

DOCKET NO. 016-SE-0916

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

DECISION OF HEARING OFFICER

Petitioner *** (***) or Student), b/n/f ***, (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The respondent to the complaint is the Abilene Independent School District (Abilene ISD or the District). Petitioner alleges the District failed to evaluate all areas of Student’s suspected disabilities, to implement the Individualized Education Programs (IEPs) as written, and to provide Student with Free and Appropriate Public Education (FAPE). The District denies Petitioner’s allegations. As detailed further below, the Hearing Officer finds for Petitioner and orders Student’s placement be to ***, a residential treatment facility (RTF). Moreover, it is ordered that Student receive compensatory services for the District’s failure to provide FAPE.

I. RESOLUTION SESSION AND MEDIATION

The parties agreed to mediation in lieu of the Resolution Session. The parties proceeded to mediation on November 1, 2016, reaching an Interim Rule 11 agreement that allowed a Full Individual Evaluation (FIE) to be completed. The mediator was retained and assisted in working out additional issues as this matter proceeded. Ultimately, mediation was not successful in resolving all issues in dispute.

II. PETITIONER'S ISSUES AND REQUESTED RELIEF

A. Issues

Petitioner filed a Request for a Due Process Hearing (the Complaint) on September 21, 2016. Petitioner raised numerous issues relating to the IDEA, as noted below. The statute of limitations (SOL) date was not at issue. The Hearing Officer's determinations follow in parenthesis.

1. Did Abilene ISD fail to provide Student with a FAPE designed to meet Student's unique educational needs that arise as a result of *** and Attention Deficit Hyperactivity Disorder (ADHD) and related emotional problems? (Affirm)
2. Did Abilene ISD fail to provide Student with a FAPE designed to meet Student's unique educational needs as indicated by Student's continued failure of state assessments and courses? (Affirm)
3. Did Abilene ISD socially promote Student and fail to ensure Student's receipt of both academic and nonacademic progress in Student's current placement? (Deny; failed to prove promotion was not in accordance with IDEA)
4. Did Abilene ISD fail to provide Student with behavior intervention plans (BIPs) that were designed to address Student's behaviors in a meaningful way and did they fail to implement them as stated? (Affirm)
5. Did Abilene ISD fail to update Student's IEPs and behavior plans, including BIPs, in a meaningful way each calendar year thus impeding Student's receipt of a FAPE? (Affirm)
6. Did Abilene ISD fail to offer Student an appropriate educational setting designed to meet Student's academic needs that is a more restrictive and safe environment for Student? (Affirm)
7. Did Abilene ISD fail to fully evaluate Student in all areas of suspected disability and fail to identify and provide services for all areas of disability? (Affirm)
8. Did Abilene ISD fail to consider a parent-provided evaluation? (Deny)
9. Did Abilene ISD fail to evaluate Student for *** needs and provide Student's parents with information about *** services? (Affirm)

10. Did Abilene ISD fail to provide Student with an appropriate *** that includes consideration of ***? (Deny, until evaluation performed)
11. Did Abilene ISD unlawfully and repeatedly change Student's placement without complying with statutory and regulatory procedures? (Deny to extent "unlawfully" means procedural violations)
12. Did Abilene ISD fail to provide prior written notice of the Manifestation Determination Review (MDR) meetings prior to changing Student's placement? (Deny)
13. Did Abilene ISD fail to provide prior written notice of the change of placement review of Student? (Deny)
14. Did Abilene ISD fail to provide an appropriate MDR for Student in determining to send Student to Disciplinary Alternative Education Program (DAEP)? (Deny)
15. Did Abilene ISD deny Mother meaningful participation in the Admission, Review and Dismissal Committee (ARDC) process and fail to keep Mother informed of progress? (Deny)

B. Requested Relief

During the pendency of this proceeding, an evaluation was performed and several placements were made. The result is that some initially requested relief is no longer applicable, such as the request that Student be placed in general education. The parties agree that Student's least restrictive environment (LRE) is a RTF. The viable relief sought includes:

1. Placement at a RTF;
2. Compensatory education in an amount equal to Student's deprivation of FAPE and with compensatory services for failing to provide Student with an appropriate IEP;
3. An appropriate IEP that includes measurable goals to determine whether Student is progressing in Student's education; and
4. Staff training regarding completing paperwork correctly, completely, and in compliance with IDEA.

III. NON-IDEA ISSUES; BURDEN OF PROOF; HEARING AND DECISION DATES; POST-HEARING MATTERS; AND OTHER GENERAL INFORMATION

A. Non-IDEA Issues

The Hearing Officer does not have jurisdiction to hear claims arising under any law other than the IDEA. Issues and relief sought pursuant to non-IDEA laws, as well as asserted rights regarding payment of the prevailing party's attorney's fees, were dismissed by previous order.

B. Burden of Proof

IDEA creates a presumption that a school district's decisions made pursuant to IDEA are appropriate and that the party challenging those decisions bears the burden of proof.¹ To prevail, Petitioner must, therefore, establish by the preponderant evidence that the District's decisions were inappropriate on the issues listed above.

C. Hearing and Decision Due Date

The hearing was held on January 18-19, 2017, before Hearing Officer Tommy Broyles. Attorneys Elizabeth Angelone and Fernando Salcedo with the Cuddy Law Firm, P.C. represented Petitioner. Attorney Charlotte Salter with the law of Walsh, Gallegos, Trevino, Russo & Kyle, P.C. represented the District. Both parties submitted written closing arguments on or before February 24, 2017. This decision was timely rendered and forwarded to the parties on March 14, 2017.²

¹ *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

² The transcript prepared in this case had technology issues that limited use of the index and searching capability. Even the revised attempts to correct continued to have an inaccurate index. This was not due to inaccurate reporting but rather due to a software glitch. The index should not be used.

D. Post-Hearing Placement and other General Matters

At the close of the evidentiary hearing, the Hearing Officer declined Petitioner's request for immediate placement at ***, as the Texas Education Agency (TEA) had not approved this RTF for contracting with school districts.³ Petitioner urged that the rule requiring TEA approval is inconsistent with the IDEA, creates the TEA as a "super ARDC," and is thus invalid under the supremacy clause of the Constitution. The Hearing Officer found that this Constitutional issue was outside Student's jurisdiction, reserved for the judicial branch of government.

For the immediate time, the Hearing Officer ordered that Student continue to receive *** academic instruction as well as *** (*i.e.*, *** or ***).⁴ Student's mother agreed to propose some specific *** to the District by January ***, 2017.⁵ The Hearing Officer ordered that during *** instruction, Student receive *** hours of *** educational services divided as follows: *** hours of instructional program, *** for counseling, and *** minutes for speech therapy.⁶ An additional *** minutes was discussed for ***.

The amount of *** instruction was reduced from the previous *** agreed to by the parties because the District requires *** instruction is provided. ***. Moreover, Student is currently unable to participate in *** per week of educational instruction, because of Student's needs that must first be addressed at a RTF. Petitioner reserved its claim that Student was not getting a school day commensurate with Student's peers.⁷ Both parties agreed to hold an ARD to review the new schedule of services and plan for the *** instruction pending TEA's approval of ***.⁸ No other RTF was proven appropriate for Student. The District agreed to send to TEA a letter of intent by 5:00 p.m. on January 20, 2017, indicating its intent to place Student at ***

³ 19 Tex. Admin. Code §89.61. *** was the only RTF proven during the hearing to be acceptable for Student.

⁴ Tr. at 694. ***—thus other placements are unacceptable. Moreover, the ***, is unacceptable for Student given Student's present condition. *** or an RTF are the only two acceptable educational settings at this time.

⁵ Tr. at 696, 698.

⁶ Tr. at 699-670.

⁷ Tr. at 701.

⁸ Tr.at 702.

subject to TEA's approval and requesting that *** be approved as quickly as possible. *** is the only RTF supported by this record. Information filed after the evidentiary hearing, other than that regarding ***, was not considered and is not properly in the record.

The record remained open for additional information on whether *** was approved and TEA's approval of *** was received on March 13, 2017. Additional information was also filed with the Hearing Officer on March 13, 2017, indicating that Student was ***. Order No. 18 issued on March 13, 2017, requiring an ARDC meeting by March 17, 2017, and Student's placement at *** by March 20, 2017.

Student's grade level by years and the statute of limitations beginning date are:

*** Grade: September 2013 – May 2014
*** Grade: September 2014 – May 2015
*** Grade: September 2015 – May 2016 (September 21, 2015, starts SOL)
*** Grade: September 2016 – Date

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

1. Student, a ***-year-old *** grader, resides with Student's *** within the geographical boundaries of the District.
2. Student was initially identified as a child with speech impairment (SI) in *** while in *** and received speech therapy services through the *** grade.⁹
3. Student was *** grade. On ***, Student retained eligibility as a student who qualified for speech services, and Student was also deemed eligible for special educational service for emotional disturbance (ED), other health impairment (OHI).¹⁰

⁹ Ex. R-105 at 2.

¹⁰ *Id* at 5.

4. Student was given speech therapy in a small group or individual setting to reduce distractions.
5. Student has many strengths, Student's ***, and is interested in *** and ***.¹¹
6. Student attended a specialized behavior program during Student's *** and *** grade years and again during Student's *** and *** grade years.¹²
7. Student received minimal counseling and undefined content-mastery services throughout Student's formal education.¹³
8. Student's speech skills were deemed within normal ranges during an FIE in 2011 and speech therapy was discontinued.¹⁴ The 2016 FIE revealed that Student met the criteria SI so this disability was restored.
9. Educational assessments performed regarding Student include:
 - December 2012 FIE (2012 FIE)¹⁵
 - April ***, 2014 review of existing evaluation data (REED) (April 2014 REED)¹⁶
 - October ***, 2014 (October 2014 REED)¹⁷
 - October ***, 2015 (2015 REED)¹⁸
 - October ***, 2016 (2016 REED)¹⁹
 - December ***, 2016 Functional Behavioral Assessment (FBA) (2016 FBA)²⁰
 - December ***, 2016 (2016 FIE)²¹
10. The most relevant ARDC meetings are those starting with the Annual ARD and FIE on April ***, 2014, when Student was in *** grade and in preparation of *** grade. Between that date and the hearing, there were at least 15 ARDC meetings. The ARDC dates and reasons held are:

¹¹ Ex. J-8 at 2; Ex. J-12 at 3.

¹² Ex. R-105 at 2.

¹³ Ex. R-105 at 2.

¹⁴ *Id* at 6.

¹⁵ Ex. R-231. This evaluation is not in the record but it is referenced in the April 2014 REED. It is noted only for background information.

¹⁶ Ex. R-231.

¹⁷ Ex. P-30.

¹⁸ Ex. R-189; Ex. P-27 and 28.

¹⁹ Ex. P-27.

²⁰ Ex. P-5; Ex. R-217.

²¹ Ex. R-105.

<u>Date</u>	<u>Reason</u>
April ***, 2014	Annual ARD with FIE ²²
October ***, 2014	REED ²³
August ***, 2015	3-Year Review ARD ²⁴
September ***, 2015	Review ARD ²⁵
October ***, 2015	REED ²⁶
October ***, 2015	Annual ARD ²⁷
December ***, 2015	Disciplinary ARD ²⁸
February ***, 2016	Review ARD (placement) ²⁹
April ***, 2016	Review ARD ³⁰
June ***, 2016	Review ARD ³¹
October ***, 2016	REED ³²
October ***, 2016	Annual ARD ³³
November ***, 2016	Annual ARD ³⁴
November ***, 2016	MDR ARD ³⁵
December ***, 2016	Reconvene ARD ³⁶

11. In 2012, Student was diagnosed with ADHD and *** (***). Student' eligibility for OHI was amended to include these diagnoses and Student's eligibility for ED was removed.³⁷

²² Ex. P-14.

²³ Ex. P-30.

²⁴ Ex. R-225.

²⁵ Ex. R-201.

²⁶ Ex. R-109.

²⁷ Ex R-188.

²⁸ Ex. R-213.

²⁹ Ex. R-187.

³⁰ Ex. R-179.

³¹ Ex. P-21.

³² Ex. P-27.

³³ Ex. P-26.

³⁴ Ex. R-243.

³⁵ Ex. P-11.

³⁶ Ex. R-214.

³⁷ *Id.*

12. Student was *** on the following dates:

***	***	***	***
***	***	***	***38
***	***	***	***39
***	***	***	***40
***	***	***	***41
***	***	***	***42
***	***	***	***43
***	***	***	***44

***** Grade 9/2013 – 5/2014**

13. During Student's *** grade year, Student was ***. On numerous occasions Student ***, and refused to comply with instructions. The ***,” ***.⁴⁵
14. Mother requested an Individual Educational Evaluation (IEE) on May ***, 2014, re-urging Student's ED disability and stating that an FIE proposed to be performed in October 2014 was too late.⁴⁶
15. In *** grade, Student did not show adequate progress in reading, math, or *** skills.⁴⁷

***** Grade 9/2014 - 5/2015**

16. The October 2014 REED was performed while Student was in *** grade and attending the ***. Student ***. Student responded inappropriately to oral and written instructions

³⁸ Ex. R-11.

³⁹ Exs. R-23, R-25.

⁴⁰ Exs. R-224, R-232. Student was ***.

⁴¹ Ex. R-204.

⁴² Ex. R-177.

⁴³ Ex. R-143.

⁴⁴ Ex. R-167.

⁴⁵ Ex. R-9 at 1-8. See the FBA at Ex. R-217 for a thorough history of Student's behaviors and the several interventions attempted by the District.

⁴⁶ Ex. R-16.

⁴⁷ Ex. R-225 at 49 (information from general education teacher as of May ***, 2014).

and when presented with work. Student was inattentive, disturbing and disruptive to Student's classmates, unprepared for activities, and ***. Student was ***.⁴⁸

17. Student's disciplinary incidents during Student's *** grade year included that Student:⁴⁹
 - a. continued to be defiant, ***;
 - b. ***;
 - c. ***;"
 - d. ***;
 - e. ***;
 - f. ***;" and
 - g. ***."
18. By October ***, 2014, Student failed to make adequate progress in reading, math, and *** skills.⁵⁰
19. During Student's *** grade year, the classification of ED was restored to Student's eligible diagnoses, and Student continued to be eligible under OHI for ADHD.⁵¹
20. On ***, 2015, Student was placed at the *** (***) but Student's poor conduct continued.⁵² In May 2015, Student *** and refused to perform work. Mother confirmed the same conduct occurred at home, because Student does not care.⁵³
21. In *** grade, Student did not pass the State of Texas Assessment of Academic Readiness (STAAR) A *** assessment (score-***%) and did not pass the *** (score-***%). Student did not pass the *** in *** and *** (scores-***% and ***%). Student scored a ***% on the math benchmark test.⁵⁴
22. By the August ***, 2015 ARDC meeting, the District was reasonably on notice of the need for a FBA. The interventions previously put into place were unsuccessful as Student:
 - a. ***,⁵⁵
 - b. increased non-compliance ***;⁵⁶

⁴⁸ Ex. R-231 at 4, 7.

⁴⁹ Ex. R-208 at 1-7.

⁵⁰ Ex. R-231 at 7.

⁵¹ *Id.*

⁵² ***.

⁵³ Ex. R-208 at 7.

⁵⁴ Ex. R-225.

⁵⁵ Ex. R-217 at 4.

⁵⁶ Ex. R-217 at 4-5.

- c. ***;
 - d. escalated Student's poor behavior, ***.
23. An FBA was not performed until Student's *** grade year but was necessary at least by September 2015.
24. The August 2015 ARDC reasonably found that Student required self-contained special education support to be successful in the general education curriculum and Student was placed ***. By this time, Student's behavior and lack of educational progress triggered or should have triggered the ARDC's understanding that placement in general education with the present BIP and certain supports would not provide Student with an opportunity for an education.

***** Grade 9/2015 – 5/2016**

25. After starting the year at the ***, Student was returned to a general education campus following an ARD on ***, 2015.⁵⁷
26. ***, ***, ***, ***, ***.”⁵⁸
27. Student demonstrated that Student was attempting to control Student's actions when seen ***, ***.⁵⁹
28. ***.⁶⁰ On one particularly difficult day, Student was ***.
29. When teachers or administrators confronted Student ***.⁶¹
30. The 2015 REED found Student continued to be eligible due to OHI and ED. The REED indicated that Student did not require a *** or ***.⁶²
31. An annual ARDC was convened on ***, 2015, after Student returned to Student's general education, ***. Student was eligible for special education services under OHI and ED.⁶³ The ARDC placed Student in general education classes with counseling services to be provided in ***-minute sessions *** times every *** weeks.

⁵⁷ Ex. R-201.

⁵⁸ Ex. R-208 at 1-20.

⁵⁹ Ex. R-208

⁶⁰ Ex. R-217 at 13.

⁶¹ Ex. R-217 at 13.

⁶² Ex. R-216.

⁶³ Ex. R-188 at 1.

32. At the Annual ARD in 2015, the ARD Committee determined that Student would be provided *** and *** during the STAAR.⁶⁴ Despite these accommodations, Student did not pass any administration of the STAAR that year.
33. The IEP goals set out for Student during the period ***, 2015, to May ***, 2016, required Student to complete Student's assignments and to respond appropriately to teachers and authority ***% of the time; to ***, and ***. Student's designated time in the *** was less than ***% of Student's school time.⁶⁵
34. During the 2015-2016 school year, Student's IEP lacked sufficient academic goals, a ***, and was not based on Student's individual needs.
35. On ***, 2015, Student was placed in a behavioral program at *** (***) for a period of *** days, because Student ***.⁶⁶
36. An ARDC was convened with a MDR on ***, 2015, to address Student's behavior that resulted in Student being placed at the ***. The placement was for educational purposes rather than disciplinary purposes, because the MDR found the conduct in question was caused by or related to Student's disability.⁶⁷
37. Student's BIP was revised at the December 2015 ARD to address Student's ***.
38. On ***, 2016, a review ARD was held at mother's request. Mother wanted Student moved from the *** ***. Since *** 2015, Student had attended only *** days of classes. The committee determined that Student would return to Student's home campus, following testing at *** (***)⁶⁸
39. On ***, 2016, an intellectual disability (ID) evaluation was performed at the ***.⁶⁹ The evaluation was not comprehensive and the findings made pursuant to this evaluation should not be considered for anything more than the need to obtain an additional and comprehensive evaluation.⁷⁰
40. Given consideration to the complete evaluative, ***, and educational evidence presented, Student was not proven to have ID, and Student is not properly diagnosed with Autism.

⁶⁴ Ex. R-188 at 1.

⁶⁵ Ex. R-188.

⁶⁶ Exs. R-44, 46.

⁶⁷ Ex. R-213.

⁶⁸ Ex. R-187 at 19.

⁶⁹ Ex. R-116; P-24.

⁷⁰ Tr. at 593-594.

41. ***,⁷¹ ***. Most of Student's *** stemmed from difficulties with school, poor grades, and attention difficulties.⁷²
42. On April ***, 2016, an ARDC meeting was held and it was noted that Student:⁷³
- was failing *** (grade ***), *** (grade ***), *** (grade ***), and *** (grade ***);
 - ***, and did not complete assignments; and
 - failed to meet the state standard for the STAAR A assessment for ***, ***, and *** with Student's greatest needs found in *** (**% correct) and *** (**% correct).
43. On ***, 2016, the school placed Student in DAEP for ***.⁷⁴
44. Student failed all subjects, except ***, during the 2015-2016 school year.⁷⁵
45. A June ***, 2016 ARDC meeting resulted in a determination that Student receive *** during the school year with special education that included ***.⁷⁶
46. The ARDC promoted Student from *** to *** grade, despite Student's failing grades and this did not prevent a FAPE:
- ***;
 - ***;
 - Returning Student *** would have been viewed by Student as punishment and, with Student's behavioral concerns, encouragement over punishment was chosen.
47. When promoted into ***, the ARDC placed Student in a general education setting which was inappropriate educationally. Student needed a more restrictive placement with student-to-teacher ratios of ***, modified instruction to teach the *** grade materials first, and an isolated or semi-isolated classroom, with infrequent general education inclusion until Student's behavior improved and Student's *** lessened.

***** Grade 9/2016 – to current**

48. During Student's *** grade through *** grade years, Student progressively failed behaviorally, academically, and socially. Nevertheless, Student was placed in general

⁷¹ Ex. R-180.

⁷² Ex. R-180 at 135.

⁷³ Ex. R-179.

⁷⁴ Ex. R-162.

⁷⁵ Ex. R-241 at 2.

⁷⁶ Ex. R-242.

education ***, starting Student's *** grade year, September 2016. This placement was unsupported by Student's demonstrated educational, ***, behavioral, and social needs. The general education placement in *** (***) grade) exacerbated Student's already compromised ability to receive an opportunity for education.

49. On September ***, 2016, Student was ***.
50. In September and October 2016, Student was unengaged with classroom activities, *** and was non-responsive to presented tasks. At times Student became ***.⁷⁷
51. The November ***, 2016 ARDC reported that Student was able to ***.⁷⁸ ***. Student struggled with ***. These deficits impacted Student's performance in the general education setting. Student continued to have difficulty responding to teachers and authority figures.
52. Student demonstrated needs in receptive, expressive and pragmatic language as indicated in the 2016 FIE meets the criteria for SI:⁷⁹
 - a. showed a below average Core Language Score;
 - b. demonstrated receptive language difficulty with understanding syntactic and morphological components of language;
 - c. has vocabulary skills below average and that interfere with Student's expressive language and comprehension;
 - d. has difficulty providing verbal definitions and explaining how words go together; and
 - e. is limited in the academic setting by Student's low oral language skills.
53. Student's OHI-ADHD disability compromises Student's ability to attend classroom lectures.⁸⁰
54. Student has significant impairment in adaptive skills. Student is below grade-level in academics and has difficulty with skills necessary for achievement. A determination on Student's eligibility as ID should be made after Student receives services through a RTF to allow the complexities of Student's presentation to be sorted out. Other factors to consider include attention abilities, emotional-behavioral concerns, IEPs that failed to address Student's unique needs, and absenteeism.

⁷⁷ Ex. R-214 at 38; Ex. R-243 at 3.

⁷⁸ Ex. R-243 at 3.

⁷⁹ Ex. R-105 at 42.

⁸⁰ Ex. R-105 at 42.

55. The District's BIP and implementation of behavior supports and interventions were inappropriate for Student's behavior needs and they negatively reinforced Student's ***, noncompliance, and ***.⁸¹
56. Student has learning challenges and these must be addressed through direct instruction and accommodations and modifications in the educational setting.⁸²
57. Student's *** and ability to *** must be evaluated at the RTF and then addressed pursuant to those findings.
58. Student continues to meet the educational disability classification of ED.⁸³
59. Student does not meet the educational classification of Autism and Student's educational performance is primarily negatively affected due to ED.⁸⁴
60. At all times, the District members of the ARDC were collaborative with Mother and the District's staff with each other. It was not proven that the District failed to provide sufficient prior written notices to Mother prior to all actions or evaluations for which a prior written notice is required.⁸⁵
61. The December 2016 FIE was delayed 3-4 months by the unavailability of one of the professional team members who was administering assessments.⁸⁶
62. The District did not unreasonably delay Student services at a RTF:
 - a. On December ***, 2016, Petitioner had not agreed to an RTF and "stay put" was in effect, as modified by agreement of the parties.⁸⁷
 - b. A RTF placement was supported pursuant to the FIE of December ***, 2016;
 - c. *** was appropriate and necessary until the December 2016 FIE was completed as Student *** (this placement was agreed to by the parties);
 - d. The District was ready and willing to facilitate Student's admission into a RTF in January 2017, but the District wanted to collaborate with Mother and her desire for Student to attend ***;
 - e. the District timely provided site visits to RTFs;

⁸¹ Ex. R-217.

⁸² Ex. R-105 at 44.

⁸³ Ex. R-105 at 44.

⁸⁴ Ex. R-105 at 44.

⁸⁵ See the ARDC reports noted in the chart above and the documents referring Student to DAEP, ***, and ***.

⁸⁶ Tr. at 564.

⁸⁷ See Petitioner's Notice of Residential Treatment Centers served on December 9, 2016, last sentence: "While Petitioner is open to options provided by the District, Petitioner has not agreed that *** is an appropriate placement at this time."

- f. Mother agreed to only one RTF, but this RTF was not approved by the TEA; and
 - g. the District was willing to immediately send Student to RTFs that were approved by TEA.
63. The District failed to provide Student with an opportunity to obtain a meaningful educational benefit from September 21, 2015, to date, because the District failed to:
- a. evaluate in areas of need and disability, particularly after numerous *** behavioral events;
 - b. sufficiently modify Student's curriculum in general education;
 - c. place Student in an educationally-acceptable setting as LRE;
 - d. provide ***;
 - e. provide appropriate IEPs addressing all of Student's disabilities in a sufficient manner;
 - f. devise present level of academic achievement and functional performance (PLAAFP) information that identified Student's baseline levels for use in developing appropriate and individualized IEP goals.
 - g. provide sufficient general and psychological counseling services;
 - h. perform an FBA until December 2016;
 - i. sufficiently modify Student's BIP in order to address Student's complex and escalating behavior concerns;
 - j. provide speech and language services; and
 - i. provide ***.
64. Student's present placement is appropriately at ***, which was proven to be capable of providing Student with the special needs services and academics necessary for Student to obtain an educational opportunity.
65. Student should receive compensatory services for speech and language amounting to *** minutes *** per week for ***. Speech services provided at the RTF should be deducted on an hour-per-hour basis.
66. Student should receive compensatory services for *** and *** at *** minutes per week for ***, or until Student's skills are average. Services provided at the RTF should be deducted on an hour per hour basis.
67. Student should receive compensatory services for behavior and general counseling for *** minutes per week for ***, or until Student's behavior is within an average range. Services provided at the RTF should be deducted on an hour per hour basis.
68. Student should receive compensatory services for ***, ***, ***, and ***, at *** minutes per week for each, for ***, or until Student's academic testing in these areas is passing. These may be modified as appropriate and as determined by Student's evaluation at the RTF. Services provided at the RTF should be deducted on an hour per hour basis.

V. ISSUES AND ANALYSIS

A. The IDEA and Its Implementing Regulations

Under the IDEA, and its implementing regulations, school districts in Texas must afford children with disabilities a FAPE. The IDEA defines a FAPE as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet state standards (including IDEA requirements); (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.⁸⁸

B. Issues

1. FAPE

Petitioner claims the District did not provide Student a FAPE but instead failed: to timely and appropriately evaluate Student; to identify all of Student's disabilities; to develop and implement appropriate IEP goals, objectives, and behavioral support; and to educate Student in the LRE. The evidence supports a finding in Petitioner's favor. The District failed both prongs of the FAPE two-prong test established by the U.S. Supreme Court: (1) whether the District complied with IDEA procedures and (2) whether Student's IEP was reasonably calculated to enable Student to receive educational benefits.⁸⁹

In relation to prong (2) above, the U.S. Supreme Court ruled that FAPE requires tailoring an education to the unique needs of the child with a disability by means of an IEP that meets a specific standard.⁹⁰ The Fifth Circuit summarized the Supreme Court's *Rowley* standard as:

⁸⁸ 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

⁸⁹ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982).

⁹⁰ *Rowley*, 458 U.S. 176, 181; 102 S.Ct. 3034, 3038 (1982).

[An IEP] need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit Student 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child, consisting of 'specialized instruction and related services which are individually designed to provide educational benefit.' Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.' (Internal citations omitted.)⁹¹

In the Fifth Circuit, there are four factors applied in order to determine whether the IEP as implemented was reasonably calculated to provide Student with the requisite meaningful educational benefit under the IDEA. These factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the LRE;
- The services are provided in a coordinated and collaborative manner by key stakeholders; and
- There are positive academic and non-academic benefits demonstrated.⁹²

The four factors need not be weighed in any particular manner, but instead are merely indicators of when an IEP meets IDEA requirements.⁹³ Further, the provision of FAPE must be judged by the overall educational benefits received and not solely by remediation of the student's disability.⁹⁴

The educational benefit is not defined exclusively or even primarily in terms of correcting a student's disability. Rather, remediation may be a component of a student's IEP, including for example, behavioral modifications. IEP strategies may remediate a disability while also being

⁹¹ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000), citing to *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 247-248 (5th Cir. 1997).

⁹² *Bobby R.*, 200 F.3d at 347-348, citing to *Cypress-Fairbanks*, 118 F.3d at 253.

⁹³ *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d, 286, 293 (5th Cir. 2009).

⁹⁴ *Klein Independent School District v. Per Hovem*, 690 F. 3d 390, 391 (5th Cir. 2012)(high school student's IEPs enabled student to excel with accommodations for Student's severe learning disabilities in a mainstream high school curriculum – therefore school district provided student with FAPE).

necessary to confer educational benefits. However, it is the whole educational experience, and its adaptation to confer benefits that is the ultimate goal of the IDEA.⁹⁵ The question then is whether the IEPs at issue conferred Student with an educational benefit from this perspective.

- a. **The District failed to comply with IDEA as the IEP was not based on Student's necessary assessments and performance; rather, evaluations were insufficient and untimely, at least until the December ***, 2016 FIE was performed.**

The District was required to re-evaluate Student either at Mother's request, a teacher's request, or once it determined that Student's needs for educational or related services, including improved academic achievement and functional performance, warranted a re-evaluation. Such a re-evaluation must occur not more than once a year or less than once every 3 years, unless a school district and parent agree otherwise. The re-evaluation must be conducted in accordance with 34 C.F.R. §§ 300.304 through 34 C.F.R. 300.311.⁹⁶

Districts have an affirmative duty to assess students in all areas of suspected disability, for initial and subsequent evaluations.⁹⁷ A failure to evaluate may prevent the ARDC from developing an appropriate IEP.⁹⁸

The evidence establishes that the District did not conduct timely and appropriate evaluations of Student, despite being on notice as to Student's ***, deteriorating behavior, and failing grades. This failure deprived Student of a FAPE.

Perhaps the most significant evaluation failure was in regard to the lack of an FBA prior to December ***, 2016, for Student's significant and escalating behavior issues. Without the direction of a Board Certified Behavior Analyst (BCBA), Student's IEP—BIP in particular—

⁹⁵ *Klein ISD*, 690 F. 3d at 397, 398.

⁹⁶ 34 C.F.R. § 300.303(a), (b).

⁹⁷ 20 U.S.C. §§ 1414(b)(3)(B), 1414(a)(2)(A); 34 C.F.R. §300.303. See also *N.B. v. Hellgate Elem. Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).

⁹⁸ *N.B. v. Hellgate Elem. Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).

negatively reinforced Student's behavior.⁹⁹ As Student escalated Student's noncompliance (***), Student was "rewarded" with task demands removed, instructions removed, or *** (***). Over time, this misplaced effort to address Student's behavior actually shaped Student's reliance on noncompliance, and the escalation thereof when lower forms of noncompliance were unsuccessful, in order to achieve Student's ***.

In order to formulate a meaningful and effective BIP, Student's individual needs necessitate an FBA. This was highlighted by the BCBA's assertion in the FBA that the provision of *** was a form of negative reinforcement. According to the BCBA, Student's three target behaviors of non-compliance, ***, and *** share *** function and continued because the behavior was reinforced through the policy of allowing Student to ***, etc.¹⁰⁰ The failure to conduct an FBA resulted in the District developing an inappropriate BIP and was at least partly responsible for the inappropriate placements.¹⁰¹

As Student missed school and the academic instructions provided, Student began to fall behind academically. As the subject matters became more difficult and complex, Student lacked the skill developments needed to be successful. Thus, Student was increasingly unsuccessful in acquiring age-appropriate academic skills and this failure to succeed led to Student's increasing desire to ***. As noted in the FBA, this created a negative loop, in which skill acquisition was slowed due to chronic non-compliance, followed by an increasing probability of non-compliance as academic content became more rigorous and difficult for Student, due to Student's non-compliance in earlier grades.¹⁰²

The second failure by the District was the delay in conducting a FIE until December ***, 2016. It was in this evaluation that the full extent of Student's complex and significant difficulties across multiple domains was identified.¹⁰³ Without these identifications,

⁹⁹ Ex. R-217 at 24-26.

¹⁰⁰ Ex. R-217 at 23-24.

¹⁰¹ *C.F. v. New York City Dept. of Educ.*, 746 F.3d 68 (2nd Cir. 2014).

¹⁰² Ex. R-217 at 26.

¹⁰³ Ex. R-105 at 42.

the IEPs prepared were ineffective and could not address Student's unique needs. Thus, by this failing, the District again did not provide Student with a FAPE.

The evidence establishes that both the FBA and FIE were untimely. Student demonstrated patterns of ***, and academic failure years before the District recognized these issues and took action. Moreover, Student ***. Thus, the District was on notice of Student's behavioral, ***, and educational needs well prior to December 2016, certainly by the start of the SOL in September 2015.

The Hearing Officer concludes that the District failed to timely refer Student for an FIE and FBA when required to do so. Student's demonstrated needs for additional educational and related services, including improved academic achievement and functional performance, warranted a FBA and additional FIE, at least by September 2015.

b. Student's IEP was not reasonably calculated for Student to receive a meaningful educational benefit.

The provision of FAPE includes special education, support and related services, and specially designed personalized instruction that meet the unique needs of the child in order to provide a meaningful educational benefit.¹⁰⁴ The evidence demonstrates the ARDC failed to adequately recognize or address the severity of Student's disabilities and unique needs. This failure resulted in Student lacking a FAPE.

Student's *** grade was unsuccessful, both behaviorally and educationally. Student's educational setting changed four times. Student ***, pursuant to a referral to DAEP for behavior concerns ***. However, ***, Student was returned to a general education ***.¹⁰⁵ Within ***, Student was returned to the *** in DAEP for academic support. Finally, Student was returned to general education at Student's ***. None of these settings was successful, either behaviorally or educationally.

¹⁰⁴ 20 U.S.C. § 1401(9). *Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

¹⁰⁵ *** grade, when referred to DAEP.

A REED was conducted towards the end of Student's *** grade year, in April 2014. It was noted that Student was ***.¹⁰⁶ Thus, even at the beginning of Student's *** grade year, the ARDC had extensive evidence of Student's multiple disabilities.

The 2015 REED revealed to the ARDC that Student exhibited significant behavioral and social concerns. These included reacting to Student's environment with ***, and noncompliance with instructions.¹⁰⁷ Moreover, Student was ***, ADHD, ***. Also by this time, Student had been ***, ***, ADHD, and a learning disorder during the April 2015 *** alone. Student was further diagnosed by ***.

Educationally, Student was not faring any better. Student was failing every class, except ***, and had failed every state standard since *** grade.¹⁰⁸ Student was noted to ***. Thus, Student was failing educationally, emotionally, and behaviorally. Yet, the ARDC meeting held on October 2015 did not find that additional information was necessary.¹⁰⁹ Rather, the ARDC found that with classroom accommodations, Student was able to successfully participate in the general education setting.¹¹⁰ The record in this case establishes otherwise.

None of the "reinforcers" or consequences applied over the prior years was effective, but most tended to make the behavior increase or made no difference at all.¹¹¹ The special education supports offered were in general education classes with core instructional interventions, tutoring, an accelerated program of instruction, accommodations, and counseling.¹¹² In *** grade, these supports proved to be ineffective and they were proven ineffective again during Student's *** grade year, as demonstrated by Student's lack of success behaviorally and educationally. Thus, the IEPs failed to adequately address the breadth or extent of Student's behavioral and educational needs and

¹⁰⁶ Ex. R-231 at 4.

¹⁰⁷ Ex. R-189 at 14.

¹⁰⁸ Ex. R-188 at 3.

¹⁰⁹ Ex. R-188 at 1.

¹¹⁰ Ex. R-188 at 14.

¹¹¹ Ex. R-189 at 31.

¹¹² Ex. R-188 at 14.

they were not sufficiently individualized, as additional evaluation was needed.

While extensive efforts were made to help Student succeed in the general education setting, particularly with behavioral issues, the efforts were misplaced.¹¹³ As noted above, the behavioral interventions developed and implemented prior to the FBA were, to great extent, more hurtful than helpful. Moreover, Student was not afforded an opportunity to succeed in the general education setting. Student needed a more restrictive, less complex setting, with goals and objectives that adequately addressed Student's behavioral and emotional issues. More extensive educational supports and better student-to-teacher ratios in all subjects were necessary. And while Student was intellectually capable, Student had fallen behind academically. Student needed to recover academically before Student could take on the grade-level challenges, particularly in core subjects. These shortcomings in Student's *** grade IEPs resulted in the District failing to provide Student a FAPE.

Perhaps even more troubling, is the ARDC's decision to promote Student into *** grade and into the general education *** setting, despite Student's failing of every core subject in *** grade. Student was known to be ***. Placing Student in the general education, *** setting when Student was academically unprepared and emotionally fragile certainly contributed to Student's ***. One ARDC member feared putting Student on a pedestal above other students. But the evidence establishes that there was no pedestal; rather, Student was sinking in the general education academic setting. Student was not on equal footing with Student's peers and needed greater interventions.¹¹⁴

The total of *** minutes of counseling per *** weeks, included in Student's IEP, was wholly insufficient.¹¹⁵ The record demonstrates that the ARDC did not understand the extent of Student's disabilities, despite all the evidence it was presented of Student's multiple ***, numerous and severe disabilities, and lack of any educational advancement in general education. Rather, some

¹¹³ Tr. at 366-375.

¹¹⁴ Ex. R-188 at 24.

¹¹⁵ Ex. R-189 at 30.

of the ARDC members continued to believe that Student's failure was due simply to a lack of effort. The end result was that Student received no educational benefit when in the general education setting during Student's *** and *** grade years. The District failed to provide Student with a FAPE from September 2015 to the hearing date.

c. The IEP was not administered in the LRE

i. Applicable Law

The IDEA's LRE provision requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the student's nondisabled peers and community.¹¹⁶ To remove a child from a regular education environment, the ARDC must consider whether the nature and severity of the child's disability is such that education in a regular classroom setting cannot be satisfactorily achieved, regardless of the use of supplemental aids or services; whether placement in the regular classroom will potentially be harmful to the child; and whether the IEP must include positive behavioral interventions and supports in the case of a child whose behavior impedes the child's learning or that of others.¹¹⁷ In making a placement decision, first consideration should be given to placement in a regular classroom before considering more restrictive placement options on the continuum of alternative placements, which includes special classes, special schools, home instruction, and instruction in hospitals and institutions.¹¹⁸

But the LRE mandate does not override the FAPE requirement. If a child's placement does not confer a "meaningful benefit" to the student and a more restrictive program is likely to

¹¹⁶ 34 C.F.R. § 300.114(a).

¹¹⁷ 34 C.F.R. §§ 300.116, 300.324(a)(2)(i); *see also* *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993); and *Daniel R .R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989).

¹¹⁸ *Letter to Cohen*, 25 IDELR 516 (OSEP 1996); 34 C.F.R. § 300.115(a), (b); 19 Tex. Admin. Code § 89.63.

provide such benefit, the child is entitled to be placed in that more restrictive program.¹¹⁹ Conversely, if a student shows awareness and some positive reaction to being with peers without disabilities, then such interaction weighs in favor of inclusion (assuming the student can receive a meaningful educational benefit and is not unduly disruptive).¹²⁰

Notwithstanding a presumption in favor of inclusion, Circuit Courts have ruled that districts generally are not required to mainstream a student with a disability who threatens the safety of other students or poses a danger to ***self if placed in the general education classroom, or engages in significantly disruptive behavior, even with the use of behavioral intervention, that interferes with the education of classmates.¹²¹

ii. Analysis and Conclusion

The ARDC made numerous errors in educational placements for Student. The ARDC failed to recognize the substantial number of incidents *** that suggested the need for additional evaluations, and the failure to evaluate led to placements that did not provide Student with the potential for meaningful benefit. First, *** Student's *** grade year, Student was returned to general education after less than *** at the ***. By *** of Student's *** grade year, Student was referred to DAEP (for educational reasons) and then back to general education. Ultimately, Student received no educational benefit Student's entire *** grade year.

The evidence establishes that during Student's *** grade year, Student required a more restrictive placement with better student-to-teacher ratios, less noise, and a less complex social setting. Student's placement in general education significantly contributed to Student's failure of district-wide tests, Student's lack of class participation, *** and absenteeism, failure socially and

¹¹⁹ *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2nd Cir. 2008); *see also Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 111 LRP 18076, 522 U.S. 1046 (1998).

¹²⁰ *Daniel R. R.*, 874 F.2d at 1048.

¹²¹ *See, e.g., R.R. Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *cert. denied*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983); *A.W. v. Northwest R-1 School District*, 813 F.2d 158 (8th Cir. 1987); *cert. denied*, 484 U.S. 847, 108 S.Ct. 144, 98 L.Ed.2d 100 (1987); *Sacramento City Unified School District v. Holland*, 14 F.3d 1398 (9th Cir. 1994).

academically, and particularly with Student's growing ***. These behaviors were fully evidenced while Student was in *** grade, so the District was on notice and was required to take action but did not.

Nor did the District take action after another year of complete failure academically, socially, and behaviorally in *** grade. Instead, the ARDC promoted Student ***, again placing Student in general education. The reasoning behind this decision is not understood. The decision was made after Student showed no positive interactions with Student's nondisabled peers, throughout *** grade. Accordingly, peer interaction, while often appropriately considered in the preference for inclusion, does not save the ARDC's choice of a general classroom placement in this instance. Student showed no development of social and communication skills, no increased sense of self-esteem, and no positive role modeling. Rather, Student was failing socially and Student's negative and dangerous behaviors were escalating.

Student was also failing academically. By the beginning of *** grade, Student needed modification of the general education curriculum to allow Student a chance to catch up, after several years of falling behind and with a complete lack of academic success during Student's *** grade year. The mistakes made by the ARDC during Student's *** and *** grade years were repeated when Student was promoted into *** grade, only the setting was much more challenging and Student was further behind in academics. It is not surprising, then, that *** quickly became overwhelming, depressing, and disturbing for Student. ***. ***.

Student was placed in *** grade general education classes without any of the academic foundations Student's peers had gained in *** grade. Student immediately fell behind, failing Student's courses. Because of this, the ARDC met on November ***, 2016, and modified Student's curriculum and classes in all core subjects. Student was enrolled in *** (***), for assistance in Student's core subjects.¹²² While the ARDC then realized Student's academic situation, it was too little and too late.

¹²² Ex. R-243 at 19, 26.

***, on ***, 2016, ***. ***. ***.¹²³ ***. ***. ***. **.

Finally, on December ***, 2016, Student's ARDC concluded that placement in the general education setting prohibits Student from achieving Student's IEP goals and objectives, even with supplementary services; that the Texas Essential Knowledge and Skills (TEKS) assigned to Student's grade level exceeded Student's present level of educational performance, and that Student required instruction based on present competencies which were significantly below Student's grade placement. At this time, the ARDC found that the modifications necessary for Student to achieve Student's IEP goals and objectives could not be provided in the general education setting, and Student was placed ***.¹²⁴

While *** was an improvement, particularly in protecting other students and teachers, a FAPE was still not provided. The teachers *** were not shown Student's IEP and they were unknowledgeable about Student's disabilities. Again, the strategies attempted to engage Student were insufficient, even hurtful given the information gained through the December ***, 2016 FBA. Moreover, Student failed to receive speech therapy and adequate counseling, as detailed and found necessary in the December ***, 2016 FIE.

For the entire time at issue in this proceeding, the ARDC failed to place student in a setting that provided an appropriate educational environment, given the extent of Students' disabilities. Thus, Student was denied a FAPE.

d. Key stakeholders provided the services in a coordinated and collaborative manner

Despite the substantive failings, the evidence supports the conclusion that Student's services were provided in a coordinated and collaborative manner by key stakeholders.¹²⁵ Parents are an

¹²³ Ex. R-214 at 36.

¹²⁴ Ex. R-214 at 22, 25.

¹²⁵ *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d at 253.

integral part of the IEP development process and, as such, are key stakeholders in the provision of services to their child, as are a student's teachers and a school district's administrators.¹²⁶

Petitioner offered insufficient evidence of a lack of coordination or collaboration in the development or implementation of Student's IEP.¹²⁷ The evidence shows Mother fully participated in the ARDC meetings, sometimes with the assistance of an advocate or an attorney; regularly communicated with Student's teachers and District staff. In addition, Student's teachers fully participated in the IEP development process, writing draft goals, preparing PLAAFPs, and participating in ARDC meetings. School administrators also were directly involved in implementing Student's IEP and BIP, either through direct contact with Student and Mother, consulting with Student's teachers, or attending ARDC meetings.

Petitioner also urged that Student's IEP was not implemented as written. After an IEP is written and an appropriate placement determined, the local education agency is obligated to provide the student with special education and related services as listed in the IEP.¹²⁸ The local education agency must implement a student's IEP with all required components.¹²⁹ The evidence does not support a finding that the District failed to implement Student's IEPs and BIPs as written.¹³⁰ However, for the reasons noted above, the District implemented an IEP that was not developed to address Student's unique needs. Thus, the District, even when implementing the IEP appropriately, failed to provide Student with a FAPE.

e. Positive academic and non-academic benefits were not demonstrated.

No meaningful positive academic or non-academic benefits were demonstrated at any

¹²⁶ 34 C.F.R. § 300.321(a).

¹²⁷ The most significant evidence supporting Petitioner's claim was the District's failure to discuss Student's IEP and BIP with the teachers ***.

¹²⁸ 34 C.F.R. § 300.323(c).

¹²⁹ 34 C.F.R. § 300.323(c).

¹³⁰ *Bobby R.*, 200 F.3d at 349.

point during Student's *** and *** grade year.¹³¹ Once Student's placement was ***, some academic progress was made but it was no more than *de minimus*.

Student was promoted from *** grade to *** grade in consideration of Student's social and self-esteem needs, and not on Student's academic achievements. The Hearing Officer also suspects the safety and educational environment of students promoted into *** grade was, or at least should have been, considered if Student (***)***

Whether in *** grade or *** grade, the BIP in place during this period addressed Student's extraordinary needs with rather ordinary means.¹³² It is not that the District did not attempt to help Student; rather, the District was continually behind on the interventions, the curriculum, and the setting/placement necessary to allow Student an opportunity to succeed. The District addressed Student's educational and behavioral issues in the general education setting when greater interventions and a more restrictive setting were required. Student's psychological issues were preventing Student from success in grade level curriculum, and then, Student's lack of academic success fed Student's psychological disabilities and unhealthy view of ***self. At this same time, Student's disabilities prevented Student from social success, again creating an unhealthy loop of failures. Student spiraled down Student's *** grade year until the District had no option other than to acknowledge the need for Student to be placed at a RTF. The December ***, 2016 FIE concluded as much.

It appears that some on the ARDC believed Student's lack of success was due to Student's poor choices; that Student had the capability to succeed in general education but was choosing not to succeed. But the evidence establishes otherwise. The record substantiates that the District failed to sufficiently address Student's disabilities, failed to recognize that Student's behavioral and social disabilities left Student in need of a more restrictive environment and that Student's educational needs required, at minimum, a better teacher-to-student ratio in order to allow Student to have an opportunity to succeed.

¹³¹ *Houston Ind. Sch. Dist. v. VP*, 582 F. 3d at 583 (5th Circuit 2009).

¹³² Ex. R-188 at 10.

It may be argued that Student received an educational benefit once Student's placement was ***. Here, Student had a much more restrictive setting and the curriculum was presented in subject modules that corresponded to Student's academic level, not the grade-level academics of Student's peers. Student began making up a little of the ground lost in ***. However, Student remained unable to focus on academics in such a way that Student could receive an education comparable to that of students without RTF placement. But, the IDEA requires that Student's benefit from the educational program be meaningful and more than simply *de minimis*.¹³³ The educational program must be likely to produce progress and not be merely trivial. Even when ***, this standard was not met.

2. Other Issues

a. Whether the District "socially" promoted Student despite Student's lack of academic and nonacademic progress.

The District's Executive Director for Special Education (SPED) testified as to why Student was promoted into *** grade after showing no academic success in *** grade, noting that the ARDC considered several factors, including:¹³⁴

- i. ***,¹³⁵
- ii. ***, and ¹³⁶
- iii. ***,¹³⁷

The District's SPED testified that Student's failure in classes was a result of absenteeism, noncompliance, and behavioral issues that interfered with Student's ability to learn.¹³⁸ It should

¹³³ *Polk v. Cent. Susquehanna Int. Unit 16*, 853 F. 2d 171, 180, 182 (3d Cir. 1988).

¹³⁴ Tr. at 472.

¹³⁵ Tr. at 473.

¹³⁶ Tr. at 473-474.

¹³⁷ Tr. at 474.

¹³⁸ Tr. at 535

be noted that all three of these factors were later found to be a manifestation of Student's disabilities.¹³⁹ It should also be noted that Mother expressed concern for Student ***. At the ARDC meeting considering this issue, much of the faculty ARDC members were concerned about promoting Student but Mother was concerned about retaining Student.¹⁴⁰ Student was promoted by an ARDC in agreement.

b. The District did not refer Student to DAEP for disciplinary reasons without a MDR.

Petitioner failed to meet its burden of proof on this issue. The evidence does not establish that any of Student's referrals to the alternative campus, which has several different programs, were made for disciplinary reasons and for 10 days or more, without a MDR. Most of the referrals were for behavior support, as agreed to by Mother and the remaining ARDC members.

c. The District failed to properly evaluate and identify Student in all areas of suspected disability.

As noted above, there is no doubt that the District failed to properly evaluate Student when it failed to perform a FBA and an appropriate FIE until December ***, 2016. In addition, the District discontinued speech/language services for Student in 2011. The December 2016 FIE showed that Student qualified as a student with a speech disability and needed services. The delay in reassessing Student for speech/language delays from 2012 to almost 2017 is a failure in Child Find. This is significant because during the period of concern in this proceeding, Student did not receive needed speech/language services, which added to Student's academic struggle and low self-esteem.

Petitioner also asserted that the District failed to assess Student's *** needs. The evidence supports a finding that Student's *** should have been evaluated and that Student may,

¹³⁹ Tr. at 537.

¹⁴⁰ Ex. R-242 at 20.

in fact, need support in this area. Mother testified that *** were needed. The RTF should evaluate and provide services as necessary.

d. Whether the District failed to properly consider the evaluation from the *.**

The *** performed an evaluation in February 2016, finding that Student was borderline intellectually impaired, a person with Autism, and in need of speech/language assistance. The independent expert and lead author of the 2016 FIE testified that the *** evaluation was not comprehensive. On a scale from 1 to 5, with 1 being least confident, she stated that her level of confidence in the *** evaluation was “1.”¹⁴¹ The District appropriately considered the *** evaluation as indicative of a need for a comprehensive evaluation, which was completed in the December 2016 FIE. The evidence establishes that the *** evaluation was based on only three tests, did not include at least two settings, and was otherwise unsupported.¹⁴²

e. Whether the District unreasonably protracted the final resolution of the issues in controversy in the hearing.

Petitioner failed to meet its burden of proof on this issue. The delays in failing to provide FAPE are addressed above. The delays after the due process hearing complaint was filed were as much caused by Petitioner as the District. Even on December ***, 2016, Petitioner refused to agree that Student should be placed in a RTF. Petitioner then later complains that the District unreasonably delayed its efforts to begin the admission process at an RTF.

The Hearing Officer disagrees with this assertion. The District did not have the authority after the complaint was filed to call an ARDC meeting and place Student in an RTF. “Stay put” was in place. And even after Mother did agree to placement at an RTF, she chose a facility not approved by the TEA. Her choice continues to cause delay today.

¹⁴¹ Tr. at 593.

¹⁴² Tr. at 594.

The District was at least partially responsible for the 4-month delay, from late August 2016 to December 2016 while the FIE was prepared. However, a particularly qualified evaluator was requested to address this complex case, and she made herself available in August to perform the assessments. She found that Student was unable to accurately take more than a few assessments with each meeting. Also, Student failed to show up for 1 day of assessments.

After August, the evaluator was not available until December. She *** and testified that work commitments would not allow her to return to Abilene until December 2016. Mother agreed to this delay. The District's notation that Student's absenteeism led to the delay was partially accurate. It was initially expected that the assessments would be completed in August. They were not. However, in its reason for delay, the District failed to note the evaluator's scheduling difficulties which also was a major factor in the delay.

The Hearing Officer finds the delays were understandable and did not unreasonably protract the final resolution of the issues in controversy in the hearing.

C. Conclusion

After considering the evidence and parties' closing arguments, the Hearing Officer finds Petitioner met Student's burden of proof in this matter, proving that the District failed to provide Student a FAPE in accordance with the IDEA and relevant case law. Accordingly, Petitioner is entitled to the requested relief, in part.

D. Relief Including Placement and Compensatory Time

Specific evidence supporting Petitioner's requests for relief, and in particular for compensatory relief, was barely presented during the hearing. And, this was despite the Hearing Officer's instruction that evidence related to the requested relief was needed.

However, the District agreed—and is now ordered—to place Student at *** in accordance with the ARDC's decisions and the individual plan developed by ***'s

interdisciplinary team, until such time that Student accomplishes the goals or at least makes satisfactory progress towards those goals set by ***, expected to take 12-18 months.¹⁴³

Other specific compensatory services are ordered as noted in the above Findings of Fact, but are subject to offset by time and achievement at ***. The compensatory services ordered are made through a combination of the quantitative approach, an hour for hour determination, and the qualitative approach, a determination made in accordance with Student's "specific educational deficits" related to Student's loss of FAPE. Both are considered in relation to a loss of *** of education for Student's *** and *** grade years.

These include compensatory services for *** minutes per week for *** in speech and language; *** and *** at *** minutes per week for ***, or until Student's skills are average; for behavior, general and *** for *** minutes per week for ***; *** for Math for *** minutes per week, for ***, or until Student's academic testing in Math is passing grade level test; and *** for Language Arts for *** minutes per week, or until Student's academic testing in Language Arts is at grade level. Services provided at the RTF should be deducted on an hour per hour basis for each of the above.

Should the RTF determine that Student is qualified as a student with ID, additional tutoring may be needed. However, a present determination about ID is not possible from the conflicting evidence presented at the hearing and due to the complexity of Student's needs. Only after Student's behavioral and psychological issues are addressed, may a determination on ID be appropriately made at the RTF. The resolution of this situation is left to the ARDC, after reviewing the RTF evaluations and input.

VI. CONCLUSIONS OF LAW

1. The District is a local educational agency responsible for complying with the IDEA as a condition of the State of Texas's receipt of federal education funding, and the District is

¹⁴³ Tr. at 234-238.

- required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-300.513.
 3. Petitioner bears the burden of proof on all issues raised in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
 4. A party attacking the appropriateness of an IEP established by a school district bears the burden of showing why the IEP and resulting placement were inappropriate under the IDEA. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-248 (5th Cir. 1997), as cited in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-1011 (5th Cir. 2010).
 5. The 1-year statute of limitations applies to this proceeding. 19 Tex. Admin. Code § 89.1151(c).
 6. Student is a child with IDEA-enumerated disabilities, who by reason thereof, is eligible for special education and related services, which Student receives as a child with Emotional Disturbance, Other Health Impairment, and Speech Impairment. 34 C.F.R. § 300.8; 19 Tex. Admin. Code § 89.1040(a), (c)(4), (c)(8), (c)(10).
 7. The District failed to provide Student with a FAPE during the 2015-2016 and 2016-2017 school years, even while services were provided at *** placement. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *Board of Edu. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 181; 102 S. Ct. 3034, 3038 (1982); *Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).
 8. The District failed to develop appropriate IEPs for Student throughout the time in dispute. 34 C.F.R. §§ 300.320 through 300.324; *Rowley*, 458 U.S. at 181; *Bobby R.*, 200 F.3d at 347-348, citing to *Cypress-Fairbanks*, 118 F.3d at 253.
 9. Student's placements in the 2015-2016 and 2016-2017 school years did not meet the educationally appropriate, LRE requirements of the IDEA. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.116; *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1039, 1046-1047 (5th Cir. 1989).
 10. Up and until the December ***, 2016 FIE, the District's evaluations of Student during the applicable time period were not in accordance with IDEA requirements. 34 C.F.R. §§ 300.303 through 300.311; 300.304(c)(6).

11. The District failed to comply with the IDEA provisions related to *** when evaluating Student and devising Student's 2016-2017 IEP. 34 C.F.R. §§ 300.304(c)(6); 300.320(b); Tex. Educ. Code §§ 29.011, 29.0111, and 19 Tex. Admin. Code § 89.1055(h)(i).
12. The December 2016 FIE was conducted in accordance with IDEA requirements at 34 C.F.R. §§ 300.301, 300.303 through 300.311.
13. The District failed to provide Student's *** teachers with information about Student's 2016-2017 IEP, in accordance with the requirements of 19 Tex. Admin. Code § 89.1075(c).
14. As a form of compensatory education, Student's placement at *** at the District's expense is appropriate. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).
15. Student's placement at *** meets the LRE requirements of the IDEA. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.116; *Daniel R.R.*, 874 F.2d 1036, 1039, 1046-1047.
16. The District did not unreasonably protract the final resolution of the issues in controversy in the hearing. 19 Tex. Admin. Code § 89.1185(m)(1).

ORDER

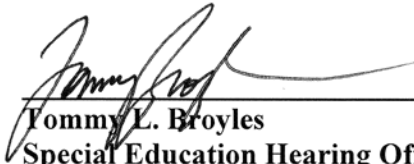
After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders as follows:

1. Student be placed at *** in accordance with the ARDC's decisions and the individual plan developed by ***'s interdisciplinary team, until such time that Student accomplishes the goals or at least makes satisfactory progress towards those goals set by the ARDC, taking into consideration the finding made by ***.
2. Compensatory services be provided for the loss of *** of education for Student's *** and *** grade years.
3. Compensatory services for *** minutes per week for *** in speech and language; *** and *** at *** minutes per week for ***, or until Student's skills are average; for behavior, general and *** for *** minutes per week for ***; *** for Math for *** minutes per week, for ***, or until Student's academic testing in

Math is passing grade level test; and *** for Language Arts for *** minutes per week, or until Student's academic testing in Language Arts is at grade level.

4. Services provided at the *** should be deducted on an hour per hour basis for each of the above.
5. Should *** determine that Student is qualified as a student with ID, and the ARDC adopts this determination, additional tutoring be provided on academics and the academic levels of expectation may be changed as per ARDC determination.

SIGNED March 14, 2017.



Yommy L. Broyles
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.¹⁴⁴

¹⁴⁴ 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).