

DOCKET NO. 033-SE-1022

STUDENT, b/n/f PARENT,

Petitioner,

v.

EAGLE MOUNTAIN-SAGINAW
INDEPENDENT SCHOOL
DISTRICT,

Respondent.

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER FOR

THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Introduction

This case involves two actions arising under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing regulations. Petitioner Student, by Student's next friend and Parent (Petitioner or Student), brings an action against Respondent Eagle Mountain-Saginaw Independent School District (Respondent, District, or EMSISD), alleging certain violations of IDEA. Respondent also brings an action against Petitioner, seeking to defend the appropriateness of an evaluation conducted to determine Student's additional eligibility for special education services and whether Student would benefit from counseling.

II. Procedural Background

Student filed Student's request for a due process hearing on October 5, 2022. The District later filed its request for a due process hearing on April 24, 2023. Throughout these proceedings, Mark Whitburn of Whitburn & Pevsner represented Student. Cynthia Buechler of Buechler & Associates represented the District.

The parties sought and were granted two continuances for good cause. The Hearing Officer consolidated both cases for hearing on the merits and later consolidated the cases for all purposes in an order dated June 5, 2023.

A hearing on the merits took place on May 31 and June 1, 2023 via Zoom. A court reporter recorded and transcribed the hearing. The parties filed post-hearing briefs on July 3, 2023, and the Hearing Officer's decision is due July 17, 2023.

III. Legal Issues

A. Petitioner's issues

Petitioner's request for a due process hearing presents the following issues for resolution in this case:

1. Whether the District failed to provide Student a free and appropriate public education (FAPE) under IDEA from the 2021-2022 school year to the present;
2. Whether the District failed to appropriately develop and implement a Behavior Intervention Plan (BIP) for Student as part of Student's Individualized Education Program (IEP);
3. Whether the District failed to provide appropriate special education transportation services to Student;
4. Whether the District should be ordered to provide private placement to Student if it failed to provide FAPE to Student;
5. Whether the District should be ordered to reimburse Student's parents for expenses incurred in the private placement of Student; and
6. Whether the District should be ordered to reimburse Student's parents for *** counseling services for Student.

According to Petitioner's request for due process hearing, Petitioner seeks the following relief in this case:

1. An order to compel the District to provide private placement of Student;
2. An order to compel the District to reimburse the Student's parents for expenses incurred for private placement of Student;
3. An order to compel the District to reimburse the Student's parents for *** counseling services and related expenses; and
4. Any and all further relief that the Hearing Officer deems appropriate or which is recommended by the Student's experts and evaluators.

B. Respondent's issues

In response to Student's request for due process hearing, the District generally denies the claims. The District also seeks dismissal of any claims outside the applicable two-year statute of limitations.

The District's own request for due process hearing seeks a decision that its evaluation of Student in March 2023 was an appropriate evaluation under the IDEA.

IV. Findings of Fact¹

Background

1. Student is a *** year-old child with ***. (*JX4-3; PX 2-1; Tr. at 264*).
2. Student is eligible for special education services under the categories of ***, speech impairment, and other health impairments. (*JX3-3; JX4-3*).
3. Student, with some exceptions discussed below, has attended different campuses within the Respondent District since the *** grade. (*RX3-8*).

2021-2022 school year, Student evaluations, and ARD committee meeting

4. Student began *** in the 2021-2022 school year at ***. (*JX2-5*).
5. On September ***, 2021, the District convened Student's annual Admission, Review, and Dismissal (ARD) committee to review Student's most recent evaluations and to establish an IEP for the current school year. (*JX2*).

A. Student's 2019 Full Individual Evaluation

6. The District previously had completed a Full Individual Evaluation (FIE) of Student on April ***, 2019. (*RX3*). That evaluation concluded that Student meets the criteria for the educational disability conditions of ***, speech impairment, and other health impairment. (*RX3-21-22*).

¹ References to the record evidence in this decision will use the following format: References to the transcript from the May 31-June 1, 2023 hearing will be "Tr. at _"; Joint Exhibits will be "JX _"; Petitioner's Exhibits will be "PX _"; and Respondent's Exhibits will be "RX _."

7. Specifically, the evaluators found Student had speech deficits in the areas of receptive language, expressive language, and articulation. (RX3-6). The evaluators also found Student had cognitive deficits that included multiple normative weaknesses in adaptive behavior, as well as scores in the lower extreme range of various cognitive assessments. (*Id. at 22*) Noteworthy, Student's results from recent assessments, when compared to similar assessments three years earlier, showed no significant regression in skills. (*Id. at 13*). The evaluators also found that Student, in addition to having cognitive deficits, had Attention Deficit Hyperactivity Disorder (ADHD). (*Id. at 22*).

8. The FIE also noted that Student has a Behavior Intervention Plan (BIP) in place to address three primary target behaviors: noncompliance (refusing directives, including transitioning), physical aggression (***), and ***. (RX3-9).

9. In addition, the FIE concluded that Student continued to need speech therapy to address significant receptive language, expressive language, and articulation delays. (RX3-27-29).

B. Student's 2021-2022 IEP

10. The ARD committee determined in its September ***, 2021 meeting that Student continued to be eligible for special education services based on the conditions of ***, speech impairment, and other health impairment. (JX2-4).

11. Academically, after reviewing Student's present level of academic and functional performance (PLAAPF), the ARD committee found Student's disabilities significantly affected Student's involvement and progress in the general education curriculum. (JX2-5). Student's math assessment placed Student overall at the *** grade level. (*Id. at 7*). Student's reading writing skills were at the *** grade level. (*Id.*) In ***, Student met ***. (*Id.*) Student also actively participates in class discussions and enjoys whole-class discussions. (*Id.*) In ***, Student can ***. (*Id. at 8*). Student needs help ***. (*Id.*)

12. Behaviorally, the ARD committee noted that Student is a very outgoing, energetic, and loving student. (JX2-5). Still, Student's inappropriate behavior increased in the past year. Student's behaviors included noncompliance, ***. The Behavioral Specialist updated Student's BIP, and the committee continued its implementation of the BIP in its IEP for Student. (JX2-22, 25-28).

13. The ARD committee proposed special education courses for Student in *** in Student's IEP. (JX2-10). The committee also proposed instruction in activities for Student's *** success. (Id. at 12). Student would continue to receive speech and occupational therapy. (Id. at 10, 13). The IEP also provided for special education transport services for Student to and from school to Student's home. (Id. at 11, 13, 23, 54-55).

14. The ARD committee placed Student in the *** classroom for the 2021-2022 school year. (JX2-10). Relative to a least restrictive environment, the ARD committee considered several factors and found it appropriate for Student to participate in some general education classes and activities with nondisabled peers. (Id. at 18). The committee also found it appropriate for Student to participate in available nonacademic or *** activities. (Id.)

15. The ARD committee established several comprehensive and individualized goals and objectives for Student's IEP for the 2021-2022 school year in the areas of ***. (RX9).

16. Student's father attended this ARD committee meeting and had no objection to the IEP. (JX2-22, 30). Throughout the 2021-2022 school year, Student made progress on nearly all Student's goals and objectives in Student's IEP. (RX9). Student also made passing grades in Student's classes and passed the *** for Student's *** year. (JX3-19-22).

C. Student's April 2022 reevaluation and proposed IEP for the 2022-2023 school year

17. The District reevaluated Student in April 2022 and prepared a report dated April ***, 2022. (RX1). Student's cognitive levels continued to demonstrate eligibility for special education services for ***. (Id. at 1). Student's speech and language results were commensurate with Student's cognitive and adaptive functioning. (Id. at 2). Student made significant progress and mastered Student's prior goals for speech and language

performance. (*Id.*) The evaluator found Student able to communicate with Student's peers and adults. (*Id.*) The evaluator also noted that classroom accommodations and modifications were needed to support Student's communications needs. (*Id.*) Student continued to be eligible for special education services based on speech impairment. (*Id.*)

18. The Student's ARD committee reconvened on May ***, 2022 for Student's annual IEP meeting to create Student's IEP for the 2022-2023 school year. (*JX3*). The committee reviewed and confirmed Student's eligibility for special education services, again for ***, speech impairment, and other health impairments (ADHD/ADD). (*Id. at 3, 19*). Confirming progress with Student's IEP goals, the committee reviewed Student's PLAAFP and found Student mastered Student's English and math goals and is working on mastery of all Student's goals. (*Id. at 4-6*).

19. The committee reviewed and updated Student's BIP based on Student's current needs and Student's father's expressed concerns about Student's ***. (*JX3-20, 24-27*). The ARD committee also proposed speech therapy and various assistive technology supports. (*Id. at 9-10*). The committee discussed *** services for Student. (*Id. at 20, 42-44*). The IEP also proposed specialized transportation services for Student, as well as a *** supplement. (*Id. at 21, 41, 45-46*).

20. Addressing the least restrictive environment for Student, the ARD committee reviewed the proposed continuum of services and concluded that Student's current placement and IEP implementation continues to be the least restrictive environment. (*JX3-15*). Specifically, the committee considered the potentially harmful effects of removing Student from certain general education activities and agreed that the benefits of general education outweighed any potential harm from removing Student from those proposed activities. (*Id.*) Student also had the opportunity to maximize social interactions with nondisabled peers with general education classes in art and PE, as well as in lunch and with available *** activities. (*Id.; Tr. at 460, 606*).

21. Student's father participated in the May 2022 ARD committee meeting and agreed with the proposed IEP. (*JX3-17*). Despite the progress Student made during the then-school year, Student's father withdrew Student from the District on or around May ***, 2022 and enrolled Student for the remaining school year in the *** School District. (*RX7-4; Tr. at 157-158*). Student's father later decided to re-enroll Student in the EMS ISD for the 2022-2023 school year on August ***, 2022 – the first day of school – although the record does reveal why he reenrolled Student in EMS ISD. (*Tr. at 158*).

The *** incident

22. On the first day of the 2022-2023 school year, the District was not ready to provide special education transport services to Student. (*Tr. at 158-160, 169-170*). Typically, if transportation is required in the IEP supplement, that information is carried over to the next school year for the student. (*JX3-45*). Here, Student's sudden withdrawal at the end of the preceding school year and subsequent re-enrollment at the last minute resulted in Student not having special education transport services in place on the first day of school, since it normally takes about 7-10 days to create a special education ***. (*Tr. at 122-123*).

23. District staff nevertheless immediately began working on arranging the transport services required by Student's IEP. (*PX5*). Due to Student's last-minute enrollment, the District's *** department mistakenly advised Student's father that Student would ***. (*Id. at 14*). District staff contacted Student's father on the first day of school and advised him not to have Student***. (*Tr. at 158-160*).

24. On August ***, 2022, Student noticed several students from Student's school at the nearby general education ***. (*Tr. at 349-352*). Student's father decided that Student could ***. (*Id.*) Shortly after getting to the ***. (*PX9; RX12*). Student ended up *** and missed school for several days. (*Tr. at 364, 412; RX8*).

25. The District investigated the *** incident. (*RX10; Tr. at 24, 43-60, 80*). The parties submitted videos obtained from the incident. (*PX9; RX12*). Though not clear from the videos, it appeared that Student initiated the incident by ***. (*Id.*) Student did not ***. (*Id.*) Assistant Principal *** spoke to the ***. (*RX10*). ***. (*Id. at 1-2*). *** also spoke with and emailed Student's father frequently about the incident. (*Tr. at 56, 76-77; RX11-21-30*). Ultimately the District determined that the ***." (*Tr. at 34-36; RX10*).

26. Within a couple days after the *** incident, the District had special education transportation services ready for Student on August ***, 2022. (PX5-9; Tr. at 169, 615). The District also developed a Safety Plan for Student on August ***, 2022. (JX 7). The plan called for ***. (Id.)

The * incident**

27. After the ***, Student missed several days of school. When returning to school on August ***, 2022, Student ***. (Tr. 39-41, 51). One of Student's teachers immediately intervened and de-escalated the situation. (Tr. at 177).

Student begins attending private school

28. Student's father is a friend of Student's ***, who also owns and runs a school for disabled children - ***. (Tr. at 366-357, 269-370). He encouraged Father to visit the school with Student and let him see if Student would like to attend that school. (Id.) Student visited the school in or around early September 2022 and remains there still. (RX8; id. at 372).

29. The private school is a small setting of *** disabled students. (Tr. at 205, 210, 213). All but *** of the students *** like Student. (Id.) Student is in a micro-class of *** students of mixed ages equivalent to elementary, middle, and high school grade levels. (Tr. at 611-612). Student has only occasional interaction with non-disabled peers who are children of a speech pathologist who visits the school. (Tr. at 204, 223-224).

30. Father testified that Student is thriving at the private school. (Tr. at 370-372). Father believes Student is now part of a community and is excited to go to school. (Id.) Father states that Student needs to continue in Student's current school setting. (Id.) Tuition for the school is about \$*** annually. (Id. at 373).

31. ***, Student's primary teacher at the private school, reviewed Student's current level of performance. In math, Student can ***. (*Tr. at 193*). Student is progressing overall but shows some regression. (*Id. at 194*). In Student's reading skills, according to ***, Student currently performs at a level ***. (*Id. at 195*). Student's *** skills are at the *** level as well. (*Id. at 195-196*).

The October and December 2022 ARD committee meetings

32. The District held another ARD committee meeting for Student on October ***, 2022 and reconvened the meeting again on December ***, 2022. (*JX 4*). Father attended both meetings. (*Id. at 15, 17; Tr. at 390*). In response to Father's concern over Student's possible *** from the ***, the District offered to complete a counseling evaluation for Student. (*JX4-15*). Father declined any counseling services from the District. (*Id. at 17*). The ARD committee also proposed revisions to Student's BIP. (*Id. at 15*). And the committee also agreed to revise instructional accommodations and social skills goals. (*Id.*)

33. Noteworthy, at December ARD committee meeting Father stated that he would "never bring Student back to EMSISD." (*JX4-17*). During this meeting, the District also expressed its desire to observe Student in Student's private school setting, and Father and his attorney agreed. (*Id.*) The observation was delayed due to legal disputes but took place in February 2023. (*Id.; Tr. at 611*).

The District's observation of Student's private school education

34. Some of the District's special education staff observed Student and Student's work at Student's private school. ***, Student's former special education teacher, noticed that Student's work was at a much lower level at the private school than when she was Student's teacher at the District. (*Tr. at 457*). She also found no functional significance to the worksheets reflecting Student's work, and that they in fact suggested regression. (*Id. at 458, 473; PX7 & PX8*). Overall, *** concluded that Student's private school setting did not provide a structured learning environment to prepare Student for ***. (*Tr. at 459-463*).

35. ***, Student's former *** teacher at the District, found Student's level of performance in the worksheets she reviewed was extremely lower than it was when Student attended school in the District. (*Tr. at 485, 491-492*). She concluded that Student appeared to have regressed in Student's current school setting and expressed concern that Student was not being prepared for ***, real world practice. (*Tr. at 491-492*).

36. ***, the District's Director of Special Education Services, also visited Student's private school to observe Student's performance there. (*Tr. at 602, 609*). Like the District's other special education staff, *** found Student's current placement inappropriate. She noted that the instruction lacked functional significance to prepare Student for ***. (*Tr. at 613-614*). She also found troublesome Student's lack of interaction with nondisabled peers or even peers around Student's own age. (*Id.*)

March 2023 psychoeducational evaluation

37. The District conducted a full individual evaluation of Student in February and March 2023 to determine if Student met the educational disability criteria for Emotional Disturbance.² (*JX6-1, 8*). This evaluation was an outgrowth of previous ARD meetings where Father had expressed concern about Student's possible *** from the ***. (*JX4-27, 42*).

38. The evaluation was comprehensive, involving an interview and information from Father; interview and observation of Student; review of a recent *** evaluation; and various assessments. (*JX6-1, 7*). It also included an appropriate test within a special education setting for evaluating Emotional Disturbance and the need for counseling. (*Tr. at 539*).

39. The evaluator concluded that Student does not meet the educational disability criteria as a student with an Emotional Disturbance. (*JX6-8*). The evaluator further concluded that Student nevertheless is easily stressed and would benefit from counseling to help Student develop resiliency and coping strategies to respond to stress when triggered by an event causing Student to recall the ***. (*Id.*)

² The District characterized the March 2023 evaluation as a "full individual evaluation [] to determine if the student meets the criteria for a disability condition, describe the student's level of performance across several domains, identify strengths and weaknesses, and make recommendations regarding the student's needs within the educational setting." (*JX6-8*).

The March and April 2023 ARD committee meetings

40. The District conducted an ARD meeting on March ***, 2023 to review the District's observations from their visit to Student's private school and the recent evaluation of Student for Emotional Disturbance. (*JX5 at 13*). Regarding the evaluation, as noted above, the District's school psychologist *** stated that Student did not additionally qualify for special education services based on Emotional Disturbance but that Student could benefit from counseling services. (*Id.*)

41. Special Education Director *** then shared her observations from Student's private school, noting that all the students there were disabled; stating that the District had been providing and continues to offer the same (or better) type of instructional services as Student receives at the private school; and concluding that the District's proposed IEP for Student is appropriate to meet Student's individualized educational needs in the least restrictive environment. (*Id.*)

42. The ARD committee reconvened on April ***, 2022. *** reiterated that the District is ready, willing, and able to meet Student's educational needs in an appropriate program in the least restrictive environment. (*JX5-13*). *** also noted that the District, in addition to offering special education services and accommodations, would offer counseling and further offered to implement Student's IEP at another *** campus within the District. (*Id.*) Father, through his counsel, advised the ARD committee that Student was having Student evaluated by a private provider to see if she agrees that Student needs to go to a private school. (*Id.*) The ARD meeting ended in disagreement. (*Id.*)

Student's evaluation by private psychologist

43. Student saw Dr. ***, a private clinical and consulting psychologist, for an evaluation on May ***, 2023. (*PX 2*). *** interviewed Student and Father to prepare a *** assessment for evaluation of potential ***. (*Id. at 1, 3*). She also reviewed the recent *** psychiatric report and the District's March 2023 evaluation of Student. (*Id. at 2*). Relying primarily on the *** assessment, *** concluded that Student meets the criteria for ***. She further offered the following recommendations:

1. Student should continue to receive counseling from a practitioner well versed in *** and ***;
2. Student should not return to the school ***;
3. Student will benefit in a school environment that can meet Student's needs and provide appropriate services for Student's ***, SI, OHI (AD/HD, ***) and ED.

(PX2 at 3-4).

44. Dr. ***, the District's Executive Director of Special Programs, disagreed with Dr. ***'s conclusions and her methodology. Dr. *** first took issue with Dr. ***'s primary reliance on the ***assessment because that assessment is not intended for use with children and would never be used in a school setting. (*Tr. at 587*). Dr. *** also explained that *** uses a four-point scale and that Dr. ***'s report never referenced any scaled score or measure. (*Id. at 565-566*). Dr. *** was persuasive in her critique of Dr. ***'s report. In addition, there was concern raised during cross-examination of Dr. *** about the absence of documentation, or protocols, in her evaluation report. (*Id. at 274-286, 305-306*).

45. Noteworthy was Dr. ***'s testimony that her evaluation of Student was *not* intended to be an independent educational evaluation (IEE) for IDEA eligibility or programmatic purposes. (*Id. at 239, 341*). As such, her conclusion and diagnosis of *** is not determinative in whether the District complied with the IDEA.

46. Dr. *** further testified that the District could meet the recommendations suggested by Dr. *** in her report. (*Tr. at 562-563, 598-599*). The most recent ARD committee meeting and its resulting IEP support her conclusion. (*JX5*).

47. Throughout the relevant period in this case, the District provided Student, and offered to provide Student even after Student's withdrawal, an individualized IEP created in a coordinated and collaborative manner by all the key stakeholders. (*JX2; JX3; JX4; JX5*). Student's IEP was implemented in the least restrictive environment and provided both academic and non-academic benefits. (*Id.; RX9*). And until the most recent IEP, Father never objected to Student's previous IEPs. (*JX2; JX3; JX4; JX5*).

48. Any finding of fact above that should be more appropriately treated as a conclusion of law shall be treated as such.

V. Discussion and Analysis

A. Burden of proof

There is no distinction between the burden of proof in an administrative hearing such as this case or a district court proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). In a due process hearing under the IDEA, the burden of proof rests upon the party challenging a proposed IEP and placement or seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). Further, “a presumption exists in favor of the local public school district’s plan for educating the child, provided it comports with IDEA.” *Teague, supra*, at 132.

B. FAPE

In this case, Petitioner Student challenges the Respondent District’s provision of FAPE in two respects:

Whether the District failed to provide Student FAPE from the 2021-2022 school year to the present.

Whether the District failed to appropriately develop and implement a Behavior Intervention Plan (BIP) for Student as part of Student’s Individualized Education Program (IEP).

The Supreme Court has held that to determine whether a public school has provided FAPE to a student, the school must both comply with IDEA’s procedural requirements and develop an individualized program reasonably calculated to enable the student to receive an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982). The Court also explained that an “educational benefit” under IDEA means one which is meaningful and provides a basic floor of opportunity or access to specialized instruction and related services individually designed to provide educational benefit. *Id.* at 201. Shedding additional light on IDEA and its FAPE requirements, the Court later made clear that the Act does not guarantee any particular educational outcome but rather only requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, __ U.S. __, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017).

The Fifth Circuit created a four-part test for determining whether a school district has provided FAPE to a student, using the following factors:

1. Whether the program is individualized on the basis of the student's assessment and performance;
2. Whether the program is administered in the least restrictive environment;
3. Whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and
4. Whether both positive academic and nonacademic benefits are demonstrated.

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997). When reviewing these factors, courts have found there is no particular manner to consider or weigh them. Rather, the caselaw holds these factors are “indicators” of an IEP's appropriateness and intended to guide the fact-intensive inquiry for evaluating whether an IEP provided an educational benefit. *Michael Z.*, *supra*, at 293-294.

A review of the *Michael F.* factors in the present case supports a conclusion that the Respondent District provided an IDEA-compliant educational benefit to the Petitioner Student. Those factors are discussed below.

1. *Individualized IEP based on assessment and performance*

As part of its obligations under IDEA, a school district must have an IEP in place at the beginning of each school year that is individualized for the student, based on assessment and performance. 34 C.F.R. §§ 300.22, 300.320, 300.323(a).

Here, Student's IEPs for the relevant period met IDEA's requirements. For both the 2021-2022 and 2022-2023 school years, the Respondent District developed Student's IEP based on the most current assessments and performance results available. The District also considered Student's strengths, Student's parent's concerns for enhancing Student's education, as well as Student's academic, developmental and functional needs. 34 C.F.R.

§ 300.324 (a)(1). In addition, Student's ARD committee developed and implemented a BIP for Student that used positive behavioral interventions and supports, and the committee revised Student's BIP from time to time as needed. 34 C.F.R. § 300.324 (a)(2).

In addition, in response to the *** incident the District immediately created and implemented a safety plan for Student's benefit. And the plan proved effective, defusing and deescalating a situation ***.

Looking at Student's most recent IEPs as a whole, one can reasonably conclude that the District properly developed and implemented the IEPs while Student both attended school in the District and was in private school. In short, Student's IEPs were "reasonably calculated to enable [Student] to make progress appropriate in light of [Student's] circumstances." *Endrew, supra*, 137 S. Ct. at 999.

2. *Least restrictive environment*

The IDEA requires school districts to educate disabled students in least restrictive environment. 34 C.F.R. § 300.114. The requirement ensures that disabled children are educated to the maximum extent possible with nondisabled children. *Id.* Separate or special classes should be used only if a child's disability is such that regular education with supplementary aids or services cannot provide a satisfactory education. *Id.* Simply put, IDEA requires schools to mainstream disabled students as much as is appropriate. *Rowley, supra*, 458 U.S. at 202; *Daniel R.R. v State Bd of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

In this case, Student presents significant deficits in Student's speech and communication functions. Student's cognitive functioning is also at a severely lower grade level than Student's nondisabled peers. And for several years Student has had a BIP in place to address behavioral problems. Together, these obstacles make Student's placement in general education for all purposes inappropriate. Consequently, the District placed and continues to recommend placement of Student in primarily individualized special education classroom settings, with appropriate accommodations and supports. And to maximize Student's least restrictive environment, Student has the opportunity to socialize with nondisabled peers in *** and in available *** activities.

The District satisfied its requirement of educating Student in the least restrictive environment.

3. *Services provided in a coordinated and collaborative with key stakeholders*

The process of developing an IEP is holistic, requiring the input and collaboration of various persons, including the Student's parents, special and regular education teachers, therapists, and often the child **self. 34 C.F.R. §§ 300.321-322; 19 Tex. Admin. Code 89 § 1050(c). To the extent possible, the decision of the ARD committee should be by mutual agreement. 19 Tex. Admin. Code 89 § 1050(g).

In this collaborative process to develop an IEP, a parent's right to meaningful input is not synonymous with veto power over the ARD committee's decisions or the right to dictate the outcome of an IEP. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Rather, absent a school's bad faith exclusion of the parents or refusal to listen to or consider their input, the school is deemed to have complied with the IDEA's requirements for collaboration with the parents. *Id.*

In this case, all necessary stakeholders participated collaboratively in developing Student's IEP during the relevant period. The record shows that Student's father played an active role in developing Student's IEPs. Student's father did not object to the IEPs that the District previously created and implemented for Student until after the *** incident and only after he (or Student's mother) unilaterally withdrew Student from the District and enrolled Student in a private school.

4. *Academic and non-academic benefits*

This last factor – whether a student received academic and nonacademic benefits – is one of the most critical factors in determining whether a school has met its obligation to provide FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-814 (5th Cir. 2012). It is not necessary for a student to improve in every area of Student's IEP to obtain an academic benefit that satisfies the IDEA. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000).

The Respondent District developed and implemented an IEP for Student that provided a meaningful academic benefit. The record shows that Student made demonstrable progress toward Student's goals during the 2021-2022 school year, mastering most of the educational objectives set for Student for that year, as well as passing Student's classes and the *** test.

For the 2022-2023 school year, the analysis of Student's academic and nonacademic benefits is more difficult because by October 2022, Father removed Student from the District and enrolled Student instead in the private school. Thus, there is little information to evaluate what academic and nonacademic benefits Student received in the 2022-2023 school year at the District during the few weeks Student was there. But Student's past successful performance in the previous year provides some predictive basis for the current school year, had Student remained in the District.

As noted above, the ARD committee met and agreed in May 2022 on Student's IEP for the following school year. The committee developed new individualized goals for Student, provided necessary and appropriate services and accommodations, and the IEP was approved by all stakeholders - including Student's father. For reasons not in the record, Father withdrew Student from the District in the last month of the 2021-2022 school year and then re-enrolled Student in the District on the first day of the 2022-2023 school year with the last agreed-upon IEP in place. The analysis therefore is whether the IEP in effect for the 2022-2023 school year was reasonably calculated to enable Student to make appropriate progress in light of Student's individual or unique circumstances. The record evidence suggests that it was an appropriate IEP for many reasons.

First, the District had in place an educational program with several services and accommodations that previously provided Student an IDEA-compliant educational benefit, which Student's progress confirmed. *Second*, the District conducted mid-year ARD meetings with Father in October and December 2022, as well as in March 2023, to address Student's concerns about Student's individualized needs. These ARD meetings, though Student had been withdrawn from the District by then, noted that Student was making gradual progress while Student attended ***. *Third*, the District also offered counseling to Student, which Father declined, and conducted a psychoeducational evaluation of Student for possible Emotional Disturbance. When that testing failed to confirm a diagnosis of educational Emotional Disturbance, the District still made recommendations that would afford Student additional academic and nonacademic benefits during the 2022-2023 school year, even offering a different campus within the District if Father so chose. But he declined.

As part of Student's IEP, the District also had in place a well-developed BIP to address special and unique behavioral concerns affecting Student. The BIP was frequently reviewed and updated throughout the relevant period in this case. The District's most recent update to Student's BIP took place in October 2022, after Student's father withdrew Student from the District.

A fair review of the evidence shows the District stood ready, willing, and able to implement an IEP that was reasonably likely provide Student both academic and nonacademic benefits during the 2022-2023 school year. And based on Student's track record from previous years, it was reasonably likely Student would have made progress in that year as well. It is also worth noting that Student's performance at the private school demonstrated some regression in Student's core skills, suggesting by comparison that the District's IEP with related services and supports previously were working as intended.

Collectively, all of the four *Michael F.* factors for evaluating whether a school has provided a FAPE weigh in favor of the District. This finding, along with the presumption in favor of a school's IEP, support the conclusion that the Respondent District provided an IDEA-compliant FAPE to Student, including the BIP component of Student's IEP. Student not surprisingly disagrees, challenging some aspects of the IEP or BIP – e.g., the District's not specifically addressing Student's possible *** or failing to target particular behaviors in the BIP. But IEPs are never perfect or metaphysically exhaustive; instead, they must be reasonably calculated to give the student a meaningful educational benefit. *Rowley, supra.* In this case, they were.

C. Transportation services

Another issue Student raises in Student's complaint relates to Student's special education transportation services. The question presented is:

Whether the District failed to provide appropriate special education transportation services to Student.

Under the IDEA, transportation for students with disabilities can be a "related service." 34 C.F.R. § 300.34(a). All of Student's IEPs in the record reflect that Student's ARD committee agreed to provide Student with special education *** transportation to and from school and included in Student's IEPs a supplement for these services.

The specific issue in this case is whether the District failed to provide appropriate transportation services in the 2022-2023 school year. The District provided Student with special education *** but, through no fault of its own, did not have Student's *** in place at the start of the school year. That's because Father did not re-enroll Student back into the District until the first day of the school year. So on the first day of school it was impossible for the District to have a special education *** ready to pick up Student at Student's front door. The District's transportation department obviously had no reasonable way of knowing Student needed a special education *** in place to transport Student when the school year started.

Despite the District's lack of advance notice, District witness *** testified that immediately upon learning that Student re-enrolled for the 2022-2023 school year, he contacted the transportation department to get Student's special education *** service restarted. And that same day – the first day of school – *** also called Father to advise him that the general *** information he previously had received was not for Student's ***.

Normally it can take to 7-10 days to create a new ***. The District was able to have special education *** transportation in place for Student in place by August ***, 2022 – just four days after school year began and two days after the *** incident. On these facts, it is not reasonable to conclude that the District failed to provide appropriate transportation services to Student. The District acted with all due speed to provide a special education *** for Student, given the late notice of Student's re-enrollment, and did so in less the time than normal for establishing new *** service. The District did not deny special education transportation services to Student in violation of the IDEA.

D. Private placement

Next, Student seeks both private placement of Student, as well as reimbursement of past and future expenses for Student's private placement, raising the following issues:

Whether the District should be ordered to provide private placement to Student if it failed to provide FAPE to Student.

Whether the District should be ordered to reimburse Student's parents for expenses incurred in the private placement of Student.

The law on these issues is well established. To be entitled to a private placement at public expense, Student must prove that *both* (1) the District did not provide Student a FAPE during the relevant period, *and* (2) Student's private placement is appropriate. 20 U.S.C.

§ 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(c); *see also Sch. Comm. of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 370 (1985).

In the present case, Student meets neither condition for Student's unilateral private placement. As discussed above, the District provided Student with a FAPE during the relevant period. Second, Student's current placement at Student's private school is not appropriate when compared to the FAPE Student received and would have received at the District. Student has regressed functionally at Student's current school. In addition, Student's private school setting is not the least restrictive environment but instead lacks significant interaction with nondisabled peers and with peers at Student's own age and grade level. Accordingly, Student is not entitled to reimbursement for the unilateral placement at Student's private school.³

E. Payment for private * counseling and the appropriateness of the District's March 2023 evaluation**

These last two issues are discussed together because they are interrelated. Student raises the following issue relating to Student's claim of ***:

*Whether the District should be ordered to reimburse Student's parents for *** counseling services for Student.*

The District, in its own request for due process hearing, raises the issue below regarding its most recent evaluation of Student:

Whether the District's evaluation of Student in March 2023 was an appropriate full individual evaluation (FIE) under IDEA regulations.

³ Another basis for denying the request for reimbursement of private school costs is Petitioner's apparent failure to comply with the notice requirements for enrolling a child in private school. *See* 20 U.S.C. § 1412(a)(10)(C) (describing parent's notification requirements to school *before* removing child from public school program); 34 C.F.R. § 300.148(d). The record in this case does not clearly show whether either of Petitioner's parents complied with this requisite notice.

The starting point for addressing these issues is whether Student has ***. Student's basis for claiming *** is the evaluation of Student's private psychologist, Dr. ***. Dr. *** based her diagnosis of Student's having *** primarily on the results of a *** assessment she performed. District witness Dr. *** disagreed with both Dr. ***'s conclusion and her methodology, noting first that the *** assessment is not intended for use with children and would never be used in a school setting. Dr. *** further noted that *** uses a four-point scale and that Dr. ***'s report never referenced any scaled score or measure. Dr. *** was persuasive on the *** dispute. Perhaps most significantly, Dr. *** also testified that she did not make an IEE of Student for purposes of the IDEA and her report was not intended to be used as such.

Regarding the District's evaluation of Student in March 2023 (actually, in February 2023), the District conducted a psychoeducational evaluation to determine whether Student met the eligibility criteria for Emotional Disturbance. An FIE must use various assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, to determine whether the child has a disability qualifies for special education and the content of the child's IEP. 34 C.F.R. § 300.304(b)(1).

The FIE should also use technically sound instruments of evaluation to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors, and not rely on any single measure or assessment as the sole criterion for its conclusion. 34 C.F.R. § 300.304(b)(2), (3). Finally, the FIE must also be sufficiently comprehensive to identify all the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6).

The March 2023 evaluation in this case was comprehensive and included interviews of Student and Father, review of school and medical records, observation of Student in the private school, and various assessment tools. The evaluator concluded that Student did not meet the criteria for Emotional Disturbance. However, the evaluator recommended that Student would benefit from counseling within the school setting, which Father declined. In short, the record evidence shows the District's FIE in March 2023 was an appropriate evaluation under 34 C.F.R. § 300.304.

Dr. *** also testified that the District could meet all the recommendations that Dr. *** suggested in her report for Student. The District even offered counseling for Student during its later ARD meetings, but Father declined.

Counseling is a related service under IDEA. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a). A child must receive counseling where that service is necessary for the child with a disability to receive an educational benefit. *E.g., Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186 (2nd Cir. 2005).

Based on the record, neither Dr. ***'s evaluation nor the District's March 2023 evaluation warrants requiring the District to reimburse Student for *** counseling. Dr. ***'s diagnosis of *** was seriously challenged by the Dr. *** and, importantly, Dr. ***'s evaluation was admittedly *not* intended for use as an IEE. Further, the District's March 2023 evaluation did not support a finding of Emotional Disturbance, let alone ***, which militates against requiring the District to reimburse Student for *** counseling. If there is no finding of *** for an educational evaluation, nor a finding of Emotional Disturbance, logic dictates that Student does not require *** counseling to receive an educational benefit.

In sum, neither the record evidence nor the law entitles Student to public reimbursement for any *** counseling Student may have received to date.

VI. Conclusions of Law

Based on the preponderance of the evidence, and applicable law, the Hearing Officer makes the following conclusions of law:

1. Respondent Eagle Mountain-Saginaw Independent School District (District) is a local education agency responsible for complying with the IDEA. 20 U.S.C. § 1400 *et seq.*

2. Petitioner Student is a child with a disability eligible for special education services under the IDEA based on the categories of ***, speech impairment, and other health impairments. 20 U.S.C. § 1401(3)(A); 34 C.F.R. §§ 300.306, .307.

3. In a due process hearing under IDEA, the burden of proof rests upon the party challenging a proposed IEP and placement or seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127 (5th Cir. 1993).

4. Student did not meet Student's burden of proof by a preponderance of the evidence to show the District violated the IDEA or denied Student a FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

5. Student did not meet Student's burden of proof by a preponderance of the evidence to show the District violated the IDEA by failing to provide Student necessary transportation services. 34 C.F.R. § 300.34(a).

6. Student did not meet Student's burden of proof by a preponderance of the evidence to show Student is entitled to reimbursement for private placement because the District provided Student a FAPE, and the private school Student currently attends is not an appropriate placement. 20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(c); *Sch. Comm. of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359 (1985).

7. Student did not meet Student's burden of proof by a preponderance of the evidence to show Student entitled to reimbursement of private counseling for *** expenses. 34 C.F.R. §300.34(a).

8. The March 2023 evaluation that the District conducted for Student was an appropriate evaluation under the IDEA. 34 C.F.R. § 300.304.


VII. Orders

1. Based on the above findings of fact and conclusions of law, Petitioner's claims and requests for relief are **denied**.

2. Based on the above findings of fact and conclusions of law, Respondent's claim that the March 2023 evaluation of Student was an appropriate evaluation under IDEA is **granted**.

3. All other claims for relief not specifically addressed in this decision are denied.

Dated: July 14, 2023

By: 

Christian A. Bourgeacq
Special Education Hearing Officer
for the State of Texas

VIII. 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 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. 20 U.S.C. § 1415(i)(2); 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, § 2001.144(a)-(b).