DOCKET NO. 062-SE-1022

STUDENT b/n/f PARENT,	**§**	**BEFORE A SPECIAL EDUCATION**
Petitioners	**§**	
	§	
v.	**§**	
	§	**HEARING OFFICER FOR**
	§	
FRISCO INDEPENDENT SCHOOL DISTRICT,	**§**	
Respondent	**§**	
	§	**THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioners, Student b/n/f Parent (collectively, Petitioner) brings this action against Respondent, Frisco Independent School District (herein after Respondent or District) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. §1402 et.seq. (hereinafter IDEA) and its implementing state and federal regulations.

There are two primary issues in this case. First, whether the District provided the Student with a free, appropriate public education (hereinafter FAPE), and specifically, whether the program and placement proposed for the Student for the school years in question were designed to provide the Student both educational and non-educational benefit, or whether, the Student required a private placement in order to receive educational benefit. Secondly, if a private placement is warranted, then whether the proposed placement is appropriate and if the parent is entitled to reimbursement for that placement.

The hearing officer finds that the District did provide the Student FAPE and therefore consideration of the appropriateness of the unilateral private placement is not addressed, and Petitioner is not entitled to reimbursement for the private placement.

II. Procedural History

Petitioners, Student, b/n/f Parent (collectively, Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). The Complaint was received by the Texas Education Agency (TEA or Agency) on the 27th day of October, 2022, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on October 28, 2022. The Respondent to the Complaint is the Frisco Independent School District. The Agency assigned the matter to this Hearing Officer, who then issued the Initial Procedural Scheduling Order on October 28, 2022.

Thereafter, on October 31, 2022, Respondent District filed its Motion to Reassign the Hearing Officer. After consideration, it was determined that TEA was unable to reassign the hearing officer in this matter and Order No. 2 was issued. On October 31, 2022, counsel for the Respondent District informed the hearing officer that the parties had agreed, in writing, to waive the Resolution Session, and further that they were not going to participate in mediation. The Decision Due Date was then moved and the Due Process Hearing rescheduled. Order No. 3, with the Revised Scheduling Order was issued on November 3, 2022.

The pre-hearing conference (PHC) was held on November 7, 2022, and at that time, the parties were unable to agree on a date for the hearing. Thereafter, a continuance was requested and granted regarding the particular hearing dates, that also necessitated a revised decision due date as set forth in Order No. 4, issued on November 14, 2022. On November 22, 2022, Petitioner filed a Motion to Conduct Hearing in Person and at Neutral Site. Respondent District then filed its Response to said Motion on November 28, 2022. Order No. 5, issued on November 30, 2022, granted Petitioner's Motion.

On November 9, 2022, Respondent District filed its Motion to Enforce the Prior Disclosure Deadline, as this current case involves essentially the same facts and issues as the prior case, that had been dismissed just seven days prior to this matter being filed. Respondent had also pointed out in its Motion to Reassign the Hearing Officer, dated October 31, 2022, just three days after the case was filed, that the issue of the disclosure deadline was a critical issue in this current case. While Respondent's Motion was filed on November 9, 2022, and earlier notice of the issue was given on October 31, 2022, no ruling was made until December 5, 2022. During that time, no

Response to the Motion was filed by Petitioner. It was after the issuance of Order No. 6, granting Respondent's Motion to Enforce the Prior Disclosure Deadline, that Petitioner, on December 6, 2022, filed a Motion to Reconsider the Order of December 5, 2022. On December 8, 2022, Respondent filed its Response in Opposition to Petitioner's Motion for Reconsideration of the Disclosure Deadline. Order No. 7, the Order denying Petitioner's Motion for Reconsideration, was issued on December 10, 2022. Order No. 8, setting forth the Petitioner's Issues and Requested Relief for the hearing, was issued on December 12, 2022.

Thereafter, on December 12, 2022, Respondent filed its Objections to Petitioner's Disclosure of Documentary Evidence and Witnesses, noting the September 2022 Disclosure Deadline, and the Petitioner's submission of the documents and witness list on December 6, 2022. Order No. 9 was then issued on December 13, 2022 and sustained in part and overruled in part the Respondent's Objections.

A. Representatives

Petitioner was represented by Tomas Ramirez III of the Law Firm of Tomas Ramirez III. The Respondent District was represented by Nona Matthews and Meredith Walker of Walsh, Gallegos, Trevino, Kyle & Robinson, P.C.

B. Resolution and Mediation

The parties agreed to waive the Resolution Session and further, declined to participate in mediation.

C. Continuances and Adjustments to Scheduling Order

There were few adjustments to the hearing schedule and the decision due date in this case. Initially, as the parties had agreed to waive the Resolution Session and declined to participate in mediation, the timeline for the decision due date and hearing dates were accelerated. Due however, to scheduling issues, a continuance of the decision due date was requested and granted on November 14, 2022. Thereafter, at the conclusion of the due process

hearing on December 16, 2022, the parties also requested a continuance of the Decision Due Date, so that time was adequate for the submission of Closing Briefs by the parties and the issuance of the Decision.

D. Preliminary Motions - Discovery

During the pendency of this case, no issues were raised with regard to discovery or information exchange, other than those related to the Disclosure Deadline, as set forth above.

E. Due Process Hearing

The due process hearing was conducted on December 14 & 16, 2022, at the Region 10 Educational Service Center in Richardson, Texas. The Petitioner continued to be represented by Tomas Ramirez III, and the Student's mother, *** attended the hearing. The Respondent continued to be represented by its legal counsel, Nona Matthews and Meredith Walker of Walsh, Gallegos, Trevino, Kyle & Robinson, P.C. Ms. ***, Assistant General Counsel for the District attended the hearing, along with Mr. ***, Executive Director of Special Education for Frisco ISD. With the consent of all hearing participants, Chrystal Hernandez, another attorney with Walsh, Gallegos was present as an observer. The hearing was recorded and transcribed by a certified court reporter.

F. Further Continuances

At the close of the hearing, the parties agreed to a scheduling order for the submission of the post-hearing briefs and the decision due date. Both parties duly filed written Closing Briefs by the January 17, 2023 deadline. The decision in this case is due January 31, 2023.

III. Issues

A. Petitioner's Issues

The issues as set forth in the Complaint, and those to be determined at the due process hearing are as follows:

Whether the school district failed to provide Student with a FAPE within the meaning of the Individuals with Disabilities Education Act (IDEA) beginning on October 27, 2020 through the present; and more specifically:

- Whether the school district failed to devise an appropriate IEP for Student, based upon the Student's unique disability-related needs;

- Whether the District failed to provide Student with an IEP that provided the Student both academic and non-academic benefit;

- Whether the District failed to implement Student's IEP resulting in a denial of FAPE;

- Whether the District failed to implement Student's IEP in the least restrictive environment;

- Whether the District failed to provide Student services in a coordinated and collaborative manner by key stakeholders; and

- Whether the District failed to comply with student and/or parental procedural rights under the IDEA;

B. Petitioner's Requested Relief

Petitioner also set forth in the Complaint the following items of requested relief:

- That the hearing officer order the District to reimburse the parent for the Student's private educational placement, from August 2021 to May 2022;

- That the District be ordered to pay costs, fees, and tuition for private placement for Student for the next two calendar years;

- That the District be ordered to provide compensatory services to the Student for areas where Student was denied services under Student's IEP;

- That the District be ordered to craft an IEP individualized for the Student's unique needs, with measurable goals and objectives, including specially designed curriculum to make the Student successful in the classroom, in the least restrictive environment;

- That the hearing officer order the District to pay for all therapeutic services and compensatory services for which the Student qualifies and is in need of in the future;

- That the District be ordered to pay for all compensatory services provided by the parent within the past two years; and

- That the District pay for the parent's reasonable and necessary attorneys' fees and costs of this suit.

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C. Respondent's Issues and Legal Position

Regarding the Respondent, the District denied the allegations in Petitioner's Complaint with respect to Petitioner's IDEA claims and contends that it provided Student with FAPE during the relevant time period. The District contends that the IEP was reasonably calculated for the Student to make both academic and non-academic progress in light of Student's particular circumstances, and further, the IEP provided appropriate supports and services for the Student. The District set forth detailed factual allegations in its Response as to the services it provided, and attempted to provide, to the Student during the time period relevant in this matter. Respondent District also contends that the Student's parents were afforded all opportunities to participate, that they did participate, and that there has been no denial of FAPE on procedural grounds.

D. Statute of Limitations

The parties were clear that at issue in this due process proceeding were the school years 2020-2021 (beginning October 27, 2020) and 2021-2022. While some of the testimony and exhibits related to the Student's attendance, education, and services prior to that time, they were provided and were discussed only in the context of background and basis for understanding the events preceding those of this matter.

IV. Findings of Fact*

1. Student is a ***-year-old *** grader whose permanent residence with Student's parents is within the jurisdictional boundaries of the Frisco Independent School District (District).[1]

* References to the Due Process Hearing Record throughout this section are as follows: Citations to Petitioner's Exhibits and Respondent's Exhibits are designated with a notation of "P" or "R" respectively, followed by the exhibit number or letter and page number. Citations to Joint Exhibits are designated with a notation of "J", and followed by the exhibit number and page number. Citations to the transcript are designated with a notation of "T" followed by the page number.

[1] T. 42.

2. Student has been enrolled in the District since Student ***. Student attended school in the District from *** through Student's *** grade year, which was the 2020-2021 school year.[2]

3. Student qualifies for special education services under the eligibility categories of Autism, Speech Impairment, and Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD).[3]

4. Early in the Student's *** grade year, in the Fall of 2019, Student's mother voiced a concern that Student's teachers were not following the Student's Individualized Education Program (hereinafter IEP). A behavior specialist for the District conducted a validity check and determined that the Student's IEP was being followed and implemented by all of the Student's teachers.[4]

5. During the Student's *** grade year, the 2019-2020 academic year, the annual Admission, Review and Dismissal (hereinafter ARD) committee meeting was held, with some reschedules and reconvenes at the mother's requests, in December 2019 and January 2020. At all meetings the Student's mother disagreed with the IEP.[5]

6. The Behavior Intervention Plan (BIP) in the Student's IEP addressed the Student's non-compliance with new tasks and following direction appropriately.[6]

7. Because of the disagreement, after the five-day waiting period, the Student's IEP was implemented on January ***, 2020.[7] The IEP provided numerous accommodations and assistance for the Student. This included providing structure, routines, space for movement breaks, extra time, option of typed responses, and feedback for social and behavioral supports.[8] In addition, the Student had two speech and language goals, with one addressing articulation and the other focused on social skills as part of speech.[9]

8. During this year, the Student was to have social skills in a group setting, but the Student's mother did not want the Student to be in 'special education', so the District compromised and provided social skills training through speech services by way of discussing hypotheticals rather than actually interacting with others.[10]

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[2] T. 61, 126.
[3] R. 2:47.
[4] T. 205-206.
[5] R. 3:1, 27-29.
[6] R. 3:15-16.
[7] R. 3.
[8] T. 361; R. 3:5-6.
[9] R. 3:7-8.
[10] T. 208-209, 366-367.

9. During the 2019-2020 school year, the Student was in *** program, and was enrolled in ***, that being the *** class. The Student only had goals for behavior and speech, and none for academics.[11]

10. The Student, when in Mr. *** class, was able to demonstrate the use of the Canvas platform, which is an online asynchronous teaching and learning platform. The Student was also observed sending some emails.[12]

11. The Covid-19 Pandemic occurred during March 2020 of the Student's *** grade year, and instruction was provided through the Canvas platform that the District had already been using in some classes.[13]

12. The Student was successful during the ***-grade year, being 2019-2020, demonstrated growth, and was promoted to *** grade. [14]

13. There was no STAAR testing in the Spring of 2020, due to the Covid Pandemic and the State of Texas waiver of the obligation.[15]

14. The evidence quite clearly established that during the 2019-2020 school year, the Student had demonstrated on a daily basis, Student's ability to access and use technology, even navigating between multiple sites.[16] In fact, credible testimony showed the Student's extensive use of technology in Student's *** class, which included online work such as the creation of videos and websites, with text and images inserted.[17]

15. During the *** grade, the Student even experienced issues with the overuse of technology during classes. Specifically, the evidence showed that when doing an assignment on a laptop or a Chromebook, Student was also at other websites such as YouTube for videos and utilizing the technology for games and entertainment purposes, rather than completion of Student's assignments. Evidence also showed that Student was familiar with emails.[18]

16. Student's *** grade year was the 2020-2021 academic year. Frisco ISD conducted the initial three weeks of the school year entirely online, or virtually, after which the students

[11] T. 206-207, 227, 233, 362.
[12] T. 210-211, 304-305, 315-316.
[13] T. 210.
[14] T. 211, 311, 368.
[15] T. 211.
[16] T. 249-251, 279-280, 290-291.
[17] T. 310-311, 397-398.
[18] T. 290-291,357-358, 363, 384-385; R. 3:7.

could elect to attend school online, through the District's Virtual Academy (synchronous online instruction) or alternatively attend in-person classes.[19]

17. During those first three weeks, testimony noted that the Student did not do well with the Virtual Academy.[20] Specifically, Student had difficulty with having the camera on, and the teachers worked with the Student in trying to find alternate ways to verify Student's attendance at the computer without actually showing Student's face.[21] More specifically, testimony demonstrated that the District offered options for the Student to not have to have the camera directly on Student's face. Options included and even be able to use an alternative such as a leg, or arm or even the use of a bitmoji for the picture.[22]

18. Student's parent then elected the option that the Student would attend in-person classes, but Student never attended school in person during the fall 2020 semester.[23] The District made efforts to educate the Student during the fall semester, 2020, and while Student rarely attended the Virtual Academy or Canvas, Student did complete work that was sent home.[24] Evidence also demonstrated that the District had a discussion with the parent in order to assist the Student in changing the educational selection to the Virtual Academy, but the parent declined.[25]

19. During the 2020-2021 school year, the District had applied for, and received from the TEA, a waiver regarding in-person homebound instruction. Specifically, the waiver provided that the District could provide virtual homebound instruction and still be eligible for Foundation School Program (FSP) funding by counting the student in attendance.[26] The District then had in effect a district-wide policy that all homebound instruction was conducted virtually.[27]

20. In September 2020, as the Student was not accessing instruction either by attending classes in person or attending the Virtual Academy, the District attempted to schedule an ARD committee meeting in order to discuss the issues and options for instruction.[28] A meeting was finally set for September ***, 2020. Since the Student's parent requested homebound services for the Student, the meeting was abruptly canceled by the Student's mother on the morning of September ***, 2020, as she understood that the necessary form from the physician had not been received in time to be considered at the meeting.[29]

[19] T. 212-213.
[20] T. 65-67, 317.
[21] T. 214, 258, 290, 313.
[22] T 214, 258, 313, 400; R.12:2.
[23] T. 67-68.
[24] T. 216-218.
[25] T. 370-372.
[26] T. 347-349; R. 8.
[27] T. 260, 347-348.
[28] T. 283-284.
[29] T. 134.

21. Thereafter, the District tried to reschedule the ARD meeting, and had requested dates in October from the Student's mother. The parent selected October ***, 2020, and then on October ***, 2020, the parent cancelled the previously scheduled meeting.[30]

22. When the ARD was cancelled, no reason was provided at that time, as apparently the Petitioner's advocate called the District.[31] Testimony notes that the cancellation was due to the advocate's availability, and other evidence shows that the cancellation was due to the Student's family being exposed to Covid, and then in quarantine. The meeting was finally scheduled for November ***, 2020.[32]

23. At the beginning of classes for the fall 2020 semester, on September ***, 2020, Ms. ***, the speech pathologist, reached out to the Student's mother to discuss the scheduling for speech services. The Student's parent responded on September ***, 2020, and that initial correspondence did not include any reference to the fact that the Student would not be attending school in person.[33]

24. Dr. ***, a ***, stated in a form dated September ***, 2020, that the Student needed homebound instruction due to ***. Follow-up attempts by the District to talk with Dr. *** were not successful, however, as he declined to be further involved with the matter.[34]

25. In advance of the November ***, 2020 ARD committee meeting, when the student did not respond to correspondence from teachers on Canvas, the District then went to paper assignments that were sent home for the Student to work on.[35] More specifically, by September ***, 2020, the school was augmenting the Student's limited use of Canvas by sending hard copy work home for Student, with the Student's father picking it up.[36]

26. The testimony established that during the Fall of 2020, instruction and accommodations were provided to the Student to the extent the District could, under the circumstances of Student's nonattendance. These included the provision of paper or hard copy packets of work and information, including power points, checklists, assignments, and the like, all in accordance with the Student's IEP. Testimony also showed that at least one teacher spent several hours per week putting these together for the student. [37]

[30] R.12:30.
[31] T. 135; R. 12:30.
[32] T. 134-135; R. 12.
[33] T. 285-286; R. 6.
[34] T. 374-376; R. 15:28.
[35] T. 238.
[36] T. 215-216; R. 7.
[37] T. 314-315.

27. Although some testimony noted that the Student failed to receive any instruction during the fall of 2020,[38] other credible evidence and testimony demonstrated that the Student did Student's classwork using printed assignments and was doing daily work and quizzes. In addition, the teachers were pleased with the progress of the work Student was doing.[39]

28. Another homebound physician form, dated December ***, 2020, was submitted to the District from a Dr. ***. This correspondence requested that the Student be provided homebound instruction, due to Student's Autism, and specifically noted that some Students with Autism have difficulty with computer use. In addition, the form noted that virtual learning was 'not appropriate' due to the Student's inability to navigate Canvas. The recommendation, however, was to improve the Student's ability to work on Canvas. [40]

29. Ms. ***, the Special Education Coordinator for the District, testified that she then conducted a telephone call with Dr. ***, as is typical protocol in order to obtain more details and more student-specific information regarding the medical reasons for the homebound instruction. Ms. *** testified that Dr. ***'s comments were more general in nature, rather than specific to this Student. There was no evidence submitted that Dr. *** ever observed the Student on the Canvas platform. [41]

30. On November ***, 2020, the ARD committee held a meeting, continued from September and October dates, where discussions centered on the review of existing data and the possibility of a new evaluation (as the three-year evaluation date was approaching) and possible homebound services.[42] At the meeting, the Student's parent requested a new evaluation, and the areas for testing were agreed upon.[43]

31. A discussion of homebound instruction was then held during the November ***, 2020 revision ARD. The ARD was also to discuss the Student's re-evaluation. At that time, the Student's parent, Ms. ***, requested face-to-face homebound services since she contended the virtual platform would not work. The ARD Committee, except for the parent, determined that the Student did not qualify for homebound instruction, since the District's other option for instruction, that being the Virtual Academy, could provide education in a virtual manner, thereby providing FAPE in the Least Restrictive Environment (hereinafter LRE). The discussion also included how, through the IEP provisions of support, the Student would be assisted in accessing the Virtual Academy.[44]

[38] T. 82.
[39] T. 216-218.
[40] P. 8.
[41] T. 396-397; R. 15:28-29.
[42] R. 12.
[43] R. 12:2.
[44] T. 380; R. 12.

32. The parent then determined that she did not want to hear about it, only wanted to focus on the homebound option, and then became upset and left the meeting.[45]

33. Another reason for the homebound request from the Student's mother was that she wanted the Student to have only one teacher rather than eight.[46]

34. The ARD Committee then convened on November ***, 2020 for the Student's Annual ARD and continued the homebound discussion. The parent was accompanied by her lawyer and an advocate. A number of matters were discussed, including option for the Student to have access to Student's teachers, instead of calling them during class time. Additional supports for the Student in accessing virtual instruction were also discussed, such as a private room for meeting with teachers. During that meeting, which lasted several hours, the time then expired, and the ARD committee agreed to recess and reconvene.[47]

35. On December ***, 2020, the ARD Committee reconvened and, due to the Student's mother refusing to participate in a conference room rather than the school library, the meeting never started. The ARD had to be rescheduled for another time so that the District's administration building could be used for the meeting.[48]

36. Thereafter, on December ***, 2020, the last day of school before the District's winter break, the ARD Committee again met to continue the discussions from the November ***, 2020 ARD. During the ADR meeting, a request was made to conduct homebound instruction using ***. While testimony is conflicting, the deliberations demonstrate that this was initially requested by the mother's attorney, and in an effort to temporarily resolve the issue, the District finally agreed to provide *** homebound instruction.[49]

37. The District's agreement to provide homebound services for the Student by *** was scheduled for one hour per day. The agreement was to conduct homebound by *** until the FIE was completed, and then reconsider the options after reviewing the Student's evaluation. [50]

38. The December ***, 2020 ARD meeting lasted at least six hours. Credible evidence demonstrated that the ARD committee meetings for this Student generally lasted three hours, or more, and involved the mother's comments throughout the process; recording those on notes posted throughout the room, and other accommodations. The evidence also establishes that the Student's mother was accompanied by an attorney and/or

[45] T. 219, 381-382; R. 12:3.
[46] T. 379-380; R. 12:17.
[47] T. 372; R. 15: 20, 21, 24.
[48] T. 392-394; R. 15:25.
[49] T. 99-100; R. 15:30.
[50] T.345, 410; R.15:29-30.

advocate at the meetings, and often the Student's Board-Certified Behavior Analyst (BCBA) would attend as well.[51]

39. Evidence demonstrated that the District made numerous attempts and offered options to assist the Student in accessing the Virtual Academy, which were consistent with Dr. ***'s recommendations.[52]

40. During November 2020, a proposed amendment to the Student's social skills goal was proposed, but the parents did not sign in agreement. As a result, the District was unable to change the Student's goal to make it reflect the proposed modification.[53]

41. The consent for Student's three-year evaluation, the Full Individual Evaluation (hereinafter FIE) was received from the parent on December ***, 2020,[54] and the evaluation was completed in March of 2021.[55]

42. On March ***, 2021, a revision ARD was held. The purpose of the meeting was to review the completed FIE of the Student, and to create an updated IEP based upon the results of the evaluation. The Student's mother was accompanied at the meeting by her attorney and advocate. [56]

43. At the time of the March ***, 2021 meeting, the committee reviewed the FIE, and the parent disagreed with the report. When asked what specifically she disagreed with, she stated that she disagreed with the entire FIE.[57]

44. At the time of the March meeting, the ARD committee determined that the Student did not meet eligibility for homebound instruction, as there was no medical basis that established an inability to access virtual instruction. The proposal was made to discontinue homebound instruction. [58]

45. The District then proposed face-to face instruction in a District administration building at a time other students were not attending.[59] However, the Student's mother insisted that instruction be provided in her front yard. The Student's mother also declined the District's offer of virtual homebound, and thus without agreement the placement continued as *** homebound, which Student continued to receive throughout the spring semester, 2021.[60]

[51] T.386, 388-391; R.20: 8, 9. 28-29.
[52] T. 214,258,313,400; P.8:2.
[53] T. 382-383; R. 13.
[54] R.16.
[55] R.18; R. 20.
[56] R.20:6, 28-29.
[57] T. 408-409; R. 18; R:20:10.
[58] T. 223-224, 409-410; R.20:10.
[59] T. 223-224, 409-410; R. 20:10-11.
[60] T. 188-192, 415; R.20:10-11.

46. During this time, there were some speech services difficulties, and in particular with articulation. As working with the Student and Student's***, it is important to actually be able to***, which was not done by ***. Options such as *** were suggested, but the Student declined to do so.[61]

47. An agreement was reached to continue the ARD committee meeting until the *** of April, 2021, and then the Student's mother made a request to reschedule the meeting. In that request, she also listed four individuals who would also attend with her, that being her attorney, her advocate and two BCBAs. [62]

48. On May ***, 2021, the ARD committee reconvened from the March ***, 2021 meeting. At that time, the ARD committee had revised the Student's goals and objectives, based upon the results of the FIE, and revised Student's accommodations. The committee also discussed and proposed compensatory services for services lost during the spring 2020 Covid closure. The proposal was that educational services would be provided virtually during the summer. [63]

49. The Student's promotion to the *** grade was discussed, and was somewhat problematic as grades were missing for that current school year. The District, however, offered several options so that the Student could be promoted.

50. The options for promotion, provided by Mr. ***, the school principal, were to: (a) take and pass the STAAR test; (b) attend and pass summer school; and (c) do a relief STAAR test prior to the beginning of the next school year, that being the 2021-2022 school year. These assessments were to be conducted in a safe, in-person environment.[64]

51. The Student's mother, however, disagreed with all of the options and would only allow testing in her home or front yard. The Student's mother also then disagreed with the proposed IEP and the services.[65] In order for validity of the testing it needed to be conducted in an appropriate learning environment.[66]

52. At the conclusion of the ARD, the Student's mother disagreed with the IEP and all proposed services. The District and the Student's mother then agreed to a ten-day reconvene, that being by the *** day of school year 2021-2022. The agreement was specifically for August *** or ***, 2021.[67]

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[61] T. 184, 266, 405-406.
[62] R.20:11,54.
[63] R.20.
[64] T. 225-227, 415.
[65] T. R. 20:16.
[66] T. 221-224; R. 20:10.
[67] T. 416; R.20:16, 67-68.

53. During the summer, numerous attempts were made to contact the parent and set the ARD reconvene. However, the District either did not receive a response from the Student's mother, or in one instance, once the District set the time (previously agreed on), the parent said she was no longer available.[68]

54. The May 2021 ARD, however was not reconvened, despite the attempts by the District to do so. The evidence shows that the IEP proposed for the 2021-2022 school year would comply with all of the elements of a provision of FAPE.[69]

55. The District also sent correspondence to the Student's parent dated August 2021, noting that the time for holding the reconvene ARD had passed, and the ARD was closed out. The letter also noted that another ARD meeting could be scheduled, and a copy of the Student's IEP for the 2021-2022 school year was included, as well as notice of a copy being left for pick up in the school lobby.[70]

56. In June 2021, the District sent correspondence to the Student's mother concerning the proposed IEP amendment for the compensatory services and a proposal for scheduling the time to provide the Student the services. The evidence demonstrated that the amendment was never signed by the parent and the Student never accessed such services.[71]

57. The evidence clearly demonstrated that the Student did receive an education during the 2020-2021 school year, and that Student's accommodations in accordance with Student's IEP were provided to the extent possible. In fact, learning took place and progress made so that all that was necessary for the Student to be promoted to the *** grade was to take an assessment at the end of the year or attend and pass summer school.[72]

58. The District received no response regarding the options and the promotion to *** grade. However, as they had hoped that the Student would take advantage of the final option, the STAAR test right before school started, the District prepared both a *** grade and ***-grade class schedule for the Student.[73]

59. The parent's testimony contended that the Student received no services in the fall of 2020 and also stated that the District failed to provide any homebound services to the Student.[74] However, other credible testimony and evidence clearly demonstrates that

[68] T. 274-275; R.26.
[69] T. 421-425.
[70] T. 420; R. 25.
[71] T. 413-414, 417-419; R. 23.
[72] T. 221-222; 225-228.
[73] T. 228-229.
[74] T. 82, 94.

educational and speech services were provided throughout the 2020-2021 school year, but for the speech articulation piece.[75]

60. Evidence established that access to instruction on Canvas, primarily asynchronous, and attending classes through the District's Virtual Academy, synchronous, are different methods of the use of technology for instruction and learning.[76]

61. For the 2021-2022 school year, the Student was enrolled in ***, a private school, and attended virtually.[77] Student was able to be online with the camera, and the private BCBA worked with Student to attain that goal, which was the same or at least quite similar to what the District had proposed.[78] The very same strategies that the District had proposed so that the Student could attend the District's Virtual Academy were successfully implemented at ***, although the parent did not allow the District to try those same strategies.[79] A witness even observed a picture of the Student in the hearing room so engaged online.[80]

62. When the Student attended ***, Student successfully completed both *** and *** grades. *** had no special education services.[81] No evidence, however, of the appropriateness of this placement was submitted.

63. The evidence demonstrated that the parent paid $*** for the tuition for *** for the 2021-2022 school year.[82]

64. The evidence also established that the Student's family spent $*** of out-of-pocket costs for the Student's private Applied Behavior Analysis (ABA) therapy.[83] The private BCBAs on occasion apparently attended the Student's ARD committee meetings and the District also worked to collaborate with them so to help the Student generalize between home and school.[84]

65. Student is currently attending ***, a public charter school, enrolled in the *** grade.[85]

66. The Frisco ISD cannot create an IEP for the Student as Student is currently enrolled in another school, out of the District, and has an IEP. The parent has attended two ARDs for

[75] T. 421-422; R:19, 21.
[76] T. 248-249,
[77] T. 144-146.
[78] T. 313-314, 372.
[79] T. 281.
[80] T. 290-291.
[81] T. 145-146.
[82] T. 112.
[83] T. 89.
[84] T. 431-432; R.15:21.
[85] T.155; R. 34.

the public charter school. Should Student return to the District, Student would need to enroll and then the District would address Student's needs as a new Student.[86]

67. The evidence clearly established that the Student's parent was very active and involved in every ARD scheduled by the District, even to the extent that nearly every ARD would be rescheduled in order to accommodate Ms. ***'s preference for time, and even the location of the ARD.[87]

68. Evidence established that the Student's ARD Committee always addressed the parent's concerns, and that the ARDs for the Student were quite lengthy. There was also much evidence that showed that the Student's parent was accompanied at the ARDs by an attorney and/or advocate, and that often the Student's private BCBA would attend the ARD as well.[88]

69. Additional evidence also demonstrated a consistent and extensive history of working collaboratively with the parent as well as between staff and teachers in developing and implementing the Student's IEP.[89]

70. The evidence established that the District's IEPs provided the Student FAPE, in that they were based upon Student's specific needs. The District looked at Student's present levels of performance, and other data; the services were provided in a coordinated and collaborative manner, and in the least restrictive environment.[90]

V. Discussion

There are two primary issues to be addressed in this matter. The first is whether the school district was able to provide the student with a free, appropriate public education (FAPE) for the time at issue in this case, being the 2020-2021 and 2021-2022 school years. The second is whether the Student's private placement was necessary and appropriate, and then whether the parent is entitled to reimbursement for the placement.

A. Burden of Proof

[86] T.149-150, 425-426.
[87] T. 392-394.
[88] T. 84-85, 92-93, 388-389, 425-426; R. !5; R.20:28-29.
[89] T. 233-234.
[90] T. 230-234, 421-426.

The burden of proof in a special education due process hearing is on the party challenging the proposed IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Tood L.*, 999 F. 2d 127, 131 (5th Cir. 1993). No distinction has been established between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. DIst. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009).

In terms of then applying this approach, the Fifth Circuit went on to note that a presumption exists "in favor of a school systems education plan, placing the burden of proof on the party challenging it". *White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5th Cir. 2003). As a result, the burden of proof is clearly placed on the student to prove that the IEP at issue was not reasonably calculated to enable the student to make educational progress given the student's unique, individual circumstances. The student challenging the plan must bear the burden to demonstrate by a preponderance of the evidence that the school district failed to provide FAPE or otherwise failed to comply with the IDEA. *R.H. v. Plano Indep. Sch. DIst., 607 F.3d 1003, 1010-1011 (5th Cir. 2010).*

B. Duty to Provide FAPE

The primary purpose of the IDEA is to ensure that all children with disabilities have access to a FAPE that emphasizes special education as well as related services, and that the services are designed to meet the unique needs of that student. Under the IDEA, all school districts have a duty to provide a FAPE to all children with disabilities residing in the jurisdictional boundaries of the district who are between the ages of three and twenty-one. 34 C.F.R. §300.101(a).

More specifically, a free, appropriate public education is special education, related services, and specially designed, personalized instruction with sufficient support services to meet the unique needs of the child in order that the student receives an educational benefit. The instruction and services must be provided at public expense and comply with the child's IEP that meets the requirements of the IDEA, 34 C.F.R. §§ 300.320-300.324. 20 USC 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, (1982).

In order to meet its substantive obligation under the IDEA, the school district must offer an IEP that is reasonably calculated to enable the child to make appropriate progress in light of the

child's circumstances. The adequacy of a given IEP turns on unique circumstances of the students for whom it was created. *Endrew F v. Douglas Cnty. Sch. Dist.,* 137 S. Ct. 988 (2017).

The Fifth Circuit has developed the elements or benchmark for the determination of FAPE. These four factors must be assessed in order to determine whether the IEP in issue and as developed and implemented was reasonably calculated to provide students with necessary educational benefit under the IDEA. These factors are as follows:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment (LRE);
- Whether the services are provided in a coordinated and collaborative manner by key stakeholders; and
- Whether positive academic and nonacademic benefits are demonstrated as a result.

Cyprus – Fairbanks Indep.. Sch. Dist. v. Michael F., 118 F3d 245, 249, 253 (5th Cir. 1997). There is no requirement that these four factors are considered in any particular order or that any specific weight should be given to each. *Richardson Ind. Sch. Dist. v. Michael Z.,* 580 F. 3d 286, 293 (5th Cir. 2009). Each of these elements will be examined in detail with the application of the facts in this matter.

Petitioner also raised issues regarding the failure to provide FAPE as a result of procedural violations of the IDEA. Certainly, if procedural violations rise to the level of denying a student's parents the opportunity or ability to participate in the child's education, then it could be considered a denial of FAPE. *Rowley* at .

C. Private Placement

A student is entitled to reimbursement for a unilateral private placement or to be placed in a private placement in those instances where it is proven that the school district's program does not provide the student FAPE. Where tuition reimbursement is sought after a parent's unilateral placement, case law provides that at least three factors are to be considered, in what is often referred to as the three prongs of the Burlington-Carter test. See *Sch. Comm. Of Burlington v. Mass. Dep*t. *of Educ.,* 471 U.S. 359 (1985); *Florence Cnty Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

These factors are as follows: whether the district provided a student a FAPE; if the district failed to provide FAPE, then whether the private placement chosen by the parent is appropriate; and, a consideration of the equities in requiring a school district to pay for a unilateral placement of the student. *Id*. The private placement need not meet all state requirements for reimbursement purposes as long as the private placement meet students individualized needs and therefore is appropriate. *Id. at.*13,15.

Alternatively, if the Student's IEP in the local public school district was appropriate and FAPE provided, then no need exists to inquire further as to the appropriateness of any other program or placement.

VI. Analysis

Private placement tuition reimbursement is available as a remedy under IDEA only where the evidence demonstrates that: (1) the District did not make a FAPE available to a student in a timely manner prior to the private placement; and (2) the private placement is determined to be appropriate.

In this case, the first issue is whether the District provided the Student FAPE, and if not, the second issue turns on whether the placement at *** for which reimbursement is sought was appropriate. The issue of the provision of substantive FAPE is considered first, followed by an examination of Petitioner's procedural claims.

A. The IEPs

The first consideration then is whether the District was able to provide the Student a FAPE. As noted, controlling in this matter is the four-prong analysis set forth by the Fifth Circuit, often referred to as the *Michael F.* test. *Cyprus-Fairbanks Ind. Sch. Dist. V. Michael F.*, 118 F.3d 245 (5th Cir. 1997). In examining whether the IEPs in question consist of a program that provides the Student FAPE, the components are reviewed.

In conducting the *Michael F.* analysis, it is clear that the IEPs developed by the District for school years 2020-2021 and 2021-2022 along with any amendments, were reasonably calculated

to provide the Student a meaningful educational benefit under the IDEA. As noted, there are four discreet issues in this determination.

Factor I: Was the Program Individualized Based on the Student's Assessments and Performance?

The Student was enrolled in the District since ***, and at the time in question, the IEP in place was from the January 2020 ARD. This IEP provided the student academic and non-academic benefit. The Student was a very capable student, and in fact, was part of the District's ***. It was established that Student did quite well in Student's ***-grade *** class. The Student had no need for, and did not have, any academic goals; rather Student's services and accommodations were behavior and speech.

Once the Covid pandemic impacted education, the District continued to complete that school year through the use of Canvas, an online virtual platform. Instruction during the first three weeks of the 2020-2021 school year were conducted virtually, and thereafter the District had two options for the fall 2020 semester, continue with the Virtual Academy or attend school in person. The Student chose the face-to-face option, but never attended; Student provided a physician's report noting that due to Student's ***, Student could not attend school in person during the pandemic. However, that left Student the option of the Virtual Academy. However, the Student did not attend that as well. The District then went above and beyond in its attempts and willingness to educate this student. Evidence established that Student completed school work through asynchronous Canvas and hard-copy paper packets.

Clearly, consistent with the directives of *Rowley* and *Endrew F.,* the District in this case provided the Student with sufficient support services to meet Student's unique needs in order that Student could receive an educational benefit. During this time, the District also designed a goal to assist the student in accessing the District's Virtual Academy, at which point the Student's parent declined to discuss the option, as her sole focus was on the provision of in-person homebound instruction. As clearly stated in *White ex rel. White v. Ascension Parish* Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003), parents do not have the right to dictate an outcome, as parents do not possess "veto power" over a school district's decisions.

One of the main contentions of the Petitioner is that the IEP was not sufficiently 'individualized'. But the law clearly states that individualized means as to the student's assessments and performance. The goals set forth as set forth in the Student's IEP were based upon the Student's academic achievement and performance, as previously demonstrated. The nuance of the Student's refusal to access classes virtually for the 2020-2021 school year, was not based upon any prior performance, as the evidence demonstrated Student's ability to do so in the past and in the future, during the following school year. Many options of ways to assist and support the Student in the Virtual Academy were suggested by the District; however, these were nearly always met with a resounding no from the parent, or that it wouldn't work. Often the parent refused to engage in a discussion about the options. And, as it turns out, the very strategies that the District suggested and urged that the Student try to assist with virtual education, was, in the end, the very way Student accessed Student's education the following year. Clearly, the District's IEP was appropriate.

So while Petitioner relies on the need in the provision of homebound services the unique need of the Student for face-to-face instruction, and the allegation of the inappropriateness of the district-wide policy of no in-person homebound service, the case actually turns on whether the evidence in this case established by a preponderance , that the Student could not access the District's Virtual Academy. The answer is no, as the credible evidence failed to demonstrate such. In fact,, what the evidence did show was that both prior to the 2020-2021 school year, as well as after, the Student did well with virtual instruction.

The legal requirement is to offer a FAPE – in other words, to make FAPE available to the student. A school district does not have the ability to force FAPE upon an individual who refuses it. Additionally, In spite of the Parent's obstruction to the finalization of the 2021-2022 IEP, the District did have an appropriate IEP in place that would provide the Student an education and appropriate services. For the 2021-2022 school year, the District clearly made the appropriate IEP available, but the Student did not access it.

In summary, the District crafted the IEPs based on the Student's individual needs and performance, and as such, the IEPs were reasonably calculated to provide the Student an

educational benefit, and make non-educational progress, in light of the circumstances and the Student's unique needs. *Endrew* at 999-1000.

Factor II: Was the Program Delivered in the Least Restrictive Environment?

Certainly, the law is clear that a student's IEP must be administered in the least restrictive environment. In fact, the LRE requirement is one of the central components of an appropriate placement under the IDEA. The statute is clear that this means that the District is required to educate Student with others who are nondisabled to the maximum extent that is appropriate and possible. 34 C.F.R. §300.114 (a)(2). This has been emphasized by the courts, that students be integrated into the regular classroom. *Endrew F.* at 1000. The LRE requirement is a key component of an appropriate placement under the IDEA.

The statute itself is very clear in its direction to schools, stating in part,

" that the education of a student with disabilities... are educated with children who are nondisabled, and; and special classes, separate schooling and other removal of children with disabilities from the regular classroom from the regular educational environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplemental aids and services cannot be cannot be achieved satisfactorily." (emphasis added)

The evidence most clearly demonstrated that the District was concerned about the issue of the LRE, as homebound is a much more restrictive placement. In this instance, as the statute directs, the District was offering the student the Virtual Academy with the use of supplemental aids and services. In this way, Student where Student would interact with Student's peers, as Student had done previously in person. The Student, however, through Student's parent, declined that opportunity since the parent wanted only in-person homebound instruction, which is clearly the most restrictive placement. The District's Virtual Academy, with supports, was the most appropriate and least restrictive placement for this Student.

Factor III: Were the Services Developed and Provided in a Coordinated and Collaborative Manner by Key Stakeholders?

This factor requires that the educational program be developed and implemented by the key stakeholders, and done so in a coordinated and collaborative fashion. Further, the program must be delivered or implemented as well in a coordinated and collaborative manner.

The District experienced very significant involvement by the Student's mother in the ARD process. The record clearly demonstrates that the parent not only was present at every meeting, but also that she had legal representation during the meetings. Further, the evidence also demonstrates that the meetings lasted significantly longer than most ARDs with District participants noting all of the parent's concerns. The law is clear that collaboration does not equate to a requirement that a district accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657-658 (8th Cir. 1999). So, while collaboration with key stakeholders is certainly anticipated and expected, the right to meaningful input does not mean parents have the right to mandate the outcome. *White.*

With regard to the implementation of the Student's IEP, teachers and staff did work together to ensure the implementation of the Student's IEP, to the extent they were permitted to do so.

Factor IV. Did the Student Demonstrate Positive Academic and Non-academic Benefits?

The weight of the evidence clearly demonstrates that the District did all that it could in terms of designing and implementing an IEP that would provide the Student with a program that is designed to provide education and related services so that Student would make progress in light of the specific circumstances. The evidence demonstrated that the Student received both academic and non-academic benefit. Student made so much progress that Student could have been promoted to the *** grade, but for completing an assessment or summer school. These options, however, when offered, were declined by the Student (and Student's parent). Based upon the Student's past successes, there was no reason to believe that Student would not have continued to make progress.

The Student, through Student's parent, cannot merely refuse education and services, and then turn and claim that they were not provided. In this case, the Petitioners did not meet their

burden to establish that the program developed by the District did not provide FAPE. The IEP was clearly designed and calculated to provide the Student a FAPE.

B. Procedural Violations

Another allegation is that of a denial of FAPE based upon procedural violations of the IDEA. Procedural requirements under the IDEA consist of certain timelines concerning evaluations and meetings to consider them, as well as development and implementation of a student's IEP. 34 C.F.R. **§**300.301 (c) (1)(i);TEX. ADMIN. CODE §89.1011(c). 34 C.F.R. § 300.323 (c); TEX. ADMIN. CODE §89.1011(d). These timelines and deadlines are key in helping to assure that students have educational and related services available in a timely manner. Additional procedural obligations include assuring a collaborative process between the school district and the parents*. E.R. v. Spring Branch Indep. Sch. Dist*., 2017 WL 3017282, *27 (S.D. Tex. 2017), aff'd 909 F.3d 754 (5th Cir. 2018).

Petitioner does not specifically state, and so the District suggests that the Petitioner may be referring to procedural violations in the failure to re-convene the May 2021 ARD and the failure to hold an ARD after notice of the private placement of the Student. In this instance, there was no evidence submitted of these procedural violations. Evidence established may attempts by the District to reconvene the May 2021 ARD. Petitioners have not established that any procedural violation of the IDEA exists in this matter. In fact, while a great deal of effort on the part of the District to work with the parents collaboratively, the parent very rarely, if at all, agreed with the IEP or an amendment. In some instances, this then impeded the District from providing the Student instruction as it had planned, as well as related services.

C. Appropriateness of the Private Placement and Residential Placements

To be entitled to tuition reimbursement, Petitioner must prove (1) that the District did not provide FAPE to Student; and (2) that the Student's private placement at *** was appropriate. 20 U.S.C. §1412(a)(10)(C)(i); 34 C.F.R. §300.148(c). Having determined that District provided a FAPE in a timely manner prior to Student's enrollment in the private school, and that the District

had an IEP in place reasonably calculated to provide a FAPE for Student's 2021-2022 school year, Petitioner is not entitled to any relief.

Therefore, considering the presumption in favor of the District's IEP, the burden on Petitioner to demonstrate the failure to provide FAPE, and the evidence in this case, including the record, documents, and the foregoing Findings of Fact and Discussion, it is determined that the District did not fail to provide the Student FAPE. Accordingly, consideration of the appropriateness of any unilateral placement is not necessary or warranted. Petitioner is not entitled to reimbursement for the unilateral placement.

VII. Conclusions of Law

1. Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C.F.R. §300.301 and 19 TEX. ADMIN. CODE §89.1001. Student resides within the geographical boundaries of the Frisco Independent School District.

2. The Frisco Independent School District is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1001.

3. Respondent's educational program is entitled to a legal presumption of appropriateness. Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984). Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast,* 126 S.Ct. 528 (2005).

4. The Frisco Independent School District did not deny Student a FAPE. *Endrew F. v. Douglas County Sch. Dist*. RE-1, 137 S.Ct. 988, 998 (2017); *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley,* 458 U.S. 176 (1982). *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245 (5th Cir. 1997).

5. Procedurally, the Respondent did not significantly impede the Student's right to FAPE or the parent's opportunity to participate in the decision-making process, and Respondent did not cause a deprivation of educational benefit. 34 C.F.R.§ 300.513.

ORDERS

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and all claims of Petitioner are DISMISSED WITH PREJUDICE.

Signed this the 31st day of January 2023.

_____

Kimberlee Kovach
Special Education Hearing Officer for the State of Texas

X. 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). A civil action brought must be initiated not more than ninety days after the issuance of the written decision in the due process hearing. 20 U.S.C. §1415 (i)(2)(3)(A).