017 as a student with Other Health Impairment (OHI), based on Attention Deficit Hyperactivity Disorder (ADHD) and a Speech Impairment (SI) based on an articulation disorder.¹
2. The *** ISD March 2017 FIE concluded Student demonstrated average general intellectual ability and academic achievement in all areas.² The *** ISD FIE used information from Student's physician, parent, teacher, observations, and numerous standardized, valid assessment instruments.³
3. *** ISD convened Student's initial ARD meeting on April ***, 2017, to confirm Student's eligibility for special education services as a student with OHI and a SI. The ARD Committee identified the following areas of need based on Student's present levels of academic achievement and functional performance (PLAAFPs): behavior, self-regulation, and articulation. *** ISD designed an IEP that included behavioral and speech goals, direct speech services, behavior inclusion support in general education, and a set of accommodations.⁴

¹ Joint Stipulated Facts, No. 1 (SOF No. ___); Joint Exhibit 1, p.1 (J. __:___).

² SOF No.1; J. 1.

³ J.1:1, 2, 5-8, 9, 10, 13.

⁴ SOF No. 2; J. 2.

4. Student was in the *** grade when Student enrolled in the Lancaster Independent School District (school district) for the 2017-18 school year.⁵ The school district convened an ARD meeting on September ***, 2017, to determine Student's permanent placement. Student's mother attended and actively participated in the ARD meeting. The ARD Committee identified Student's areas of need, based on Student's PLAAFPs, as behavior, self-regulation, and articulation. The school district designed an IEP that included three annual behavioral goals, direct speech services, a speech IEP, behavior inclusion support in general education, and a set of classroom accommodations.⁶
5. The behavioral goals addressed Student's need to refrain from verbal and physical aggression towards peers and adults 75% of the time, reduce outbursts 75% of the time, and comply with adult verbal directives and redirection 75% of the time.⁷
6. The school district's Director of Family Engagement and Behavior Support implements a Strengthening Families Initiative through the special education department offering parents with special needs children resources and parent trainings five times a year. The Director of Family Engagement and Behavior Support also provides direct support to teachers to address specific behaviors by providing classroom assistance, sharing strategies, and giving guidance to ensure the strategies are implemented.⁸
7. The Director of Family Engagement and Behavior Support also provides parental support with accessing free community resources including counseling, mental health services, and other services to bridge the gap between the community and school.⁹ The Director first met Student's mother when the family was new to the school district and helped facilitate the family's access to local counseling services. The Director also conferred and provided some behavioral strategy training to the behavior support class teachers.¹⁰
8. The school district convened Student's annual ARD meeting on March ***, 2018. The ARD Committee reviewed the *** ISD FIE and other existing data. Student's mother attended and actively participated in the meeting. The ARD Committee identified Student's areas of need, based on Student's PLAAFPs, as behavior, self-regulation, and articulation. Direct speech services and behavior inclusion support in general education continued. A Behavior Intervention Plan (BIP) was included as a component of Student's program.¹¹

⁵ J.3:1.

⁶ SOF No. 3; J.3.

⁷ J.3:6.

⁸ Transcript Volume I, pp. 22-25 (Tr. Vol. I: ___).

⁹ Tr. Vol. I: 25

¹⁰ Tr. Vol. I: 25-28, 29.

¹¹ J.4.

9. In March 2018, Student had difficulty, at times, following adult directives or requests. When those behaviors occurred, Student needed a change in Student's environment, removal from an audience, and time to reflect on Student's behavior.¹² Student periodically exhibited behavioral outbursts. On occasion, Student ***.¹³
10. As a result, the March 2018 ARD Committee designed a single annual behavioral IEP goal: reducing verbal and physical aggression towards peers and adults. The two short-term objectives to support this goal were to use coping skills to deal with anger and frustration and comply with adult directives. These short term objectives were similar to the second and third annual behavioral goals stated in Student's *** ISD IEP.¹⁴
11. The BIP included strategies to provide Student a quiet, non-threatening, non-stimulating place when Student needed to regain self-control. The BIP also included direct instruction in pro-social and alternative behaviors from staff with specialized training in behavior support.¹⁵ The BIP also targeted Student's need to use coping strategies to deal with anger or stressful situations.¹⁶ The March 2018 IEP and BIP were to be implemented from March ***, 2018 to March ***, 2019.¹⁷
12. A set of accommodations to be implemented in all classes was included in Student's IEP, including two accommodations for adapting classroom instruction and eight accommodations to manage behavior. The accommodations addressed Student's behavioral and speech needs.¹⁸
13. Student was in *** grade during the 2018-19 school year. The IEP developed in the March 2018 ARD was in effect for the fall semester of that school year through Student's next annual ARD due in 2019. Student's mother attended and actively participated in the meeting. Areas of identified need continued to be behavior, self-regulation and articulation, based on Student's PLAAFPs.¹⁹
14. At the beginning of the school year Student was *** to address Student's needs as a student with ADHD. However, ***. Student's teachers conferred with *** about the status of Student's ***. Student *** early in the 2018-19 school year.²⁰

¹² J.4:3.

¹³ J.4:4.

¹⁴ J.3:6; J.4:6.

¹⁵ J.4:21-23.

¹⁶ J.5:6.

¹⁷ J.4:6-7, 13.

¹⁸ J.4:8.

¹⁹ J. 4; J. 5; Tr. Vol. I: 207.

²⁰ Tr. Vol. I: 130, 152-53, 159-60, 161-62

15. Between August 2018 and February 2019, Student made good academic progress.²¹ Student's first semester grades in core academics were good: ***. Student performed exceptionally well in Student's ***: **. For the fourth and fifth *** week grading periods of that school year, Student's grades in core academics were: ***; grades in *** for that period of time were: ***.²² Student passed all Student's classes in the fall semester and in each ***-week grading period. Student met standards on local assessments and Student's classroom work showed grade level mastery.²³
16. In accordance with Student's IEP and BIP, when Student's behavior was disruptive, Student went to a special education behavior support class to regain control. Student received direct instruction in pro-social and alternative behaviors from special education staff in the behavior support class.²⁴
17. During the 2018-19 school year Student received some support from the school counselor. On one occasion the counselor spoke to Student about Student's behavior *** and prepared an incident report. Sometime in late spring, the counselor also provided Student with a single counseling session when Student was sent to the counselor's office by the principal. Following the session, the counselor called Student's mother and discussed the behavior that led to the counseling session.²⁵ The counselor also communicated with Student's mother from time to time, to let her know how Student was doing, especially if Student was having a good day.²⁶
18. There are *** behavior adjustments classes on Student's *** campus: ***, ***, ***.²⁷ Students *** use the cool down room, located in the *** classroom.²⁹ The *** and ***. The special education department chair also intermittently stops by *** behavior classrooms to provide support.³⁰
19. Although Student was in *** grade and it would have been appropriate for Student to spend time in the *** class, the teacher in the *** class knew Student because ***. The *** teacher could be a positive *** role model for Student. Therefore, when Student needed redirection or to cool down, the *** teacher often provided Student with behavioral support

²¹ J.5; Tr. Vol.I:212.

²² J. 13: 1-2.

²³ J.12; J. 13; J.14;

²⁴ J.4:6; J.5. ; Tr. Vol. I: 123, 127-28, 142.

²⁵ Tr. Vol. I: 69, 71, 74, 188.

²⁶ Tr. Vol. I: 75.

²⁷ J13:1; T. Vol. I: 27, 31, 119, 173.

²⁸ Tr. Vol. I: 31.

²⁹ Tr. Vol. I: 32.

³⁰ R. Vol. I: 139-41.

- ***.³¹ The *** teacher also provided Student with social skills training.³² The *** teacher implemented the accommodations stated in Student's IEP whenever Student was in his care, including the use of positive reinforcement.³³
20. Student needed the *** classroom support more often in late March and early April 2019, using the *** class for cooling down or redirection. Student returned to the general education class after a period of time set by the *** teacher.³⁴ At this point, Student was visiting the *** class four to five times a week, often multiple times in a single day, for about 20-25 minutes per visit.³⁵
21. All behavior support staff at Student's campus undergo annual training in non-violent crisis intervention, known as "CPI" which focuses on use of de-escalation techniques and proper forms of restraint when a student poses a threat to self or others. When restraint is used, the behavior support staff is trained to contact the parent verbally by the end of the day and complete documentation, with documentation sent home within one school day.³⁶ Behavior support staff also has access to targeted on-line courses on behavioral strategies with additional support, training, and consultation from the school district's Director of Family Engagement and Behavior Support.³⁷
22. Student's annual ARD meeting convened on February ***, 2019. The ARD Committee revised Student's IEP which continued to include direct speech services, behavior inclusion support in the general education setting, a BIP, and sensory breaks. The BIP continued to provide Student access to a quiet, non-threatening, non-stimulating place when Student needed to regain self-control in combination with direct instruction in pro-social and alternative behaviors from staff with specialized training in behavior support. Student's mother attended and actively participated in this ARD.³⁸
23. The same set of classroom instruction and behavioral accommodations from the prior IEP were included in the February 2019 IEP to address Student's behavioral and speech needs. These included: clearly defined limits, frequent reminders of the rules, notice or a warning before changing activities, giving positive reinforcement, preferential seating, and private discussions about behavior. The accommodations were to be implemented in all classes.³⁹

³¹ Tr. Vol. I: 120, 137-38.

³² Tr. Vol. I: 123.

³³ J.5: 8; Tr. Vol. I: 131-32, 142.

³⁴ Tr. Vol. I: 127.

³⁵ Tr. Vol. I: 128, 143-44.

³⁶ Respondent's Exhibit No. 1, p. 1. (R.: ___); Tr. Vol. I: 38, 118-19.

³⁷ R. 1: Tr. Vol. I: 39.

³⁸ J.5

³⁹ J.5:8.

24. There were *** behavioral incident reports involving Student during the 2018-19 school year.⁴⁰ Student averaged *** behavioral incident per week between August 2018 and late February 2019. These included: not following directions, being out Student's assigned seat, and yelling out. There were also *** behavioral incidents during that timeframe that involved Student ***. *** behavioral incidents during this timeframe resulted in office referrals.⁴¹ For each incident reported, Student needed 30 minutes to one hour to regain control in the "cool down room" and receive direct instruction on pro-social behaviors.⁴²
25. The campus used a software program to document behavioral incidents. Not all behavioral incidents resulted in office referrals. The campus principal or other staff contacted Student's mother numerous times to discuss Student's behavior.⁴³
26. Despite the behavioral incidents from August 2018 to late February 2019, Student mastered Student's behavioral goal of refraining from physical aggression 80% of the time.⁴⁴ The February 2019 ARD Committee concluded Student's behavior did not impede Student's learning or the learning of others with the behavioral supports specified in the IEP in place. The ARD Committee agreed placement in general education continued to be appropriate.⁴⁵ Student's mother agreed with the conclusions and recommendations made by the ARD Committee at the February 2019 meeting and stated she was pleased with Student's progress.⁴⁶
27. The school district implemented the behavior support and speech therapy IEP goals and objectives and set of accommodations for the 2018-19 school year.⁴⁷ Social skills training was provided by the *** teacher when Student came to the *** classroom to regroup. Clearly defined behavioral expectations were posted on the *** classroom wall and the *** teacher was clear with Student about the consequences of failing to follow expectations. Student was provided redirection and positive reinforcement when Student spent time in the *** class.⁴⁸
28. The school district provided *** sessions of direct speech therapy for 60 minutes per week from August ***, 2018 through May 2019. Consult speech services were provided on August *** and August ***, 2018. No services were provided on district or student holidays, including over the Thanksgiving holiday, the two week winter break, and during

⁴⁰ J. 10.

⁴¹ J.6: 18-19.

⁴² J; 6; J.10

⁴³ Tr. Vol. I: 181-82, 189.

⁴⁴ J.9.

⁴⁵ J.5; Tr. Vol. I: 191.

⁴⁶ J.5: 25; Tr. Vol. I: 226.

⁴⁷ Tr. Vol. I: 172.

⁴⁸ Tr. Vol. I: 123, 131-32.

the one week of spring break in March. There were no direct speech services on four district-wide assessment days and two days when the speech therapist was off campus. Student was absent *** times when direct services were offered and attended one make-up session.⁴⁹

29. Beginning in early March 2019, Student's maladaptive behaviors began to increase in frequency and intensity. Between March ***, 2019 and an ARD meeting on April ***, 2019, Student averaged *** behavioral incidents per week.⁵⁰ These incidents primarily included: ***.⁵¹ In the general education classroom, Student was having difficulty completing Student's work and focusing when expected to work independently. Student also interrupted the teacher and class during instruction.⁵²
30. ***.⁵³ ***. ***. ***.⁵⁴ ***.⁵⁵ ***. ***.⁵⁶
31. District policy prohibits a student's use of a cell phone during school hours with certain exceptions that did not apply to Student. A student who violates the policy is subject to discipline as stated in the Student Handbook.⁵⁷ The cell phone may also be confiscated.⁵⁸ Student's mother was notified of the violation ***.⁵⁹
32. On March ***, 2019 the Principal notified Student's mother, by certified letter, that Student's cell phone use *** violated the Student Handbook. The letter advised Student's mother of the possibility Student could be disciplined ***.⁶⁰ ***.⁶¹
33. ***, the principal notified Student's mother in a letter dated April ***, 2019, that ***.
***.⁶²

⁴⁹ J.15.

⁵⁰ J.6:18; Tr. Vol. I:174.

⁵¹ J.10:2-10 .

⁵² J.6:19.

⁵³ R. 2:18-19; Tr. Vol. I: 271, 274-75.

⁵⁴ R. 2: 11; Tr. Vol. I:178-79.

⁵⁵ R. 2: 13, 18, 19.

⁵⁶ R.2:11; Tr. Vol. I: 178-79, 180.

⁵⁷ R.2: 15-16; Lancaster ISD Student Handbook, 2018-19, pp. 48-49;

<https://4.files.edl.io/2053/08/15/18/153123-12a3b450-e3cf-4768-afcf-842227a179be.pdf>; Tex. R. Evid. 803(8).

⁵⁸ R.2: 17; Lancaster ISD Student Handbook, 2018-19, p. 48.

⁵⁹ R.2: 13-17.

⁶⁰ R.2:21.

⁶¹ Tr. Vol. I: 179.

⁶² R.2:20; Tr. Vol. I: 180.

34. The April ***, 2019 ***,.” ***.⁶³ Student’s mother was also notified she could appeal this decision but she never did.⁶⁴ Despite these warnings, Student’s mother continued ***.⁶⁵
35. School district staff continued to communicate with Student’s mother, including giving her notice of *** behavioral incidents that occurred between April ***, 2019 and April ***, 2019.⁶⁶ The principal continued to communicate with Student’s mother in April and May 2019. Staff never denied a parental request to meet or discuss Student’s IEP or education.⁶⁷
36. On April ***, 2019 the school district invited Student’s mother to an ARD meeting on April ***, 2019 due to concerns about Student’s escalating negative behaviors that were now interfering with Student’s learning and the learning of others.⁶⁸ Petitioner’s Complaint was available to the school district before the ARD meeting. The ARD Committee convened as proposed to discuss Student’s lack of behavioral progress, including Student’s physical and verbal aggression, increase in lack of compliance, and generally disruptive behavior since the February ***, 2019 ARD. The purpose of the ARD meeting was to discuss a possible change in placement and strategies to assist Student in reducing behavioral difficulties. Student’s mother and her advocate attended and actively participated in the ARD meeting.⁶⁹ The meeting was held at an administrative building, ***.⁷⁰
37. The ARD Committee reviewed Student’s progress from February ***, 2019 through the date of the April 2019 ARD meeting. Although Student was still passing Student’s classes, grades for *** classes were now in the seventies.⁷¹ Student was inconsistent in completing classroom assignments and grades on those assignments varied widely.⁷² Student’s measures on meeting local assessments fell from ***% to ***%.⁷³
38. Student increased Student’s need for using the cool-down strategy to four to five times per week, often multiple times a day, between February and April ***, 2019.⁷⁴ During this period of time it took Student 30 minutes to one hour to regain control with instruction on

⁶³ R.2:20.

⁶⁴ R.2:20, 22-25; Tr. Vol. I: 180-81, 185, 195.

⁶⁵ J.10: 2; R.2:26; Tr. Vol. I: 276.

⁶⁶ J.10:32-40.

⁶⁷ Tr. Vol. I: 185, 189, 237.

⁶⁸ J.6:4; Tr. Vol. I: 192, 195, 196-97.

⁶⁹ J.6:18; Tr. Vol. I: 208-09.

⁷⁰ Tr. Vol. I: 190.

⁷¹ J.6:19; J 13:1.

⁷² J.6:19; J 14:15-30, 60-63.

⁷³ J.10:2-28.

⁷⁴ Tr. I.: 87, 143-44.

- pro-social behaviors.⁷⁵ The behaviors during this time period were more serious and more intense and included acts of physical aggression ***.⁷⁶
39. Staff also received reports from parents Student was ***.⁷⁷ Student's behavior was not only disruptive in Student's general education classroom, but also on campus.⁷⁸ Student posed a safety concern to other students. During this time period Student ***.⁷⁹ ***.⁸⁰ By the end of the 2018-19 school year, Student did not cooperate with Student's teacher and other students in class for the majority of a school day. Student's "good" days were few and far between and Student struggled to maintain self-discipline in class.⁸¹
40. At the April 2019 ARD meeting the school district proposed a re-evaluation of Student that would include: a psychological (to include evaluations to determine whether Student was eligible for special education services as a student with an emotional disturbance), a FBA, a counseling evaluation, in-home and parent training assessments, a speech/language evaluation, and updated medical information (including information related to a parental concern Student might have a hearing loss as well as information related to Student's ADHD). The school district also proposed evaluations for autism, occupational therapy (OT), and sensory needs in response to the Complaint.⁸²
41. The school district provided Student's mother with a Notice of Proposal to Evaluate and Consent to Evaluate form at the April ARD meeting. Student's mother did not sign the consent form.⁸³ The school district continues to offer the proposed evaluations and will complete the proposed FIE when it receives signed parental consent.⁸⁴
42. The April ***, 2019 ARD Committee added a new behavioral goal to address Student's verbal and physical aggression and also required training for staff who would work directly with Student.⁸⁵ The ARD Committee considered providing Student with 1:1 paraprofessional support in the general education setting but school district staff rejected

⁷⁵ J.6:18-19.

⁷⁶ J. 6:19; J.10:29-53.

⁷⁷ R. 2:3-7.

⁷⁸ J.6:13; Tr. Vol. I: 145, 187, 210.

⁷⁹ Tr. Vol. I: 145, 175.

⁸⁰ Tr. Vol. I: 145, 175, 210, 247.

⁸¹ Tr. Vol. I: 129-30.

⁸² J.6:8; Tr. Vol. I: 209.

⁸³ J.6: 18, 26-31; Tr. Vol. I: 208-209.

⁸⁴ Tr. Vol. I: 220.

⁸⁵ J.6: 13, 19; J. 9:3.

this option because, in part, Student had not responded well to inclusion support in the general education classroom.⁸⁶

43. School staff instead proposed changing Student's placement from the general education classroom to the ***, a more restrictive, self-contained, special education classroom for all academics because the cool down strategy was no longer effective.⁸⁷ Student needed a smaller instructional setting with more intense behavioral support, a student to staff ratio of 4:1, and social skills instruction. Student would continue to have the opportunity to participate with students without disabilities in all nonacademic, extracurricular, and other activities.⁸⁸
44. The school district proposed implementing the change in placement while the proposed FIE was pending due to concerns that leaving Student in the general education classroom would be harmful and the proposed placement in the behavior support classroom could address Student's needs right away.⁸⁹ Student's mother disagreed with the proposed IEP and change in placement and left the meeting before it ended.⁹⁰ Student's advocate requested a recess of the April *** ARD meeting until after the parties had an opportunity to participate in mediation.⁹¹
45. After the Complaint was filed, the principal assigned a 1:1 paraprofessional to "shadow" Student for the entire school day to provide additional behavioral support in the general education classroom until the end of the school year. Student continued to use *** classrooms for cooldown.⁹² The paraprofessional implemented the accommodations and behavioral strategies in Student's IEP, including use of cool-down, problem-solving, and social skills training.⁹³
46. The paraprofessional attended all core academic and *** classes with Student in the general education setting. Despite this support, Student continued to engage in disruptive and physically aggressive behaviors at school.⁹⁴ The paraprofessional conferred with the principal and Student's teachers about Student's progress and behavior.⁹⁵

⁸⁶ Tr. Vol. I: 211.

⁸⁷ J.6:15, 19; Tr. Vol. I.: 143.

⁸⁸ J.6: 12, 14, 17, 19; Tr. Vol. I: 211, 217.

⁸⁹ Tr. Vol. I.: 225.

⁹⁰ J. 6.

⁹¹ J. 6:8.

⁹² Tr. Vol. I: 87, 187, 263.

⁹³ Tr. Vol. I: 96-97, 102-104.

⁹⁴ J.10: 2-28; Tr. Vol. I: 90, 104, 198, 212.

⁹⁵ Tr. Vol. I: 92, 97, 106-07.

47. Student was *** during the spring semester of the 2018-19 school year. ***, ***, ***. The teacher filed a written report ***.
48. Student was ***, ***, ***. The teacher removed Student from the classroom and Student was then able to calm down.⁹⁶
49. The *** teacher reported *** to Student's mother and the campus principal the same day. He then completed a written report *** and e-mailed it to the parent the next school day.⁹⁷ By this time the *** teacher felt Student was a threat to ***self and others because Student was violent at times, uncontrollable, did not listen to authority figures, and was often oppositional and defiant.⁹⁸
50. All special education teachers on the campus were trained to enter IEP progress reports by a specific deadline, print the reports, and send them home. Progress reports were issued every *** weeks for the 2017-18 and 2018-19 school years concurrent with report cards. The codes used in the progress reports were explained at the end of each report.⁹⁹ The school district maintained copies of Student's IEP progress reports through the *** week grading period of the 2018-19 school year, with the exception of the *** weeks behavior IEP progress report.¹⁰⁰
51. If Student's teacher failed to prepare the progress report, Student's name would have appeared on the "Progress report non-completion report" issued for the *** weeks. Because Student's name did not appear on that report, the school district concluded the teacher forgot to archive or save the behavioral IEP progress report in the system or put a printed report in Student's record.¹⁰¹
52. Student's mother was provided progress reports for Student's behavior goals at the April ***, 2019 ARD meeting covering the beginning of the 2018-19 school year through December 2018 and through February 2019 for Student's speech goals. The progress report for the *** week grading period could not be located in the online archives during the April ***, 2019 ARD meeting. The District agreed to locate Student's campus folder and send the progress reports for the *** week grading period with the ARD documents.¹⁰²
53. On May ***, 2019, the school district proposed an IEP amendment offering seven additional sessions of direct speech therapy, 30 minutes for each session, and again

⁹⁶ J. 11: 1-2.

⁹⁷ J. 11; Tr. Vol. I: 122, 125, 126, 134.

⁹⁸ Tr. Vol. I: 122.

⁹⁹ J. 4: 6-7; J.5: 6-7; R. 2.

¹⁰⁰ J. 7:1-2; J.9:1-15.

¹⁰¹ R. 3: 1-2; Tr. Vol. I: 235, 266-67.

¹⁰² J.6:19.

proposed conducting Student's three year re-evaluation to include all the evaluations proposed during the April ***, 2019 ARD.¹⁰³

VII. DISCUSSION

A. EVALUATION

1. Evaluation Timelines

The IDEA requires a school district to ensure a re-evaluation of each child with a disability is conducted whenever: (i) the school district determines the educational or related service needs of the child warrant a re-evaluation (including the need for improved academic achievement or functional performance), or (ii) if the child's parent or teacher requests a re-evaluation. 34 C.F.R. § 300.303 (a)(1)(2).

A re-evaluation may not occur more than once a year, unless the parent and the school district agree otherwise. 34 C.F.R. § 300.303 (b)(1). However, the school district must conduct a re-evaluation at least once every 3 years, unless the parent and the school district agree a re-evaluation is not necessary. 34 C.F.R. § 300.303 (b)(2).

In this case, Student's initial FIE was conducted by *** ISD on March ***, 2017. Student's three year re-evaluation was therefore not due until March ***, 2020. 34 C.F.R. § 300.303(b)(2). However, as Student's maladaptive behaviors escalated during the 2018-19 school year, there was a growing need to conduct a re-evaluation to address Student's need for improved academic and functional performance. 34 C.F.R. § 300.303 (a) (1).

The evidence showed the school district proposed a very comprehensive re-evaluation at the April 2019 ARD meeting. There is some evidence the school district could have proposed the re-evaluation somewhat earlier, i.e., by late February/early March given Student exhibited physical

¹⁰³ J. 7.

aggression fairly regularly from the beginning of the school year. However, the school district offered an appropriate set of evaluations by mid-April 2019 to address Student's aggressive behavior that by then had escalated in frequency and intensity and clearly interfered with Student's learning and that of others. Until that time, Student's negative behaviors were not consistent enough to interfere with Student's learning or the learning of others.

The difference between proposing the set of re-evaluations in April 2019 instead of earlier in March 2019 is not particularly significant, given Student achieved ***% mastery of Student's behavioral goals by the February ***, 2019 ARD and the school district was closed one week for spring break in March. Once Student's behaviors became increasingly aggressive and more frequent, the school district called an ARD meeting in April 2019 to propose a comprehensive re-evaluation. Petitioner did not meet Petitioner's burden of proving the school district should have proposed the re-evaluation at an earlier point in time. 34 C.F.R. § 300.303 (a)(1).

2. Autism

Petitioner also contends the school district should have conducted an evaluation to determine if Student is a student with autism. Although the school district offered to conduct an autism evaluation at the April ***, 2019 ARD meeting, Petitioner did not meet Petitioner's burden of proving the school district should have suspected Student was a student with autism. The IDEA regulations define autism as a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a student's educational performance. 34 C.F.R. § 300.8 (c)(1)(i).

Other characteristics often associated with autism are engaging in repetitive activities and stereotypical movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. *Id.* The credible evidence does not show Student exhibited these characteristics. However, once this parental request was made known to the school district when it reviewed the Complaint, an autism evaluation was included as a component of the re-evaluation proposed at the April ***, 2019 ARD meeting.

Furthermore, a child should generally not be identified as a student with autism if his or her educational performance is adversely affected primarily due to an emotional disturbance – also an eligibility classification under the IDEA. 34 C.F.R. §§ 300.8 (c)(1)(ii), 300.8 (c)(4). Under the IDEA, an emotional disturbance is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (iii) inappropriate types of behavior or feelings under normal circumstances; (iv) a general pervasive mood of unhappiness or depression; or (v) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8 (c)(4)(i)(A-E).

There is some evidence Student's behaviors over the course of the spring semester may have met certain ED criteria. The school district proposed evaluating Student in the area of ED at the April ***, 2019 ARD. Parental consent is required for re-evaluations. 34 C.F.R. § 300.300(c)(i). Student's mother has not yet consented to any of the proposed evaluations, including those for autism and an ED.

Under the unique circumstances in this case, a re-evaluation was warranted before March 2020, the date Student's three year evaluation was due. The evidence showed it was not until after the February ***, 2019 ARD meeting that the frequency and intensity of Student's physically aggressive behaviors escalated. Therefore, the school district's proposal to conduct a comprehensive re-evaluation in April 2019 was appropriate because it was almost one year in advance of the three year re-evaluation deadline of March 2020 and within a few weeks from the period of time when Student's behaviors began to escalate.

Any delay in proceeding with the proposed reevaluation is because Student's mother did not provide the requisite consent, and not due to any failure by the school district to evaluate Student for autism. See, 34 C.F.R. §§ 300.300 (c); 300.303; *In re Butte Sch. Dist. No. 1, 2019 WL 343149 *6 (D.C. MT. 2019)*(parent's failure to provide consent undermined claim school district failed to conduct re-evaluation to determine student's eligibility as a student with a specific learning disability).

B. FREE, APPROPRIATE PUBLIC EDUCATION**1. Duty to Provide a FAPE**

The purpose of the IDEA is to ensure all children with disabilities have available to them 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). A school district has a duty to provide FAPE to all enrolled children with disabilities ages 3-21. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3).

To meet its substantive obligation under the IDEA the school district must offer the student an IEP reasonably calculated to enable the student to make progress appropriate in light of the child's circumstances. The adequacy of a given IEP turns on the unique circumstances of the student for whom it was created. *Andrew F. v. Douglas Cnty. Sch. Dist., No. 15-827, 137 S. Ct. 988,999, (2017)*. The program must provide the student with a meaningful educational benefit and one that is more than merely de minimus. *Andrew F., 137 S. Ct. at 1000-01*.

2. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.¹⁰⁴ *Schaffer v. Weast, 546 U.S. 49, 62 (2005)*; *Teague Ind. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993)*. For the reasons set out below, Student did not meet Student's burden of proving the IEPs at issue or proposed placement in the behavior support classroom failed to provide Student with FAPE in the LRE.

¹⁰⁴ 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)*.

3. Individualized Education Plan

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

The evidence showed the IEP in effect and implemented during the 2018-19 school year met these requirements. The IEP goals and objectives directly addressed Student's behavioral and speech needs and included a fairly extensive set of accommodations to support Student in the general education classroom. The IEP included a description of speech therapy as a related service, and the supplementary supports and services to be provided to Student, such as cool down, redirection, and social skills training. Petitioner therefore did not meet Petitioner's burden of proving the IEPs at issue did not meet the IDEA's regulatory requirements. 34 C.F.R. §§ 300.22, 300.323(a); *Schaffer v. Weast*, 546 U.S. at 62.

4. The Four Factors Test

The Fifth Circuit has articulated a four factor test to determine whether a school district's program provides a student with the requisite meaningful, educational benefit and recently reaffirmed the validity of the four factor test. *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F. 3d 754, 765-66 (5th Cir. 2018) (*per curium*). Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the LRE;

- The services are provided in a coordinated, collaborative manner by the “key” stakeholders; and
- Positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

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

a. Individualized on the Basis of Assessment and Performance

The IEP designed at Student’s March 2018 ARD meeting and implemented during the fall semester through February ***, 2019 of the 2018-19 school year was individualized on the basis of assessment and performance. The March 2018 ARD Committee reasonably relied, in part, on the *** ISD FIE conducted the previous school year. The March 2018 ARD Committee also relied on the school district’s own behavioral and academic data. During the fall semester of the 2018-19 school year Student met local assessment standards, made good grades, and although Student was not free of behavioral issues, averaged *** per week.

The IEP proposed at the April 2019 ARD meeting was also individualized on the basis of assessment and performance. The *** ISD FIE remained timely under the law because the three year re-evaluation required by the IDEA was not due for another year. The ARD now also had Student’s grades and quite a bit of behavioral data from the 2018-19 school year it relied on when revising Student’s behavioral IEP, added staff training, and continued to provide speech therapy. The school district properly proposed a comprehensive re-evaluation of Student, which requires an ARD Committee meeting to review and discuss the results, and based on any recommendations, add services and/or revise the IEP. *See* 34 C.F.R. § 300.324 (b).

b. Least Restrictive Environment

The evidence showed that, for the beginning of the 2018-19 school year, the school district attempted to meet the IDEA's preference for mainstreaming children with disabilities with non-disabled peers to the maximum extent appropriate. 34 C.F.R. §300.114. Student was placed in the general education classroom for all classes with behavior support and received speech therapy as a related service. However, the statutory preference is not absolute and includes a qualifier: "to the maximum extent *appropriate*." *Id.* (emphasis added); *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F. 3d at 771.

The evidence also showed that, as the 2018-19 school year progressed, Student's behavioral needs were no longer being effectively met in the general education classroom, even with continued behavioral support, accommodations, and a BIP. Instead, it was no longer appropriate to mainstream Student fully due to Student's increasingly physically aggressive behavior toward classmates and staff. The benefits of Student's placement in the general education classroom were now outweighed by the disruptive nature of Student's behavior to Student's learning and the learning of Student's classmates. *Daniel R.R. v. El Paso Indep. Sch. Dist.*, 874 F. 2d 1036, 1049 (5th Cir. 1989). As to this factor, while placement in the general education classroom was initially Student's LRE, the proposed change in placement to a behavior support classroom became Student's LRE when Student's needs changed over the course of the 2018-19 school year.

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

Student's IEP called for speech therapy services and the evidence showed Student received those services. Student did not receive speech on certain occasions for good reasons: holidays, district-wide assessment dates, and student absences. There is virtually no evidence Student's teachers impeded or failed to cooperate with Student's speech therapist in providing Student the speech services established by Student's IEP.

The evidence also showed Student's teachers appropriately utilized the behavior support classroom in coordination with special education staff as specified in Student's IEP. The counselor provided Student with a counseling session when the campus principal sent Student to the counselor's office and notified Student's mother about the session. The evidence showed the counselor also communicated with her periodically. The 1:1 paraprofessional discussed Student's behavior and progress with Student's teachers. The Director of Family Engagement and Behavior Support provided consultative support to the teachers in the behavior support classes and collaborated with Student's mother by facilitating outside counseling services for the family.

The principal, the 1:1 paraprofessional, and the teachers attempted to collaborate with Student's mother. She was able to communicate with Student's teachers and attend the April ARD meeting, ***. Student's teachers also conferred with the school ***.

Furthermore, collaboration is a two-way street. The IDEA contemplates parental cooperation and collaboration as much as cooperation and collaboration from school personnel. See, 34 C.F.R. §§ 300.321 (a)(1); 300.322, 300.324 (a)(1)(ii), 300.501. In this case, Student's mother knowingly disregarded school district policy and purposefully ***. Although she may have had legitimate concerns about her ***'s progress and Student's treatment by school staff, she failed to bring those concerns to the attention of school staff, choosing instead to place her *** at risk for discipline for violating school policy. These actions were not coordinated or collaborative with school district staff.

d. Academic and Non-Academic Benefits

The fourth factor to consider is critical. *Renee J. v. Houston Indep. Sch. Dist.*, 913 F. 3d 523, 529 (5th Cir. 2019); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F. 3d 801, 813-14 (5th Cir. 2012). The record demonstrates the IEP implemented during the 2018 fall semester until the end of February 2019 provided Student with meaningful academic and non-academic benefits. Although Student exhibited some maladaptive behaviors during this period, behavioral incidents occurred on an average of *** a week. Student responded fairly well to the cool down mechanism implemented in the behavior support classes. Student was often able to return to the general

education classroom after regaining self-control. Furthermore, Student made very good grades throughout the fall semester, mastered grade level materials, and met local assessment standards. The consensus of the February ***, 2019 ARD, including Student's mother, was that Student was doing well.

Student's physically and verbally aggressive behavior, however, escalated beginning in March 2019. Student needed to access the behavioral support class almost daily, often multiple times each day, from this period of time to the end of the school year. Student's grades and academic achievement also declined. This evidence showed Student's behavior now impeded Student's own learning and became so disruptive it now also impeded the learning of others. The school district recognized Student required a more structured, smaller instructional setting and proposed a change in placement to address those needs.

Any benefit Student derived from Student's mainstream placement was now outweighed by Student's need for a special education classroom, staffed with certified special education teachers trained in the use of behavioral strategies, where the limits and consequences of behavior are clearly defined. The proposed placement in the behavior support class was reasonably calculated to provide Student the requisite academic and non-academic benefit that could no longer be provided in the general education classroom. The evidence showed that even the constant shadow of a 1:1 paraprofessional in the general education classroom was not particularly effective in managing Student's behavior.¹⁰⁵

e. Conclusion as to FAPE

A hearing officer uses a holistic perspective to evaluate a student's educational program when applying the four factors test to the record. *Klein Independent School District v. Per Hovem*, 690 F.3d 390, 391 (5th Cir. 2012). The preponderance of the evidence leads to the conclusion Student received the requisite meaningful educational benefit from Student's educational program and placement during the relevant time period. Once Student's behavior and academic performance

¹⁰⁵ This is an item of requested relief Petitioner seeks in Petitioner's Complaint.

declined, the school district recognized a need for an updated and comprehensive re-evaluation. Furthermore, the proposal to change Student's placement was also necessary when the nature and severity of Student's behavioral needs began to impede Student's learning and the learning of Student's classmates. *Schaffer v. Weast, supra; Michael F., 118 F. 3d at 253.*

C. PLACEMENT

The IDEA requires children with disabilities are to be educated with children without disabilities to the maximum extent appropriate. Special classes, schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the student's disability is such that education in regular classes with supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.114 (a)(2)(i)(ii).

In this jurisdiction, a two-part test determines whether a student's 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 (i.e., what steps the school took to accommodate the student in regular education). Second, if the student cannot achieve in the regular classroom, whether the school district nevertheless mainstreamed the student to the maximum extent appropriate. *Daniel R.R. v. El Paso Ind. Sch. Dist., supra.*

When education in the regular classroom cannot meet a student's unique needs, the presumption in favor of mainstreaming is overcome. Furthermore, the mainstreaming preference is broad, but not absolute or limitless. *E.R. v. Spring Branch Indep. Sch. Dist., supra.* A school district is not required to provide the student with every conceivable supplementary aid or service. Instead, the placement/LRE analysis must be an individualized, fact-specific inquiry that includes careful examination of the nature and severity of the child's abilities, disabilities, and, needs and the school district's response to those needs. *Daniel R.R., 874 F. 2d at 1048.*

In making this fact-specific inquiry, the following factors must be considered and no one factor is dispositive:

1. The nature and severity of the student's disabilities;
 2. The student's academic achievement;
 3. The non-academic benefits of regular classroom placement;
 4. The overall experience in the mainstreamed environment balancing the benefits of regular education and special education to the student; and,
 5. The effect of the student's presence on the regular class:
 - (i) Is the student's behavior so disruptive in the regular classroom that the education of the other students is significantly impaired?
 - (ii) Does the student require so much of the teacher's attention that the teacher will have to ignore the needs of the other students in order to tend to the student with a disability? If so the balance tips in favor of placing the student in special education.
- Id.*

Applying this analysis to the facts, the school district's proposal to place Student in the self-contained behavior support class was reasonably calculated to provide Student with FAPE in the LRE. First, the evidence showed Student's behavioral challenges were becoming more and more severe as the school year progressed, resulting in physical aggression ***. Student was also physically aggressive ***. In addition, Student's vocal outbursts and non-compliant behavior became more frequent, particularly during the spring semester.

Second, although Student was initially achieving academically, by mid-spring Student was not making progress behaviorally or socially and Student's academics also began to suffer. Third, the benefit of placement in the general education setting appeared to elude Student. Instead of learning and using age appropriate socialization skills, Student was increasingly unable to interact with peers or express anger or frustration appropriately. Fourth, by March/April 2019, the evidence showed the overall benefit of general education classroom placement was outweighed by Student's need for instruction by staff trained in the use of behavioral strategies and for regular cool down periods following outbursts. Student's need to access the behavioral support classroom for cool down and redirection increased, especially by April 2019.

Fifth, Student's verbal and physically aggressive behavior began to require more and more attention and intervention by teachers and staff. The principal assigned a 1:1 paraprofessional to shadow Student after the April ***, 2019 ARD meeting as a proactive strategy to manage Student's aggressive behavior and reduce the risk of harm to others. Student required regular removal from the general education classroom at that point by the paraprofessional. By the April 2019 ARD Student's behavior impeded not only Student's own learning but that of Student's peers.

In consideration of these factors, the nature and severity of Student's behavioral issues had such a negative impact on Student's ability to learn and were such that, by mid-April 2019, any benefit from placement in the general education classroom was outweighed by Student's behavioral and academic needs for a more structured, smaller instructional setting. Student needs staff trained in behavioral strategies where behavioral expectations are emphasized and taught in the classroom. Student's removal from the general education setting to ***, behavior adjustment class is reasonably calculated to provide student with FAPE in the LRE. Furthermore, Student will be mainstreamed to the maximum appropriate by joining students without disabilities in nonacademic and extracurricular activities. 34 C.F.R. § 300.114 (a)(2)(i).

Student can no longer be educated in the general education instructional setting with the use of supplementary aids and services. 34 C.F.R. § 300.300.114; *Daniel R.R. v. El Paso Ind. Sch. Dist., supra*. If Student's mother provides consent for the set of evaluations proposed by the school district, including a counseling assessment, a FBA, and in-home and parent training assessments, the parties will then have an opportunity to convene an ARD to make any revisions to Student's IEP and BIP, and add any related and support services the evaluation recommends.

By addressing Student's behavioral, emotional and social needs, the proposed placement is also reasonably calculated to support Student in once again making academic progress given Student's natural abilities as a student with average general intellectual ability capable of meeting grade level standards and earning good grades. Next year Student will be in ***. Therefore it will be age appropriate for Student to be placed in the *** because the *** classroom is designed for students in ***.

D. PROCEDURAL ISSUES

1. Notice of ***

The credible evidence showed Student was *** during the 2018-19 school year. **. The evidence showed ** as required by state law. Although it is unclear whether Student's mother was verbally notified on the day of **, the evidence showed she was properly notified as to **. **.

Under these facts, and because state law and not the IDEA governs **, Petitioner did not prove an IDEA procedural violation. Even if the school district failed to properly notify Student's mother of the **, Petitioner did not prove by a preponderance of the evidence that this was a procedural violation that resulted in a denial of a FAPE. The evidence showed Student's academic, speech, and behavioral needs were met through the middle of the spring semester and, when Student's unique circumstances changed, the school district responded appropriately with a proposal to conduct a comprehensive re-evaluation and placement in a structured, behavioral setting. Furthermore, the evidence showed Student's mother was not denied the opportunity to participate in the educational decision-making related to the provision of FAPE – the evidence showed she was an active participant in all ARD meetings, and communicated with school staff regularly. 34 C.F.R. § 300.513 (a)(2).

2. IEP Progress Reports

An IEP must include a description of how the child's progress towards meeting annual goals will be measured and when periodic reports on the child's progress meeting the annual goals will be provided to the parent. The periodic reports may be provided through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 C.F.R. § 300.320 (a)(3)(i)(ii). The credible evidence showed the school district issued IEP progress reports with report cards for the ** grading periods. The evidence also showed the ** week grading period ended around the same date Petitioner filed Petitioner's Complaint.

The evidence showed the *** weeks progress reports were not yet archived in the school district's record-keeping system, but arrangements were made to provide Student's mother with a hard copy along with the documents for the April ***, 2019 ARD meeting. The evidence showed the IEP progress reports were sent home with report cards. Student's mother claimed she never received them but that assertion is controverted by the school district's evidence documenting the dates the progress reports were issued. There is some evidence the behavioral IEP progress report for the *** weeks grading period could not be located. This alone does not prove Student's mother did not receive the progress reports. Even if she did not receive that single progress report, the preponderance of the evidence shows she was provided with all others. Petitioner therefore did not meet Petitioner's burden of proving a procedural violation on this issue.

3. Parental Participation

The IDEA establishes a number of parental procedural rights. Of relevance here is the parental right to an opportunity to participate in the decision-making process regarding the provision of FAPE to their child. 34 C.F.R. §§ 300.321 (a)(1); 300.322; 300.513 (a)(2)(ii). In this case, Petitioner argues procedural rights for meaningful parental participation in the educational decision-making process were violated when ***. The evidence showed the parent was not completely precluded from *** nor restricted from communicating with Student's teachers or other staff by phone or email. Nothing in the IDEA grants parents unlimited access to their child's ***.

The record also shows Student's mother was invited to and participated in Student's ARD meetings. The meetings took place on campus before March 2019 and at another location in the school district for the April 2019 ARD meeting. A school district can set reasonable communication protocols and limit access to the classroom as long as parents are given the opportunity to participate in the educational decision-making process. *R.K. v. Clifton Bd. of Educ.*, 587 Fed. Appx. 17, 22(3d Cir. 2014)(school district's refusal to allow parent's expert to observe the classroom did not deprive parent of right to participate in making educational decisions).

Parents are not entitled to unlimited communications related to their child. *See, In Re Student with a Disability, 118 LRP 40697 (SEA WI. 2018)* (school district could place limitations on staff answering excessive parent emails and phone calls during instruction). Here, the evidence showed Student's mother was able to advocate for her ***. The evidence showed ***.

She was also warned about the consequences of ***, but nevertheless continued to do so in violation of school district policy. Furthermore, the *** she was accommodated to ensure her continued participation in Student's ARD meetings. ***.

4. Timeliness for Convening ARD Meeting

Petitioner contends the school district failed to convene an ARD meeting following a parental request submitted on December ***, 2018. The IDEA requires a school district take steps to ensure the parents of a child with a disability is present at each IEP team meeting. 34 C.F.R. § 300.322.¹⁰⁶ Under state law, upon receipt of a written request from a parent, a school district must schedule and convene the meeting or provide written notice why the school district refuses to do so, within five school days. 19 Tex. Admin. Code § 89.1050(e).

The school district must also ensure the ARD Committee reviews a student's IEP periodically, but not less than annually, to determine the student's progress under the IEP in place. 34 C.F.R. § 300.324 (b). Nothing in the IDEA prohibits a parent from submitting a request for an ARD meeting before the next annual ARD and state law clearly contemplates the right to do so. 19 Tex. Admin. Code § 89.1050 (e).

However, nothing in the record shows Student's mother requested an ARD in December 2018 for Student or that the request was refused. There is some evidence Student's mother requested an ARD in December to discuss Student's ***. Instead, the evidence showed Student's annual ARD convened on March ***, 2018, Student's mother participated in that ARD,

¹⁰⁶ In Texas, the IEP Team is referred to as the Admission, Review & Dismissal Committee (ARD). 19 Tex. Admin. Code § 89.1050.

and the IEP developed in that meeting was implemented through the fall semester of the following school year when the next annual ARD convened on February ***, 2019. The evidence showed Student's mother participated in the February 2019 ARD as well. Petitioner did not meet Petitioner's burden of proof on this issue.

5. Conclusion as to Procedural Violations

A hearing officer's determination whether a child received FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find a child did not receive FAPE only if the procedural inadequacies: (i) impeded the child's right to FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or, (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513.

While there is some evidence Student's mother did not receive notice of ***, or received every IEP progress report, those procedural inadequacies did not deny Student FAPE, deprive Student of an educational benefit, or significantly impede parental opportunity to participate in the educational decision-making process. Instead, the evidence showed school district staff communicated with Student's mother over the course of the school year, and she attended and actively participated in every ARD. Therefore, none of the procedural violations alleged resulted in a substantive violation of the IDEA. *Id.*

VIII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proving Respondent failed to conduct Student's three year re-evaluation in a timely manner because the re-evaluation was not due until March ***, 2020. 34 C.F.R. § 300.303 (b)(2).
2. Petitioner did not meet Petitioner's burden of proving the school district should have conducted an evaluation to determine whether Student was eligible for special education as a student with autism. 34 C.F.R. § 300.8 (c)(1). Respondent properly relied on a review of existing evaluation data and current information in determining Student's eligibility for special education services and need for special education. 34 C.F.R. § 300.305 (a).


3. Respondent properly and timely proposed a comprehensive re-evaluation when Student's unique circumstances changed, and the school district determined Student's educational needs warranted an early re-evaluation. 34 C.F.R. § 300.303.
4. Petitioner did not meet Petitioner's burden of proving Respondent failed to provide Student with a free, appropriate public education. Specifically, Petitioner did not meet Petitioner's burden of proving Respondent failed to adequately address Student's behavioral needs or failed to properly implement services including accommodations or speech services. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Andrew F. v. Douglas Cnty. Sch. Dist. No. 15-827*, 137 S. Ct. 999 (2017); *Cypress-Fairbanks Indep. Sch. Dist. v Michael F.* 118 F. 3d 245, 253 (5th Cir 1997).
5. Respondent's proposed change in placement, from a general education instructional setting with behavioral supports to a special education self-contained behavior support class, was reasonably calculated to provide Petitioner a free, appropriate public education in the least restrictive environment. The nature and severity of Petitioner's behavioral needs can no longer be achieved satisfactorily in the general education classroom with supplementary aids and services. 34 C.F.R. § 300.114 (a)(2)(ii); *Daniel R.R. v. El Paso Indep. Sch. Dist.*, 874 F. 2d. 1036, 1048 (5th Cir. 1989).
6. Petitioner did not prove by a preponderance of the evidence that Respondent violated parental procedural rights under the IDEA. Petitioner did not prove Respondent failed to provide proper notice on the use of restraint. Tex. Educ. Code § 37.0021. Petitioner did not prove IEP progress reports were not provided in a timely manner. 34 C.F.R. § 300.320(a)(3).

Petitioner did not prove *** was a procedural violation. Respondent could place reasonable restrictions limiting ***. ***.
7. Petitioner did not prove any procedural violations resulted in the denial of FAPE or deprivation of educational benefit to Student or significantly impeded parental opportunity to participate in the educational decision-making process. 34 C.F.R. § 300.513.

IX. ORDERS

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

SIGNED July 17, 2019.



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

X. NOTICE TO THE PARTIES

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