

**DOCKET NO. 284-SE-0817**

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

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Petitioner STUDENT b/n/f PARENT (collectively, Petitioner or Student) brought this action (the Complaint) against the Dallas 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 Student’s request for hearing on August 18, 2017, with a Notice of Filing of a Special Education Due Process Hearing issued by the Texas Education Agency (TEA) on the same day. This case was originally assigned to Hearing Officer Steve Elliot. On November 6, 2017, the case was reassigned to the undersigned hearing officer.

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

The hearing officer concludes Student was denied FAPE during the 2016-2017 school year because Student’s IEP was not reasonably calculated to allow Student to make educational progress in light of Student’s unique circumstances. Student is therefore entitled to relief, specifically residential placement at \*\*\* (\*\*\*), for one full calendar year, as more specifically ordered below.

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

Two continuances were granted in this case. The due process hearing was originally scheduled for October 2, 2017, with the decision due on November 4, 2017. The first continuance was granted on September 18, 2017, in Order No. 2 to allow the parties an opportunity to review the findings of Student's Independent Educational Evaluations (IEEs) and attempt mediation. The hearing was continued to January 16-18, 2018, and the decision due date was extended for good cause to February 23, 2018. A second continuance was granted on January 15, 2018 in Order No. 6 due to inclement weather that prevented safe travel to the hearing. The hearing was rescheduled for February 7-9, 2018, and the decision due date was extended for good cause to March 19, 2018 to give the parties an opportunity to submit closing arguments with access to the hearing transcript.

**B. Legal Representatives**

Student was represented throughout this litigation by Student's legal counsel, Myrna Silver, with the Law Offices of Myrna Silver. The District was represented throughout this litigation by its legal counsel, Kenyatta Braggs, with the law firm of Brackett and Ellis, P.C.

**C. Resolution Session and Mediation**

The parties agreed to attempt mediation in lieu of a resolution session. The parties met in mediation on October 18, 2017. The mediation was unsuccessful.

**D. Preliminary Orders**

The statute of limitations is an issue in this case. The parties proposed filing briefs on this issue during a prehearing conference on September 11, 2017.<sup>1</sup> In Order No. 3, issued on November 9, 2017, the newly assigned hearing officer clarified the scope of briefs and ordered

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<sup>1</sup> Prehearing Transcript at 7, 22-23.

the parties to brief the application of the statute of limitations issue to this case and to limit arguments to the potential scope of compensatory relief available to Petitioner under the IDEA, considering the Third Circuit Court of Appeal's decision in *G.L. v. Ligonier Valley School Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

The parties filed briefs on December 8, 2017, and Petitioner filed a response to the District's brief on December 15, 2017. This application of the statute of limitations to this case is discussed in Section VI of the decision.

## **II. DUE PROCESS HEARING**

The due process hearing was conducted on February 7-8, 2018 in Dallas, Texas. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Student's legal counsel, Myrna Silver. She was assisted by attorney Ruth Rickard on days one and two of the hearing. Student's parent and next friend and stepfather attended.

Respondent continued to be represented by its legal counsel, Kenyatta Braggs, assisted by co-counsel, Andrea Paris. District representatives were \*\*\*, \*\*\*, and \*\*\*, Special Education Supervisor.

The parties filed timely written closing arguments. A decision is due on March 19, 2018.

## **III. ISSUES**

### **A. Petitioner's Issues**

Petitioner raised the following issues under IDEA for decision in this case:

FREE APPROPRIATE PUBLIC EDUCATION

- Whether Student's IEP was reasonably calculated to enable Student to make educational progress in light of Student's individual circumstances;
- Whether Student made any meaningful academic, behavioral, or functional progress from January 2015 until the filing of the due process hearing request;
- Whether Student's IEP did not require Student to independently (i.e., without teacher assistance or manipulation) demonstrate mastery of IEP objectives;
- Whether Respondent failed to implement Student's IEPs written prior to May 2017;
- Whether staff working with Student were adequately and appropriately trained so as to be able to implement Student's IEP;
- Whether Student not only failed to make progress, but regressed academically and behaviorally from January 2015 to May 2017; and
- Whether staff working with Student failed to implement appropriate strategies to prevent Student from harming \*\*\*self and others.

PROCEDURAL VIOLATIONS

- Whether Respondent failed to provide progress reports to Student's parent to inform her of Student's progress on Student's IEPs;
- Whether Respondent failed to schedule or hold any Admission, Review, and Dismissal (ARD) meetings to consider two Independent Educational Evaluations (IEEs); and
- Whether Respondent failed to develop or implement an individualized autism supplement to Student's IEP.

**B. Respondent's Legal Position**

Respondent generally denies Petitioner's allegations and maintains it provided Student with FAPE in the least restrictive environment at all relevant times. Respondent also raises the statute of limitations as an affirmative defense.

#### IV. REQUESTED RELIEF

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

Petitioner seeks the following items of requested relief:

- Residential placement of Student at the \*\*\* until Student is no longer eligible for special education services in the District due to age; and
- Payment by Respondent of all costs associated with Student's placement at \*\*\*.

#### V. FINDINGS OF FACT

1. Student is \*\*\* years old and in \*\*\* grade at \*\*\* in the District.<sup>2</sup> Student lives with Student's mother and stepfather in Dallas, Texas. Student attended \*\*\* Independent School District (ISD) from age \*\*\* through the middle of the 2014-2015 school year, halfway through Student's \*\*\* grade year.<sup>3</sup> Student enrolled in the District in January 2015.<sup>4</sup>
2. As \*\*\*, Student was diagnosed with \*\*\*, \*\*\*, \*\*\*.<sup>5</sup>
3. Student received \*\*\* (\*\*\*) services for Student's \*\*\* beginning at approximately \*\*\*.<sup>6</sup> At approximately age \*\*\*, Student was diagnosed as \*\*\*.<sup>7</sup> Student had Student's \*\*\*.<sup>8</sup>
4. Student has \*\*\*.<sup>9</sup> Student functions significantly below age level in Student's cognitive and academic abilities.<sup>10</sup> Student's disabilities impact every aspect of Student's

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<sup>2</sup> Response to Complaint at 1.

<sup>3</sup> P. 1; P. 3.

<sup>4</sup> I. at 102.

<sup>5</sup> I. at 68-69.

<sup>6</sup> I. at 69.

<sup>7</sup> I. at 70-71.

<sup>8</sup> I. at 72.

<sup>9</sup> I. at 72, 78.

<sup>10</sup> P. 19 at 859; II. at 364.

education.

5. Student enrolled in the \*\*\* in \*\*\* ISD in a classroom for students with \*\*\* when Student turned \*\*\* years old.<sup>11</sup> Student was diagnosed with autism in 2007 and placed in a “structured classroom”.<sup>12</sup> Student was determined to have an intellectual disability in \*\*\* school.<sup>13</sup>
6. Student is eligible for special education and related services under the following classifications: \*\*\*, \*\*\*, \*\*\*, Autism, Intellectual Disability, Speech Impairment, and Other Health Impairment.<sup>14</sup>
7. Student requires constant supervision and is dependent on others, including District personnel, to meet Student’s needs. Student is unable to \*\*\*.<sup>15</sup> \*\*\*.<sup>16</sup> Student receives other \*\*\* services at school, such as \*\*\*, and \*\*\*.<sup>17</sup>
8. Behaviors associated with autism, including \*\*\* behaviors, impede Student’s success at school. Student’s \*\*\* behavior began in approximately \*\*\* grade and has progressively worsened since then.<sup>18</sup> Student engages in \*\*\* behavior due to severe autism across settings – at home, at school, and during transport to and from school.<sup>19</sup> Student has engaged in \*\*\* behavior the entire time Student has been enrolled in the District.<sup>20</sup> Student’s \*\*\* behaviors required Student to have \*\*\* assistants at all times.<sup>21</sup>
9. Student’s \*\*\* behavior has caused \*\*\*.<sup>22</sup> Student’s \*\*\* since enrolling in the District.<sup>23</sup> Student’s parent and the District provided Student \*\*\*.<sup>24</sup> However, even with \*\*\*, Student’s behavior resulted in \*\*\*.<sup>25</sup> \*\*\*.<sup>26</sup>

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<sup>11</sup> I. at 82.

<sup>12</sup> R. 3 at 123; I at 82.

<sup>13</sup> I. at 81.

<sup>14</sup> P. 1 at 1; R. 2 at 86; R. 3 at 146-147.

<sup>15</sup> R. 2 at 91; III. at 674.

<sup>16</sup> I. at 81.

<sup>17</sup> P. 5 at 177.

<sup>18</sup> P. 19 at 859; I. at 36, 73, 99-100, 177.

<sup>19</sup> P. 19 at 859; R. 3 at 123-124; I. at 91.

<sup>20</sup> II. at 455; III. at 606.

<sup>21</sup> I. at 123; P. 3 at 93.

<sup>22</sup> I. at 72, 74.

<sup>23</sup> I. at 77.

<sup>24</sup> P. 5 137; I. at 76.

<sup>25</sup> II. at 529.

10. Student does not have a functional communication system beyond basic signs. Student \*\*\*, and teachers use \*\*\*.<sup>27</sup> Student has been introduced to several communication methods, including a DynaVox communication device, Picture Exchange Communication System with no or limited success.<sup>28</sup>
11. Communication deficits contribute to Student's behavior.<sup>29</sup> Student's behavior impedes Student's learning and that of others.<sup>30</sup> As a result, each IEP developed by \*\*\* ISD and the District contain a Behavior Intervention Plan (BIP) for Student.<sup>31</sup>
12. Student has significant \*\*\*. Student's \*\*\* was estimated at between \*\*\* and \*\*\*. Student can use Student's vision to participate in class activities and transition from one activity to the next and locate materials from approximately \*\*\* away.<sup>32</sup>
13. Student's 2014-2015 IEP developed by \*\*\* ISD included Student's Present Levels of Academic Achievement and Functional Performance (PLAAPFs) in the areas of Reading, Speech Service, Written Expression, Math, Behavior, Functional Skills, and \*\*\*.<sup>33</sup> Student's IEP included annual goals in the areas of Speech Therapy, Reading, Language Arts, Math, Functional, and Behavior.<sup>34</sup> Student's IEP included a BIP.<sup>35</sup>
14. Student has made limited progress since enrolling in the District and has regressed in some areas.<sup>36</sup> Student's October 2014 FIE by \*\*\* ISD is a largely accurate picture of Student's current level of functioning, except in the area of behavior where Student has regressed.<sup>37</sup>
15. Student did not return to \*\*\* ISD in January 2015, but instead enrolled at Student's home school in the District. The District held a transfer meeting on January \*\*\*, 2015. Student's IEP from \*\*\* ISD was adopted with related services to be matched as closely as possible to what Student received in \*\*\* ISD. Student's ARD Committee determined

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<sup>26</sup> I. at 74.

<sup>27</sup> III. at 605-606.

<sup>28</sup> I. at 78-79; P. 17 at 768.

<sup>29</sup> P. 19 at 861.

<sup>30</sup> P. 5 at 121; P. 7 at 246; P.8 at 310.

<sup>31</sup> R. 5 at 279-280; R. 7 at 383-386.

<sup>32</sup> P. 1 at 16.

<sup>33</sup> P. 2 at 38-41.

<sup>34</sup> P. 2 at 44-48.

<sup>35</sup> P. 2 62-69.

<sup>36</sup> II. at 417-418.

<sup>37</sup> I. at 104-117

Student's needs would be best met in the \*\*\* at \*\*\*, rather than Student's home school.<sup>38</sup> The ARD Committee confirmed receipt of Student's IEP and FIE from \*\*\* ISD and determined Student would receive special education services for 30 school days.<sup>39</sup>

16. Student's ARD Committee reconvened on May \*\*\*, 2015 for Student's annual meeting and to develop Student's 2015-2016 IEP.<sup>40</sup> Student had attended school in the District for approximately \*\*\* months at that time. Recommended interventions included: special education classroom setting; speech/language therapy; assistive technology; occupational therapy; adapted physical education; instruction from a \*\*\* teacher; and teacher \*\*\* on consult.<sup>41</sup>
17. Student's IEP included Student's PLAAFPs in the areas of Language/Communication, Behavioral/Social/Emotional, Health and Development; English Language Arts/Reading, Math, Science, and Social Studies/History.<sup>42</sup> Student's 2015-2016 IEP also included annual goals and objectives in areas of Physical Education, Math, Occupational Therapy, Social Studies, Science, Speech Therapy, \*\*\*.<sup>43</sup> Student's IEP included a BIP.<sup>44</sup>
18. Functional \*\*\* re-evaluation and learning media reassessments were conducted by a Certified Teacher of the \*\*\*. Hand over hand instruction whenever possible was recommended. Ineffective or inappropriate communication and social interaction were major challenges, as were inconsistent use of signs and gestures.<sup>45</sup>
19. Student's emotional and behavioral status was assessed using informal measures, including information from Student's parents and teachers and observation. Behaviors were \*\*\*. Student's ARD Committee did not recommend a Functional Behavior Assessment (FBA). Behavioral strengths included: exhibits/expresses happiness through smiling, laughing, jumping up and down, or through enjoyment of an activity; is loving towards Student's teachers; follows simple routines; and follows simple one step directions within a routine.<sup>46</sup>
20. The May \*\*\*, 2015 ARD Committee assessed Student's intellectual functioning using formal and informal measures. Student's cognitive subtest revealed an age equivalent of

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<sup>38</sup> P. 3.

<sup>39</sup> P. 3.

<sup>40</sup> P. 7

<sup>41</sup> R. 2 at 67.

<sup>42</sup> P. 7 at 245-250.

<sup>43</sup> P. 7 255-263.

<sup>44</sup> P. 7 at 278.

<sup>45</sup> R. 2 at 68-73.

<sup>46</sup> R. 2 at 80.



- \*\*\*. Student's adaptive behavior subtest revealed an age equivalent of \*\*\*.<sup>47</sup>
21. In the area of adaptive behavior, Student's self-help and self-regulation skills were within the extremely low range of functioning. \*\*\*.<sup>48</sup> Student required a highly structured classroom setting with emphasis on development of communication and language skills through the increased use of visual supports, strategies, and structure.<sup>49</sup>
  22. An FIE was completed on April \*\*\*, 2016, including an FBA, to help address Student's continued \*\*\* behavior at school.<sup>50</sup> Student's emotional and behavioral status was assessed using formal and informal measures including: information from parents and teacher (January \*\*\*, 2016, March \*\*\*, 2016), observation by a District Licensed Specialist in School Psychology (LSSP) (March \*\*\*, 2016), FBA (April \*\*\*, 2016), and the Behavior Assessment Scales for Children-2 (January \*\*\*, 2016).<sup>51</sup>
  23. The FBA considered by Student's ARD Committee on April \*\*\*, 2016 was based on one day of observation by a District LSSP on March \*\*\*, 2016. Student's behaviors occurred with change, lack of structure, when denied something Student wants, or when something is taken from Student. Formal consequences were not provided due to fear Student would \*\*\*. Behaviors were exacerbated by language and communication difficulties, unstructured times, and difficulties with consistency and reinforced by permitting avoidance of tasks or reduction in demands. Demands were avoided to prevent Student from \*\*\*.<sup>52</sup>
  24. Recommendations for behavior interventions included: ensure consistency and structure with clear expectations and visual routines and assignments; teach social rules and provide modeling of social skills; continue to teach and practice commands; expand the complexity of commands as simple ones are mastered; ensure commands are understood outside of routines; teach Student to use visual schedules; positive reinforcement; a routine to prepare Student for getting on the bus and a structured activity to do while waiting.<sup>53</sup>
  25. On April \*\*\*, 2016, Student's ARD Committee considered Student's academic achievement using informal measures, including information from parents (January \*\*\*, 2016); information from teachers (March \*\*\*, 2016); information from educational records (March \*\*\*, 2016); and classroom observation (March \*\*\*, 2016). Observation

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<sup>47</sup> R. 2 at 84.

<sup>48</sup> R. 2 at 85.

<sup>49</sup> R. 2 at 87.

<sup>50</sup> R. 3.

<sup>51</sup> R. 3 at 138-141.

<sup>52</sup> R. 3 at 139, 141.

<sup>53</sup> R. 3 at 148.

- suggested Student listened when Student's teacher read, but it was not clear if Student understood. When the teacher worked one on one with Student on academics, it was not clear if Student understood what was being taught.<sup>54</sup>
26. Recommended instructional strategies included: structure and routine, tactile visuals, a visual schedule; continued vocabulary enrichment; teaching with simple words and pairing instruction with action and multi-sensory whenever possible; use of practical vocabulary; teaching life skills and prerequisites; continue structured classroom environment and an academic program with emphasis on teaching communication, social development, and lifelong learning skills.<sup>55</sup>
27. Student's assistive technology needs were assessed using information from parents and teachers (March \*\*\*, 2016); information from records (March \*\*\*, 2016), and observation (March \*\*\*, 2016). Visual schedules and manipulative materials were identified as needs.<sup>56</sup>
28. Student's ARD Committee met on May \*\*\*, 2016. The ARD Committee reviewed the following evaluation data and other information: information from personnel (April \*\*\*, 2016); \*\*\*/medical (May \*\*\*, 2016); FIE (April \*\*\*, 2016); FBA (April \*\*\*, 2016); BIP (April \*\*\*, 2016); Evaluation(s) for related services in the areas of \*\*\* Occupational Therapy (March \*\*\*, 2015, April \*\*\*, 2015); Statewide Testing (May \*\*\*, 2015); \*\*\*; and \*\*\*.<sup>57</sup>
29. Student's ARD Committee reviewed Student's PLAAFPs in the areas of Language Communication, Behavioral/Social/Emotional, \*\*\*/Reading, Math, Science, Social Studies, and \*\*\*.<sup>58</sup>
30. In Language/Communication, Student received integrated speech therapy services for \*\*\* minutes every six weeks and made limited progress towards Student's speech/language objectives.<sup>59</sup> Student's speech therapy services were decreased to \*\*\* minutes every six weeks.<sup>60</sup>
31. In the areas of Behavioral/Social/Emotional, Student continued to exhibit \*\*\* behavior; had difficulty working independently; and exhibited \*\*\* and \*\*\*. Student engaged in

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<sup>54</sup> R. 3 at 142.

<sup>55</sup> R. 3 at 148.

<sup>56</sup> R. 3 at 150.

<sup>57</sup> P. 8 at 307.

<sup>58</sup> P. 8 at 309-316.

<sup>59</sup> P. 8 at 309.

<sup>60</sup> P. 8 at 342.

- behaviors when having to do a non-preferred task. Student was sleepy at certain times of day. Student responded to praise, followed simple commands, and gaining attention by touching or pulling a hand.<sup>61</sup> Student was working on prerequisites in \*\*\*/Reading, Math, Science, Social Studies, and \*\*\*.
32. Student's ARD Committee developed a BIP for the 2016-2017 school year at the May \*\*\*, 2016 meeting.<sup>62</sup> The BIP identified two target and replacement behaviors: (1) Instead of \*\*\*, [Student] will communicate Student's needs by identifying pictures, objects, or preferred activities by pointing or gesturing (Behavior A); and (2) Instead of refusing to comply, Student will follow routines and directives by completing activities and following a schedule (Behavior B). The BIP directed staff to "identify triggers and minimize them" to prevent behaviors; teach Student to communicate needs through selection of preferred activities and request breaks; allow movement; use visual schedules; teach strategies for waiting; and positive reinforcement.<sup>63</sup>
33. Student's IEP goals include multiple layers of prompting, including physical assistance.<sup>64</sup> Hand over hand was needed for most tasks.<sup>65</sup> Student required some level of prompting and support to complete all tasks.<sup>66</sup>
34. Student's IEP for the 2016-2017 school year called for Discrete Trial Training (DTT) and Student's ARD Committee agreed Student's Special Education teacher would take a DTT course.<sup>67</sup> Student's ARD Committee agreed to implement the proposed program beginning on May \*\*\*, 2016.<sup>68</sup>
35. Student made minimal academic progress while at \*\*\* because the majority of the time was spent \*\*\*.<sup>69</sup> Student's BIP for the 2016-2017 school year was not effective to address Student's behavioral needs in the classroom or on the bus. Student's BIP was not clearly written and failed to address data collection.<sup>70</sup> Student's BIP did not provide sufficient information on interventions for staff to use to reduce Student's behaviors.
36. Staff might spend between \*\*\* the classroom each day.<sup>71</sup> Student's behaviors related to

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<sup>61</sup> P. 8 at 310.

<sup>62</sup> P. 8 at 346.

<sup>63</sup> P. 8 at 346.

<sup>64</sup> R. 5 253-261.

<sup>65</sup> II. at 434, 485.

<sup>66</sup> II. at 302.

<sup>67</sup> P. 8 at 364.

<sup>68</sup> P. 8 at 366.

<sup>69</sup> II. at 481.

<sup>70</sup> II. at 316317.

<sup>71</sup> II. at 433.

\*\*\* were not appropriately addressed in Student's BIP.

37. Extended Year Services (ESY) were recommended for Student each summer Student attended \*\*\*. Student's parent declined ESY services each year in favor of sending Student to a summer program for children with disabilities.<sup>72</sup>
38. \*\*\* incident reports were reviewed for dates between September 2016 and January 2017 with \*\*\* reports of restraint during the same period.<sup>73</sup> Restraint occurred \*\*\* and in Student's classroom and was necessary to keep Student from \*\*\*. District approved blocking techniques were effective to prevent Student from hurting \*\*\*self or others and restraint was used as a last resort.<sup>74</sup>
39. Student's parent requested updates on the Special Education teacher's DTT training on September \*\*\*, 2016, October \*\*\*, 2016, and October \*\*\*, 2016.<sup>75</sup> Student's Special Education teacher reported to Student's parent on October \*\*\*, 2016 that the District continued to search for an in-person Discrete Trial Training.<sup>76</sup> The teacher completed an online DTT training toward the end of 2016.<sup>77</sup> His description of DTT at the hearing did not comport with other witnesses' description of the intervention.<sup>78</sup>
40. There were times it was very difficult to prevent Student from \*\*\*.<sup>79</sup> In January 2016, February 2016, and again in May 2016, Student's parent asked that Student not be allowed to \*\*\*.<sup>80</sup> She complained again in December 2016 after learning Student \*\*\*.<sup>81</sup>
41. Student's parent raised concerns about the District's failure to address Student's behavioral and educational needs in an appropriate manner in an email to Student's Special Education teacher and District personnel. She complained of the District's failure to implement Student's and that Student's teacher had not yet been trained in DTT.<sup>82</sup>
42. On November \*\*\*, 2016 Student's parent again complained to District personnel about compliance with Student's IEP, including transportation; a significant increase in Student's \*\*\* behavior; ignored requests for data and progress reports. She inquired

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<sup>72</sup> R. 6 at 338; R. 7 at 396.

<sup>73</sup> R. 7 at 352.

<sup>74</sup> P. 15.

<sup>75</sup> P. 17 at 805, 826, 827.

<sup>76</sup> P. 17 at 835; R. 31 at 1671; II. at 430-431.

<sup>77</sup> R. 31 at 1671; II. at 430-431, 484.

<sup>78</sup> III. at 597-598, 649-650.

<sup>79</sup> III. at 544.

<sup>80</sup> P. 17 at 776, 827.

<sup>81</sup> P. 17 at 838; I. at 154.

<sup>82</sup> P. 17 at 816.

whether Student's BIP was working and the District's failure to convene an ARD Committee meeting to address Student's increasing \*\*\* and \*\*\*.<sup>83</sup>

43. Student's ARD Committee did not meet between May \*\*\*, 2016 and May \*\*\*, 2017. Student's parent continued to raise concerns and IEEs of Student in the areas of behavior and a Psychoeducational Evaluation were requested by the District during this time.<sup>84</sup> Student continued to struggle behaviorally on a daily basis at school.
44. Student's ARD Committee next convened on May \*\*\*, 2017 for Student's annual ARD/IEP meeting and to discuss parent concerns about \*\*\*.<sup>85</sup> Student's ARD Committee considered the following: Information from school personnel (April \*\*\*, 2016, February \*\*\*, 2017); \*\*\*/Medical (May \*\*\*, 2015, November \*\*\*, 2011); FBA (April \*\*\*, 2016); BIP (April \*\*\*, 2016, February \*\*\*, 2017); Related Services evaluation (March \*\*\*, 2015, April \*\*\*, 2015); Statewide Assessment Results (February \*\*\*, 2017); \*\*\*, and an FIE (April \*\*\*, 2016).<sup>86</sup>
45. Student's ARD Committee reviewed PLAAFPs in the areas of Language/Communication, Behavioral/Social/Emotional, Health and Development, \*\*\*/Reading, Math, Science, and Social Studies/History.<sup>87</sup> Student's parent expressed concerns about \*\*\*, increased \*\*\* behavior, and behavioral data. She requested cameras in the classroom and DTT training.<sup>88</sup>
46. In the area of Language Communication, Student received integrated speech therapy services for \*\*\* minutes every six weeks and \*\*\* minutes of consultative services every six weeks and made limited progress towards Student's objectives. Drowsiness impacted Student's performance at times. Student still had difficulty using pictures/objects to communicate.<sup>89</sup>
47. Student's BIP had been in place since May 2016 when reviewed in May 2017. Student continued to engage in \*\*\* and other behaviors on a daily basis.
48. In the area of Behavioral/Social/Emotional, strengths were responding to praise; high fives when asked; cooperating on familiar and preferred tasks; showing affection by taking your hand. Student struggled to stay on task, was defiant and \*\*\* when prompted to work, and displayed \*\*\* when upset.<sup>90</sup>

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<sup>83</sup> P. 17 at 834.

<sup>84</sup> II. at 245-246, 348.

<sup>85</sup> R. 7.

<sup>86</sup> R. 7 at 345.

<sup>87</sup> R. 351-358.

<sup>88</sup> R. 7 at 351.

<sup>89</sup> R. 7 at 351.

<sup>90</sup> R. 7 at 351-352.

49. In the area of Health and Development, Student had a fine motor delay related to handwriting, \*\*\*, and object manipulation. Student tolerated sensory materials such as a \*\*\*, repetition of task was still needed. Student made progress in achieving Student's goal of matching like \*\*\*.<sup>91</sup>
50. In the area of \*\*\*/Reading, physical assistance, monitoring, and visual/verbal prompt/cue on a consistent basis were required to help Student make progress towards Student's goal(s). Student could independently \*\*\* and use Student's communication board with assistance.<sup>92</sup>
51. In the area of Math, physical assistance, monitoring, and visual/verbal prompt/cue on a consistent basis were required to help Student make progress towards Student's goals. Student could \*\*\*. Student mastered \*\*\*.<sup>93</sup>
52. In the area of Science, Student could \*\*\* with assistance.<sup>94</sup> In the area of Social Studies/History, Student mastered identifying the \*\*\*. Student could \*\*\*.
53. Student displayed negative emotions, frustration, and non-compliance with non-preferred tasks.<sup>95</sup> Student's BIP was reviewed by the ARD Committee. Student's parent expressed concerns about Student \*\*\* and an increase in \*\*\* behaviors. An IEE FBA was in progress, but not yet available for consideration by Student's ARD Committee.
54. Student came to school \*\*\* on some days. Student would \*\*\* to school and then be extremely difficult \*\*\*. Student would attempt to \*\*\* in the classroom.
55. Student's parent disagreed with Student's proposed 2017-2018 IEP.<sup>96</sup>
56. Student's mother and District personnel maintained a communication log between February 2015 and November 2016. It updated one another about Student's day and evening, communicated about supply needs (\*\*\*) and discussed other matters like parent teacher conferences.<sup>97</sup> Certain entries and emails are titled 'Behavior Log.' Student's behavior is often referred to as "episodes" in the log. Some entries are brief and handwritten, others are longer typed narratives. A communication log is different than progress reports required under IDEA.

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<sup>91</sup> R. 7 at 353.

<sup>92</sup> R. 7 at 353-354

<sup>93</sup> R. 7 at 355.

<sup>94</sup> R. 7 at 355.

<sup>95</sup> R. 7 at 357

<sup>96</sup> R. 7 at 400.

<sup>97</sup> R. 10.

57. Student's 2016-2017 IEP called for progress reports every six weeks.<sup>98</sup> Progress reports were provided infrequently, and when provided, did not indicate whether a goal was attempted, mastered, or just engaged in and the level of assistance required.<sup>99</sup>
58. Student's parent began receiving meaningful progress reports when Student began \*\*\* grade at \*\*\* the District in August 2017. Reports listed the goal and benchmark, average outcome in the form of percentage and number based on the benchmark, any cue used, the number of trials, and the percent of trials completed.<sup>100</sup> Progress reports were also provided in a more narrative format for each reporting period and included a review of the annual goal, goal status, and narrative.
59. The District did not keep reliable or valid data on Student's behavior.<sup>101</sup>
60. Student had the same Special Education teacher between January 2015 and January 2017 where he resigned.<sup>102</sup> Student had a permanent substitute teacher after that.<sup>103</sup> Numerous teacher's aides and paraprofessionals also worked with Student while at \*\*\*.<sup>104</sup> The lack of continuity of staff contributed to the District's failure to manage Student's behavior and implement Student's IEP with fidelity.
61. The District requested an independent FBA of Student.<sup>105</sup> The FBA was conducted by an experienced Board Certified Behavior Analyst (independent BCBA) who specializes in evaluation of and identification of services for children with autism.<sup>106</sup> Her report is dated April \*\*\*, 2017.
62. The independent BCBA reviewed behavioral data, interviewed staff and Student's parent, and conducted systematic observation of Student at school.<sup>107</sup> Student was observed for approximately seven hours across three different days within a 10 day span during all parts of the school day.<sup>108</sup> Observation led to development of behavioral definitions for targeted behaviors.<sup>109</sup> All target behaviors were observed.<sup>110</sup>

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<sup>98</sup> R. 7 at 360-366.

<sup>99</sup> P. 11; P. 12.

<sup>100</sup> P. 12 at 481.

<sup>101</sup> P. 19 at 853-854; I. at 291-293, 333-334; II. at 316, 337, 394, 402-403.

<sup>102</sup> P. 17 at 844; P. 18.

<sup>103</sup> I. at 164.

<sup>104</sup> P. 19 at 851, 859; II. at 351-352.

<sup>105</sup> II. at 245-246.

<sup>106</sup> P. 21; II. at 234.

<sup>107</sup> I. at 250-251, I. at 247-248.

<sup>108</sup> P. 20 at 864.

<sup>109</sup> P. 20 at 865.

63. The independent BCBA observed Student performing no tasks independently – Student required some level of prompting or supports to complete a task or transition and do “pretty much everything.” This included verbal prompting, visual/gesturing prompting, hand over hand, or placing things in front of Student and asking Student questions.<sup>111</sup> No functional communication system was in place for Student.<sup>112</sup>
64. The independent BCBA made recommendations based on the determined functions of Student’s behavior (escape and access to tangibles).<sup>113</sup> These include: (1) Teaching Student in a classroom without other children and 2:1 staff to student ratio for safety purposes; (2) Multiple work stations to promote movement arranged so Student is not facing the door; (3) Preventative strategies to alter the motivating operations of Student’s behaviors, including consistent reinforcement of desired behavior, a token economy, or a visual/auditory schedule, and a functional communication system; (4) a preference assessment to identify and expand the number of potential re-enforcers; (5) a sensory schedule implemented throughout the day to address auditory, tactile, vestibular, and visual inputs; (6) consequence strategies to address precursor behaviors as well as the target behavior of \*\*\*; (7) crisis management protocol to include approved restraint techniques; (8) a data sheet and data collection system to be used in conjunction with implementing a revised BIP and staff training on its proper implementation; (9) a clearly written BIP so staff can understand and implement it correctly and consistently, including the data collection associated with it; and (10) modification of the BIP for use at home and parent training.<sup>114</sup>
65. The independent BCBA hired by the District to conduct the independent FBA IEE has not been invited to an ARD Committee meeting to discuss the evaluation.<sup>115</sup> As of the due process hearing, her evaluation had not been considered by Student’s ARD Committee.<sup>116</sup>
66. The District requested a psychoeducational IEE for Student.<sup>117</sup> An experienced licensed psychologist and licensed specialist in school psychology (independent LSSP) conducted the evaluation, which included observation on two days in March 2017 and one day in May 2017.<sup>118</sup>

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<sup>110</sup> P. 20 at 865; I. at 254-255; II. at 255, 257, 323.

<sup>111</sup> II at 302.

<sup>112</sup> II. at 311.

<sup>113</sup> P. 20 at 871.

<sup>114</sup> P. 20 871-873.

<sup>115</sup> II. at 245.

<sup>116</sup> II. at 340, 348-249.

<sup>117</sup> II. at 348.

<sup>118</sup> P. 19; II. at 348.



67. The independent LSSP used the following assessment techniques to evaluate Student: Childhood Autism Rating Scale-2: Standard Edition (CARS-2); classroom observation; parent interview; Psychoeducational Profile–3rd Edition (PEP-3); records review; teacher questionnaire/interview; and Vineland Adaptive Behavior Scales–3<sup>rd</sup> Edition.<sup>119</sup>
68. During the first day of observation by the independent LSSP, Student did not engage in any aggressive behavior.<sup>120</sup> On the second day of observation, Student exhibited \*\*\* behavior, including \*\*\*.<sup>121</sup> The observations were done on typical days for Student.<sup>122</sup>
69. The independent LSSP observed Student being assisted with hand over hand prompting or assistance for every activity.<sup>123</sup> Hand over hand is a teaching strategy and should be faded as a student learns more independence in a task.<sup>124</sup> With only hand over hand manipulation, Student is deprived of learning to complete tasks independently.<sup>125</sup>
70. Communication goals as described in Student’s IEP were not addressed in either observation.<sup>126</sup> An aide in the first observation referred to a “communication board” but what she showed the independent LSSP was not what you usually consider a communication board. There was confusion about the difference between a communication board and a visual schedule.<sup>127</sup>
71. The independent LSSP evaluated Student using the Psychoeducational Profile, Third Edition (PEP-3).<sup>128</sup> This evaluation looks at developmental functioning and measures developmental skills up to an approximate age range in areas such as communication, eye hand coordination, and gross motor skills. Consistent with previous evaluations, Student was very low developmentally in all of those areas.<sup>129</sup>
72. The other component of the PEP-3 looks at behavioral functioning and looks for behaviors that are common in children with autism and their impact on the child. Student’s behaviors were consistent with the diagnosis of severe autism.<sup>130</sup> The

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<sup>119</sup> P. 19 at 847.

<sup>120</sup> P. 19 at 850.

<sup>121</sup> P. 19 at 853; II. at 352.

<sup>122</sup> II. at 396.

<sup>123</sup> P. 19 at 853; II. at 375, 381, 399.

<sup>124</sup> III. at 648.

<sup>125</sup> II. at 382.

<sup>126</sup> P. 19 at 853.

<sup>127</sup> II. at 358.

<sup>128</sup> II. at 360-361.

<sup>129</sup> II. at 361, 364.

<sup>130</sup> II. at 362.

independent LSSP administered the CARS-2. Student received an overall score of \*\*\*, which reflects Severe Symptoms of an Autism Spectrum Disorder and was consistent with previous testing.<sup>131</sup>

73. The Vineland-3 is a standardized measure of adaptive behavior. Student scores reflected severe deficits in communication, daily living skills; and socialization with an overall Adaptive Behavior Composite score of \*\*\*. These results are consistent with Student's low cognitive skills.<sup>132</sup> Student's elevated daily living skills score indicated what Student does in terms of taking care of \*\*\*self and doing chores are relative strengths.<sup>133</sup>
74. The independent LSSP concluded Student's placement did not have the consistency or high level of expertise needed for Student to make academic progress.<sup>134</sup> Recommendations of the multiple specialists who evaluate and periodically touch base with the classroom were not being carried over into the classroom. Things they have recommended to minimize the effect of Student's other disabilities, \*\*\*, were not carried out and their expertise was not utilized in the classroom.<sup>135</sup>
75. The independent LSSP's recommendations for Student's educational program included: (1) Applied Behavioral Analysis, a schedule, such as an object schedule, and a schedule that reflects Student's actual activities; (2) Materials consistent with Student's visual needs, multiple trials for learning activities, and teaching Student to sit at a table for activities; (3) Frequent, individual speech therapy to help Student develop a new communication system, not anticipating all needs, and a communication device/board; (4) Reduced prompting because it is more meaningful for Student to be independent at a few tasks than physically assisted for many; (5) Improved data collection practices and extensive staff training on how to take data; (6) Extensive staff training; (7) In-home/parent training; and (8) Evaluation of Student's medical needs, in particular as to Student's \*\*\*.<sup>136</sup>
76. There was a delay in the District obtaining the independent FBA and psychoeducational evaluations when complete. District records showed the independent FBA was received on May \*\*\*, 2017 and the independent psychoeducational evaluation was received on May \*\*\*, 2017. The delay was discussed in a prehearing conference on September 11, 2017 and the District has had access to the completed IEEs since then.<sup>137</sup> Student's ARD

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<sup>131</sup> P. 19 at 856-857; II. at 367.

<sup>132</sup> P. 19 at 854.

<sup>133</sup> II. at 369.

<sup>134</sup> II. at 396.

<sup>135</sup> II. at 397-398, 401.

<sup>136</sup> P. 19 at 860-863.

<sup>137</sup> Prehearing Conference Transcript at 8, 27, 29-30.

Committee has not yet considered either IEE.<sup>138</sup>

77. Since beginning \*\*\* in the District, Student continues to engage in \*\*\* behavior every day at school, but it has decreased somewhat<sup>139</sup> Student's willingness to come into the classroom has improved, Student grabs less at food, can hold a marker or crayon better and for longer, is more compliant when asked to sit, and will sit at Student's desk for five to ten minutes.<sup>140</sup> Student continues to require extensive prompting.<sup>141</sup>
78. Student requires a highly structured and supervised placement with low staff to student ratios, one that can accommodate and address Student's severe behaviors, serves people who require total care in the areas of \*\*\* and other \*\*\* needs. Student needs a placement that can provide intensive ABA therapy by trained individuals.
79. \*\*\* is a licensed residential treatment center is approved by the Texas Education Agency as a non-public day school. \*\*\* serves students ages 6–22, including students with emotional/behavioral disorders and autism, and students who require \*\*\* and who may be \*\*\*, and students who may require hand over hand assistance. The commonality in the students served is "severe behavior."<sup>142</sup>
80. \*\*\* has almost 200 employees and serves approximately 100 students, 70 of whom are residential. \*\*\* employees 19 special education certified teachers. A student's IEP is fully implemented by \*\*\* staff and adjustments in programming are made in coordination with the sending District.<sup>143</sup> Related services such as \*\*\* instruction, and occupational therapy and physical therapy are available to students.<sup>144</sup>
81. Residents at \*\*\* live in single family homes. The staff to student ratio in the homes is approximately 1 to 3 and at school it is approximately 1 to 2.<sup>145</sup> For students with more functional needs like \*\*\*, such as Student, these areas are worked on with the goal of a more independent life.<sup>146</sup> \*\*\* services students with low cognitive abilities, including those who are nonverbal with multiple disabilities.<sup>147</sup>

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<sup>138</sup> II. at 340; II. at 348-249; II at 422.

<sup>139</sup> III. at 606-607, 620.

<sup>140</sup> III. at 615.

<sup>141</sup> III. at 618-619.

<sup>142</sup> II. at 264-265.

<sup>143</sup> II. at 271.

<sup>144</sup> II. at 265.

<sup>145</sup> II. at 269.

<sup>146</sup> II. at 271.

<sup>147</sup> II. at 285-286.

82. ABA therapy is provided at \*\*\*, along with other evidence-based interventions.<sup>148</sup>

## VI. STATUTE OF LIMITATIONS

Under IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507(a)(1)(2). The two year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA, in which case the state timelines apply. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Texas has an explicit statute of limitations rule. A parent must file a request for a due process hearing within one year of the date Student or she knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code § 89.1151(c).

Petitioner alleges deprivation of FAPE beginning in January 2015 when Student first enrolled in the District. Petitioner asserts neither exception to the statute of limitations, but instead requests a residential placement to compensate Student for the District's alleged failure to provide Student FAPE as the Third Circuit held was appropriate in *G.L. v. Ligonier Valley School Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015). Student's parent asserts she learned of the alleged actions that form the basis of the Complaint in the late spring of 2017 when two IEEs, a Functional Behavioral Assessment and Psychoeducational Evaluation, were completed.<sup>149</sup>

The District asserted the one year statute of limitations as an affirmative defense. Specifically, the District objects to all claims that relate to events that occurred prior to August 16, 2016. The District argues those claims are outside the hearing officer's jurisdiction because they exceed the one year statute of limitations for IDEA claims in Texas.<sup>150</sup>

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<sup>148</sup> II. at 272.

<sup>149</sup> Complaint at 2, 4-5; Petitioner's Statute of Limitations Brief at 3; Prehearing Transcript Vol I. at 10-11, 12-13.

<sup>150</sup> Response to Complaint at 3-4; Respondent's Brief on Statute of Limitations at 2.

Petitioner's cause of action under IDEA accrued when Student's parent knew or had reason to know of the injury that forms the basis of the due process complaint. *See, Doe v. Westerville City Sch. Dist.*, 50 IDELR, 132, p. 5-6 (D.C. Ohio 2008) (holding cause of action for failure to provide FAPE when student first diagnosed with a learning disability). Student's parent raised concerns about implementation of Student's IEP and Student's lack of progress on or about September 27, 2016.<sup>151</sup> While she had more information about Student's program and its potential shortcomings after the IEEs were complete, she knew or had reason to know of the alleged actions forming the basis of the Complaint on September 27, 2016.

The one year statute of limitations rule as applied in Texas expired on September 27, 2017. Petitioner's request for a due process hearing was filed on August 18, 2017, within the one year statute of limitations period. Applying the criteria on the statute of limitations to Petitioner's claims, the timeframe for the FAPE claim in this case is limited to the 2016-2017 school year (August 2016–August 2017). Events occurring prior to August 2016 and after August 2017 are included for historical and are included for purpose of understanding Student's functioning while enrolled in the District.

## VII. DISCUSSION

### A. Duty to Provide FAPE

The purpose of 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 children with disabilities ages 3-21 enrolled in the district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). The school district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick*

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<sup>151</sup> P. 17 at 816.

*Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

## **B. Individualized Education Program**

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

## **C. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>152</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5<sup>th</sup> Cir. 1993). The District was obligated to provide Student with FAPE during the 2016-2017 school year. The burden of proof is on Petitioner to show the District did not do so. *Id.*

Petitioner seeks a residential placement at \*\*\* at District expense. The burden of proof is on Petitioner to show Student's placement in the \*\*\* on a \*\*\* campus in the District is not appropriate *and* that placement at \*\*\* is essential and primarily oriented to enable Student to obtain an education. *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299 (5<sup>th</sup> Cir. 2009).

## **D. IEP Goals and Objectives**

In developing an IEP, the ARD Committee must consider a student's strengths, parental

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<sup>152</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5<sup>th</sup> Cir. 2009).

concerns for enhancing the student's education, the results of the most recent evaluation data, and the student's academic, developmental and functional needs. For 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). The ARD Committee is also required to review, at least annually, a student's IEP, and make any revisions needed to address lack of expected progress or 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 be addressed in the annual review. 34 C.F.R. § 300.324(b).

#### **E. FAPE**

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

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and
- Positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).

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

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

First, the evidence showed the IEPs implemented during the relevant time period were

not individualized for Student on the basis of assessment and performance in the areas of behavior and communication.

Student's \*\*\* worsened during Student's time in the District, including during the relevant time period. Student's BIPs developed during Student's enrollment at \*\*\* simply did not work to reduce Student's behaviors. The nature and severity of Student's disabilities were such that Student's IEP in the area of behavior was not effective. Student's performance – continued and significant \*\*\* behavior – should have triggered additional assessments by qualified specialists in autism and behavior. Independent IEEs were requested by the District during the 2016-2017 school year, but were never considered by Student's ARD Committee.

Student is \*\*\* and has a severe receptive and expressive speech disorder. Student's ability to \*\*\* changed during the relevant time period at \*\*\* after Student \*\*\* and other \*\*\* behavior. \*\*\*.

Student has no functional communication system. The evidence showed multiple recommendations in evaluations and assessments for communication strategies for Student were either not implemented or not implemented with fidelity, including communication boards and visual schedules. Staff did not demonstrate understanding the proper use of communication materials. The teacher's aides who worked with Student were confused about the difference between a communication board and visual schedule.

Student's May 2016 ARD Committee recommended DTT for Student and it was included in Student's 2016-2017 IEP. Student's Special Education teacher did not complete the training until December 2016 – approximately three months into the 2016-2017 school year and approximately six months after DTT was included in Student's IEP. Based on his description of DTT at the hearing, he was not fluent in this intervention.

## **2. Least Restrictive Environment**

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



during the relevant time period.

IDEA's preference for mainstreaming a student to the maximum extent appropriate must include an examination of the degree of benefit child will obtain from an included education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989). Student requires \*\*\* supervision for Student's safety and the safety of others. Student's ARD Committee considered the impact of Student's restrictive placement and recommended continued placement in the \*\*\* classroom at \*\*\*, as required under IDEA, and determined the benefits of a continued restrictive placement apart from peers was most appropriate.

Student's April 2017 FBA IEE recommended Student be educated in an even more restrictive placement separated from other students for their safety, so there is a question of whether Student's placement was restrictive enough. Indeed, relief ordered herein is a residential placement apart from a \*\*\* with only other students with behavioral challenges. Considering Student's extensive needs related to Student's multiple disabilities, Student would not benefit from a less restrictive educational placement.

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

Third, the evidence showed Student's ARD Committee was comprised of the required individuals between August 2016-2017. Student's parent participated in ARD Committee meetings and her input was incorporated into Student's IEPs. District personnel attempted to incorporate her feedback and direction in activities such as strategies for \*\*\* and \*\*\*.

While the statutorily required ARD Committee members were present in ARD Committee meetings, multiple opportunities to deliver Student's special education services in a coordinated, collaborative manner were missed. Student's related services, including \*\*\* and \*\*\*, and transportation were not implemented in a coordinated or collaborative manner. Recommendations of the multiple specialists who evaluated Student were not carried over into the classroom. Recommendations to address Student's \*\*\* deficits, for example, were not

carried out. The expertise provided by the various assessments was not utilized in the classroom by those providing Student's day to day instruction. Opportunities to implement already identified strategies were missed.

Student's bus transportation to and from school was not delivered in a coordinated and collaborative manner, resulting in lost instructional time. Student's behavior when \*\*\* is well-documented in the record. However, the scheduling problem was not addressed by the District. Student's parent was \*\*\* not infrequently. The lack of coordination and collaboration between the District and related service personnel in creating and adhering to a schedule for picking Student up from school created behavioral emergencies \*\*\* that could have been avoided.

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

Fourth, the evidence supports the conclusion Student derived minimal academic and non-academic benefits from Student's IEPs developed and implemented by the District.

IDEA does not require the IEP to guarantee a certain level of accomplishment – only that the IEP is reasonably calculated to meet Student's needs given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). Furthermore, a school district is not required to provide Student with the best possible education. Student does not need to improve in every academic and non-academic area to receive an educational benefit. The issue is not whether the school district could have done more. Instead, the inquiry is whether Student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.*, 582 F. 2d 576, 590 (5<sup>th</sup> Cir. 2009). The evidence showed Student did not receive more than a de minimus educational benefit from the program provided given Student's unique circumstances. *See, Andrew F. v. Douglas Cnty. Sch. Dist., supra.*

A need for special education and related services is not limited strictly to academics, but also includes behavioral progress and the acquisition of appropriate social skills. *Venus Ind. Sch. Dist. V. Daniel S.*, 36 IDELR 185 (2002). Behavior is thus a component of FAPE. Student's \*\*\* behavior worsened throughout Student's tenure in the District and during the

relevant time period. Student made no behavioral progress and even regressed. Student engaged in \*\*\* behavior on a daily basis and Student's BIP did not work to reduce it. The District's failure to develop and implement an appropriate BIP for Student with meaningful directives to classroom staff on appropriate interventions resulted in denial of non-academic benefits.

Student's communication deficits contribute to Student's behavior and went unaddressed. Recommendations showed Student required a highly structured classroom setting with emphasis on development of communication and language skills through the increased use of \*\*\*. These were not provided. Despite Student's lifelong and severe communication deficits and lack of progress in this area, Student's speech services were reduced by Student's 2016-2017 IEP.

The District's failure to address Student's communication deficits, along with how Student's behavior impeded Student's learning, resulted in Student's failure to derive more than de minimus academic benefit in the acquisition and mastery of prerequisite academic skills.

Though administered in the least restrictive environment, Student's 2016-2017 school year program was not individualized on the basis of assessment and performance, was not provided in a coordinated, collaborative manner by the key stakeholders, and did not demonstrate positive academic and non-academic benefits. Student was therefore denied FAPE during this time.

## **5. IEP Implementation**

The evidence showed implementation of Student's IEP was deficient in two areas: transportation as a related service, and the failure to implement DTT for Student as required by Student's IEP in a timely manner.

Transportation as a related service as called for in Student's 2016-2017 IEP was not properly implemented and Student's BIP did not give sufficient guidance to staff on handling Student's \*\*\* behaviors. Instructional time was lost. Student's \*\*\* behavior when Student's \*\*\* is well-documented. The type of consistent scheduling Student requires was not provided by the District. Student's parent was \*\*\* not infrequently. The lack of coordination and

collaboration between the District and related service personnel in creating and adhering to a schedule for picking Student up from school created behavioral emergencies \*\*\* that could have been avoided.

Finally, The District failed to implement DTT as required by Student's 2016-2017 IEP. Student's May 2016 ARD Committee recommended DTT for Student. Student's Special Education teacher did not complete the training until December 2016 – approximately three months into the 2016-2017 school year and approximately six months after this proven intervention for person with autism was recommended by Student's ARD Committee. There was no evidence the permanent substitute teacher in place after January 2017 implemented DTT.

Key indicators of an appropriate program were absent from Student's 2016-2017 IEP. Student's IEPs were not reasonably calculated to enable Student to make educational progress in light of Student's individual circumstances. Student's IEP was also not implemented with fidelity. Student was therefore denied FAPE by the District.

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

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

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

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

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

If the residential placement *is* essential, the second question is whether the residential placement is *primarily oriented* toward enabling the student to obtain an education. Though broad in scope, IDEA does not require school districts to bear the cost of residential services that are primarily aimed at treating a student's medical issues or enable the student to participate in non-educational activities. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d at 299. Part of this inquiry is a determination of the extent to which the private placement services are "related services" as defined by IDEA. *Michael Z.*, 520 F. 3d at 300, 301.

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

#### **b. Residential Placement Test Applied**

Student's proposed residential placement is primarily oriented towards enabling Student to obtain an education. The evidence showed \*\*\* can implement special education and related services in accordance with Student's ARD Committee's recommendations and IEP.

The District's 2016-2017 program was not appropriate under IDEA. Student made minimal academic progress. Student regressed in certain non-academic areas, including behavior. Student's behaviors impeded Student's learning and the learning and safety of others, including other students

and staff. Interventions set forth in Student's BIP were inadequate and failed to give District personnel adequate guidance in the use of proven strategies for addressing Student's behaviors.

Student's placement at \*\*\* is appropriate to meet Student's needs. \*\*\* exclusively serves students with severe behaviors, including persons with autism. \*\*\* works with individuals who, like Student, require \*\*\*, including assistance with \*\*\*. The focus of the program at \*\*\* is on addressing the needs of students, like Student, with severe behavioral issues.

Student's proposed placement at \*\*\* is also essential in order for Student to receive meaningful educational benefit. Student's \*\*\* and other behaviors prevent Student from deriving academic and other non-academic benefits from Student's educational program. Developing less maladaptive behavior is essential for Student to succeed and learn some degree of independence.

If the residential placement *is* essential, as here, the second question is whether the residential placement is *primarily oriented* towards enabling the student to obtain an education. \*\*\* is a residential treatment center licensed by the Texas Department of Family and Protective Services and approved by the Texas Education Agency as a non-public day school. Student will attend school while at \*\*\*. Staff will work with Students' ARD Committee to implement Student's IEP. This placement is primarily oriented towards enabling Student to obtain an education by working to address and improve the behaviors that have prevented Student from making meaningful progress in school.

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

Petitioner raised three procedural issues, including:

1. Whether Respondent failed to provide progress reports to Student's parent to inform her of Student's progress on Student's IEPs;

2. Whether Respondent failed to schedule or hold any Admission, Review, and Dismissal (ARD) meetings to review to consider two Independent Educational Evaluations (IEEs) of Student; and
3. Whether the District failed to develop or implement an individualized autism supplement in Student's IEP.

Petitioner contends the District violated parents' procedural rights as to the above procedural issues. 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. *See*, 34 C.F.R. § 300.513 (a)(2)(ii).

As to Issue 1, Petitioner met Student's burden of proving the District violated parental procedural rights under IDEA. Periodic reports to a parent on the progress a student is making on Student's goals are required under IDEA. 34 C.F.R. § 300.320(a)(3)(ii). Progress reports during the relevant period were missing and, when provided, did not contain meaningful information. Student's parent's requests for progress reports were ignored. Parent was denied information about Student's progress, or lack thereof. This impeded Parent's meaningful participation in the decision-making process regarding the provision of FAPE to Student.

As to Issue 2, Petitioner met Student's burden of proving the District violated parental procedural rights under the IDEA. If a parent obtains an IEE at public expense, the results of the evaluation must be considered by the District in any decision made with respect to the provision of FAPE. 34 C.F.R. § 300.502(c)(1). No explanation was offered for the delay in considering the IEEs completed in late spring 2017. Even considering the delay in receipt of the IEEs, the District had access to these important evaluations in September 2017.

Given Student's continued and significant behaviors and Student's parents' repeated requests for help in this area, the District's failure to consider the expertise of experienced evaluators they hired deprived Student of the benefit of their recommendations and impeded the parental decision-making process regarding the provision of FAPE to Student.

As to Issue 3, Petitioner did not meet Student's burden of proving the District violated

parental procedural rights under the IDEA by failing to develop or implement an individualized autism supplement in Student's IEP. For students with autism in Texas, the ARD Committee must also consider whether the student's IEP should include the following: extended educational programming, daily schedules reflecting minimal unstructured time and active engagement in learning activities, in-home and community-based training, positive behavior support strategies based on relevant information, \*\*\*, parent/family training and support, suitable staff-to-student ratios, communication interventions, social skills supports, professional educator/staff support and teaching strategies based on peer-reviewed, research-based practices for students with autism. 19 Tex. Admin. Code § 89.1055(e). This regulation is commonly referred to as "the Autism Supplement."

Petitioner alleges the District failed to develop or implement an individualized autism supplement to Student's IEP. The evidence showed Student's IEPs for the 2016-2017 school years met the requirements of 19 Tex. Admin. Code § 89.1055(e). Student's IEP considered and made recommendations for Student consistent with the strategies prescribed by the rule. Student's IEP considered and addressed ESY, daily schedules reflecting minimal unstructured time and active engagement in learning activities, and positive behavioral support strategies based on relevant information. Teaching strategies based on peer-reviewed, research-based practices for students with Autism Spectrum Disorders such as DTT required were considered and recommended.

### VIII. SCOPE OF RELIEF

The parties submitted briefs on the scope of compensatory relief available to Petitioner under IDEA, considering the Third Circuit Court of Appeal's decision in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015). The hearing officer considered the parties' arguments and finds no authority for applying *G.L. v. Ligonier Valley* in this jurisdiction. The Fifth Circuit has not adopted *Ligonier's* holding. And while the relief sought by Petitioner is partially awarded, it is equitable, rather than compensatory, in nature.

Finally, the full scope of Petitioner's requested relief – placement at \*\*\* is not only



extraordinary, but inconsistent with Student's right to challenge the IEP proposed by the District annually. 34 C.F.R § 300.323. Petitioner's relief is therefore limited to one year of residential placement.

### IX. CONCLUSIONS OF LAW

1. Petitioner met Student's burden of proof under *Schaffer v. Weast* as the party challenging the proposed IEP and placement.
2. Petitioner discovered facts supporting Student's claims on or about September \*\*\*, 2016. Student's claims were filed within the one year statute of limitations as applied in Texas.
3. The timeframe for Student's FAPE claim is limited to the 2016-2017 school year (August 2016–August 2017).
4. Student was denied FAPE by the District during the relevant time period.
5. The District failed to develop an IEP appropriate to Student's needs in light of Student's unique circumstances in the areas of behavior and communication.
6. The District failed to implement Student's 2016-2017 IEP in the area of transportation by failing to appropriately schedule transport and failing to appropriately address Student's behavior \*\*\*.
7. The District failed to implement DTT as required by Student's IEP.
8. The District's failure to provide parent with timely and meaningful progress reports and violated the parent's procedural rights.
9. The District's failure to convene an ARD Committee meeting to consider the FBA and psychoeducational IEEs violated the parent's procedural rights.

### X. 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 AS FOLLOWS:**

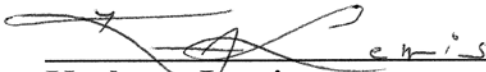
It is **ORDERED** the District will seek admission and placement of Student at \*\*\* for one calendar year to begin on a date determined by Student's ARD Committee. It is further **ORDERED** Student's placement at \*\*\*, including all associated costs, shall be at District

expense.

The District is **ORDERED** to work collaboratively with \*\*\* to implement Student's IEP. The District is further **ORDERED** to collaboratively with \*\*\* to develop and implement an appropriate transition plan for Student when Student returns to the District.

Petitioner's request for placement of Student at the \*\*\* until Student is no longer eligible for special education services in the District due to age is **DENIED**.

**SIGNED March 19, 2018.**

  
\_\_\_\_\_  
**Kathryn Lewis**  
**Special Education Hearing Officer**  
**For the State of Texas**

#### **XI. NOTICE TO THE PARTIES**

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