

DOCKET NO. 068-SE-1015

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

DECISION OF HEARING OFFICER

*** (Student), by next friend *** (Parent) (collectively, Petitioner) requested an impartial due process hearing (Complaint), pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Spring Branch Independent School District (Respondent or the District) is the respondent to the Complaint. Petitioner alleges that the District violated its Child Find obligations by failing to timely identify Student as a child with a disability prior to March 2015; failing to provide Student with a free appropriate public education (FAPE) during the 2014-15 school year, the summer of 2015, and the 2015-16 school year; and continues to deprive Student of a FAPE designed to meet Student’s unique educational needs ***.¹ The District denies Petitioner’s allegations.²

The hearing officer finds that Petitioner proved the District did not fulfill its Child Find obligation as to Student and did not properly implement Student’s Individualized Education Program (IEP), thus denying Student a FAPE for the entire 2014-2015 school year. Petitioner proved that the appropriate placement for Student is at *** (***), a private school. Although Parents did not notify the District in writing of their intention to place Student at ***, returning Student to the District would have been emotionally detrimental to Student. Therefore, Parents are to be reimbursed \$50,250 in tuition and tutoring costs for Student’s unilateral placement at

¹ Petitioner Ex. 3. ***.

² Petitioner Ex. 4.

*** for the 2015-2016 school year.³ In addition, because the District did not provide Student a FAPE in 2014-2015, Petitioner is awarded one school year of compensatory education at ***, to be fulfilled in the 2016-2017 school year at the District's expense.

I. DUE PROCESS HEARING REQUEST, ISSUES, AND BURDEN OF PROOF

A. Due Process Hearing Request and Statute of Limitations

Petitioner filed the Complaint on ***, 2015.⁴ Petitioner then filed an amended due process hearing request (Amended Complaint) on ***, 2016.⁵

Petitioner raised no exception to the 1-year statute of limitations. 19 Tex. Admin. Code § 89.1151. Therefore, the accrual date for this proceeding is *** 2014.

B. Issues

At prehearing telephone conferences held on ***, 2015, and ***, 2016, the issues for this proceeding were narrowed and simplified, as set out below.⁶ Petitioner prevailed on Issues 1, 2, 7, and 9. The remaining issues were decided in the District's favor.

1. Did the District violate its Child Find obligations by failing to identify Student as a child with a disability prior to March 2015?
2. Did the District fail to provide a FAPE to Student during the 2014-15 school year?
3. Did the District fail to consider providing Student with positive behavioral supports and interventions, including counseling?

³ Respondent Ex. 26 at 19-22, 47. Petitioner did not prove that an extended school year (ESY) was necessary for Student in the summer of 2015, so the *** tuition for the summer of 2015 is not included in the tuition reimbursement amount.

⁴ Petitioner Ex. 5.

⁵ Petitioner Ex. 3. Petitioner requested leave of the hearing officer to file the Amended Complaint. The request was granted on ***, 2016. See Order No. 6, issued ***, 2016.

⁶ See Order No. 5, issued ***, 2015, and Order No. 9, issued ***, 2016.

4. Did the District fail to provide Parents with prior written notice when it refused to evaluate Student?
5. Did the Admission, Review, and Dismissal (ARD) committee fail to consider Student's present level of academic achievement and functional performance (PLAAFP) and how Student's disability affected Student's involvement in the general education curriculum?
6. Did the District fail to provide Parents with requisite notice when Student was *** restrained in *** 2015?
7. Did the District fail to provide Student with a commensurate school day?
8. Did the District fail to develop an IEP for Student?
9. Did the District fail to implement Student's IEP?
10. Did the District fail to educate Student in the least restrictive environment (LRE)?
11. Did the District fail to incorporate recommendations from evaluations into Student's initial ARD committee report to address Student's educational needs?
12. Did the District fail to ever convene an ARD committee meeting to discuss Parents' request that Student be returned to the *** (***) program and fail to issue prior written notice concerning that refusal?
13. Did the District fail to ever convene an ARD committee meeting or respond to Parents' constructive notice and request for Student's placement at and tuition reimbursement for ***?
14. Did the District fail to provide Student with a FAPE during the summer of 2015, and the 2015-2016 school year, and is the District continuing to deprive Student of a FAPE designed to meet Student's unique educational needs?

C. Proposed Remedies

At prehearing telephone conferences held on December 7, 2015, and March 22, 2016, Petitioner's proposed remedies were identified as set out below:⁷

⁷ See Order No. 5, issued December 7, 2015, and Order No. 9, issued March 22, 2016.

1. The District should fully reimburse Parents for all tuition and costs for Student's education at *** during the summer of 2015, including transportation costs;
2. The District should place Student at *** as a private school placement consistent with the IDEA;
3. The District should provide an independent counseling evaluation;
4. The District should provide counseling services based on the independent counseling evaluation;
5. The District should provide extensive training to all staff at *** School (***) and *** School (***) about initial evaluations, the use of Section 504 plans or Response to Intervention (RtI) programs and placement in special education, and the use of positive behavioral strategies;
6. The District should provide compensatory and related services to address the lack of an appropriate education program for Student during the 2014-2015 school year;
7. The District should fully reimburse Parents for all tuition and costs for Student's education at *** for the 2015-2016 school year, including transportation costs;
8. The District should recognize and honor *** as Student's "stay put" placement until or unless the ARD committee, including Parents, agrees otherwise or the hearing officer or Court orders otherwise; and
9. Petitioner requests any other relief the hearing officer deems prudent to provide Student with a FAPE.

D. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.⁸ 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.⁹

⁸ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *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).

⁹ *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).

To prevail, Petitioner must, therefore, establish that the District violated the IDEA regarding Petitioner's delineated issues.

II. HEARING

The hearing was held May 24-26, 2016, before Sharon Cloninger, hearing officer, at the District's Administration Building, 955 Campbell Road, Houston, Texas 77024. Petitioner was represented by lead counsel Sonja D. Kerr and co-counsel Fernando Salcedo. The District was represented by Amy Tucker, attorney.

At the close of the due process hearing, the parties requested a July 6, 2016 deadline for filing written closing arguments and that the decision due date be extended from June 27, 2016, to July 29, 2016, for good cause.¹⁰ The deadline for filing written closing arguments subsequently was extended to July 27, 2016, and the decision due date was extended, for good cause, to August 3, 2016.¹¹ This decision was timely issued.

III. WITNESSES

The following witnesses testified at the hearing and are listed here for ease of reference when reading the Findings of Fact.

A. Petitioner's Witnesses

1. Father
2. ***¹²

¹⁰ See Order No. 13, issued May 31, 2016.

¹¹ See Order No. 14, issued June 27, 2016, and Order No. 15, issued July 7, 2016.

¹² Ms. *** is an Administrative Intern for the District's ***, designed to better respond to disciplinary issues with students. She has a Master's degree in Spanish Literature and a Bachelor of *** degree in Psychology. The *** provides a "****" to work with counselors, assistant principals, and teachers to arrive at alternative ways to support students with disciplinary issues so as not to respond in a punitive way. If the supports do not work, the student may be referred to the *** program. Tr. at 702-703,705 (***).

3. ***, Assistant Principal, ***
4. ***¹³
5. ***, Head of School, ***—***
6. ***¹⁴
7. ***¹⁵
8. ***¹⁶
9. ***¹⁷
10. ***, Coordinator for Special Education with the District¹⁸
11. ***¹⁹
12. ***²⁰

B. District's Witnesses

¹³ Mr. *** is Student's teacher at ***, certified in every topic through *** grade and certified in English as a Second Language. Tr. at 222-223 (***).

¹⁴ Mr. *** is a manager in TEA's Division of Federal and State Education Policy. Tr. at 276 (***).

¹⁵ Dr. ***, Ed.D., LPC-S, RPT/S, was designated as an expert witness in clinical counseling. Tr. at 152 (***). Her *curriculum vitae* is at Petitioner Ex. 17 at 3-5.

¹⁶ Ms. *** is a manager in TEA's Division of Program Monitoring and Intervention. One of her duties is to oversee special education program monitoring, including nonpublic day school placements. Tr. at 268 (***).

¹⁷ Dr. ***-***, who holds a doctorate in psychology, is the clinical supervisor for the diagnostic clinic at the ***. She is certified to administer the Autism Diagnostic Observation Schedule (ADOS), considered in the clinical community to be the gold standard for diagnosing Autism Spectrum Disorder. She has training in applied behavioral analysis (ABA), which is significant for creating treatment plans for children identified as having Autism Spectrum Disorder. Tr. at 33-34, 36, 69 (***-***).

¹⁸ Ms. *** holds a B.S. in Elementary Education, a Master's degree in Special Education, and a principal certification. She was designated as an expert in behavior management and educational programming. Tr. at 920-921 (***).

¹⁹ Ms. *** did not testify in person. Her deposition is in evidence. She has been the District's Director of Special Education since July 1, 2015, and was previously the Special Education Compliance Coordinator in the *** Independent School District for 7 years where she was responsible for ensuring that children with special needs were placed in nonpublic schools when they needed those services. Petitioner Ex. 28 at 10, 13, 14 (*** deposition).

²⁰ Dr. *** testified as an expert witness in child psychiatry. In May 2004, Dr. *** received her M.D. from the ***. In 2009, she completed her psychiatry training at the *** ***. She has been in private practice since 2009, providing psychiatric evaluation, assessment, and treatment of adults, adolescents, and children with mental health disorders. Tr. at 302-303 (***); Petitioner Ex. 9 at 7-10.

1. Mother
2. ***²¹
3. ***²²
4. ***²³
5. ***²⁴

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the hearing officer makes the following findings of fact:

Background

1. Student resides with Parents within the boundaries of the District.
2. The District is a recipient of federal funds and must comply with the IDEA, including developing and implementing an appropriate IEP for Student, designed to ensure services and placement in the LRE, and reasonably calculated to confer meaningful educational benefit.
3. Student has experienced self-regulation and adjustment difficulties since Student was a toddler.²⁵
4. Student attended *** in 2006-2007 at *** School in ***; in 2007-2008 at *** School (***) in ***; in 2008-2009 at *** School (***) in ***; and received speech therapy for articulation issues through the District from about 2006 until being released in May 2009.

²¹ Ms. ***, Licensed Specialist in School Psychology (LSSP), is a facilitator for special education programs with the District. She is certified by the International Board of Certification as an autism specialist and is certified by the National Association of School Psychologists. Tr. at 782-783 (***). She was designated as an expert in school psychology, evaluation, educational programming, social skills development, and behavior management. Tr. at 786-787 (***)

²² Ms. *** is a speech-language pathologist with the District and was designated as an expert in speech-language pathology. Tr. at 511-512, 516 (***)

²³ Ms. *** was Student's special education teacher at ***. Tr. at 629-630 (***)

²⁴ Ms. *** is an LSSP employed by the District. She was designated as an expert in school psychology, educational evaluations, educational programming, social skills development, and behavior management. Tr. at 562-563, 568 (***)

²⁵ Petitioner Ex. 7 at 1.

Parents were asked to remove Student from *** and *** due to Student's significant impulse control problems, aggression, and oppositional behaviors.²⁶

5. In 2009, when Student was *** years old, ***, Ph.D., Licensed Psychologist, identified Student as a child with a *** (WPPSI-III Full Scale IQ=***, *** percentile) and diagnosed Student to have Oppositional Defiant Disorder (ODD).²⁷
6. In 2009, Dr. *** recommended that Student begin *** and that Parents seek to have Student placed in *** program. She concluded Student is an extremely bright child who is likely to show better behavior and attention when Student is working at a level that is appropriately challenging and interesting for Student. She said Student's projects and assignments should be individualized to increase the depth and complexity of learning activities. She recognized that Student might have difficulty handling the behavioral demands of public school ***, such as complying with school rules, respecting the teacher, refraining from aggressive behavior towards other children and adults, and following task directions.²⁸
7. In 2009, Student began *** at ***, a District *** school,²⁹ and was aggressive towards other children.³⁰ Student attended private schools for *** through *** grades and did not return to *** until *** grade.
8. Parents paid for Student to attend *** and *** grade at ***, a private school ***, ***, and *** and *** grade at *** in *** (***), a private school for children with ***, located in the ***.³¹
9. By the time Student began *** grade, ***, Ph.D., clinical psychologist, had identified Student as a child with Attention Deficit Hyperactivity Disorder (ADHD), a Mood Disorder, and ODD, as well as *** student.³²
10. From *** grade forward, Student has been under the care of a Dr. ***, a psychiatrist, and Dr. ***, a clinical counselor.³³
11. Dr. *** has seen Student as a patient sometimes monthly and sometimes quarterly since 2012. In March 2012, she initially diagnosed Student with Anxiety Disorder, not

²⁶ Petitioner Ex. 1; Petitioner Ex. 7 at 1; Petitioner Ex. 12 at 2; Petitioner Ex. 15 at 8; Respondent Ex. 20 at 3; Respondent Ex. 29 at 5.

²⁷ Petitioner Ex. 7 at 2; Respondent Ex. 29 at 4-12; *see also* Petitioner Ex. 7 at 4.

²⁸ Respondent Ex. 29 at 9-10.

²⁹ Respondent Ex. 20 at 2.

³⁰ Petitioner Ex. 12 at 3; Respondent Ex. 29 at 1.

³¹ Petitioner Ex. 1; Respondent Ex. 20 at 3; Respondent Ex. 23.

³² Respondent Ex. 4 at 11.

³³ Tr. at 303 (***) ; Tr. at 154-155 (***) .

otherwise specified (NOS), with rule-out diagnoses of ADHD, OCD, and pervasive developmental disorder (PDD). In a rule-out diagnosis, a doctor suspects but does not have enough information to arrive at that diagnosis. After a comprehensive evaluation, she diagnosed Student in April 2012 with Mood Disorder, NOS; ADHD, NOS; Anxiety Disorder, NOS; and a History of ODD. Student was her patient when Student attended ***, ***, *** grade in the District, and Student remains her patient now that Student is attending ***.³⁴

12. Dr. ***'s 2012 psychiatric evaluation of Student—then age *** and in *** grade—revealed that Student had *** at *** and had ***.³⁵
13. Dr. *** was the clinical director at ***, a therapeutic school, when Student attended there. *** was available for students who need a therapeutic setting including teachers and staff who help students struggling with certain diagnostic difficulties such as ADHD, depression, autism, attachment issues, trauma, and ODD.³⁶
14. Dr. *** was Student's counselor at ***. She worked with Student daily, either in individual or group therapy sessions; met with Parents; and provided teachers with resources to better accommodate Student in the classroom.³⁷
15. At ***, when Student was in a classroom with other students, the sound/movement/change/transitions seemed to overwhelm Student. Student would put Student's head down and not do Student's work because of being overstimulated. When Student was removed from the classroom to spend one-on-one time with a teacher, Student was attentive, was aware of what Student needed (with breaks), and was able to take steps to integrate with some of Student's classmates during certain settings of the day. Student also had a lot of anxiety around separation from Mother and around being alone in a room. When Student was anxious, Student's behaviors became disruptive.³⁸
16. At ***, Student was with six or eight other students at times, but if the external stimuli became too overwhelming, Student did one-on-one work with Student's teacher or had a shortened school day, with Student's parents available, until Student could slowly integrate back into the classroom. Shortening the days was very helpful for Student. Student was able to work up to full days, but not every day of the week.³⁹

³⁴ Tr. at 303-305, 308, 309, 314 (***) ; Petitioner Ex. 9 at 2, 5; Petitioner Ex. 30 at 5.

³⁵ Respondent Ex. 29 at 3.

³⁶ Tr. at 152-154 (***) ; Petitioner Ex. 17 at 3-5.

³⁷ Tr. at 154-156 (***) .

³⁸ Tr. at 160, 164-165 (***) .

³⁹ Tr. at 189, 193 (***) .

17. On May ***, 2014, Student took the Stanford test at ***, and scored in the following percentiles: *** in Total Reading, *** in Vocabulary, *** in Comprehension, *** in Math Procedures, and *** in Spelling.⁴⁰
18. Student's 2013-2014 report card from *** indicates Student passed all *** grade academic subjects but that Student only sometimes met most behavioral requirements and that Student did not work well without supervision, accept comments on performance from others, or organize Student's materials and assignments. The report card indicates that Student's ability to demonstrate physical control and speak only at appropriate times without interrupting students and teachers improved from not being able to do so during the first semester to sometimes being able to do so during the second semester.⁴¹
19. Parents re-enrolled Student, then age ***, at *** at the beginning of *** grade for the 2014-2015 school year. Student began the school year in the general education setting; was moved to the District's *** program from ***, through ***; and on ***, was placed in the *** classroom at ***, ***,⁴² where Student finished the school year.
20. Since the summer of 2015, Student has attended school at ***, a private school.⁴³
21. *** has been open *** for *** years *** in Houston. The Houston campus has *** students and *** teachers and is *** school. *** provides one-on-one education with one student and one teacher in a classroom. Classes last for 50 minutes with a 10-minute break between classes. Students do their homework at school and do not take homework home. *** is accredited through AdvancED, which is recognized by the TEA, uses the Texas Essential Knowledge and Skills (TEKS) curriculum, and follows TEA requirements for high school graduation. *** takes a social, emotional, and academic approach to education.⁴⁴ Classes are held between *** and *** Monday through Thursday, with Friday as a mastery day for students who missed class earlier in the week or are having trouble with a particular concept.⁴⁵ A special education coordinator is on campus.⁴⁶

Issue 1:

Did the District violate its Child Find obligations by failing to identify Student as a child with a disability prior to March 2015?

⁴⁰ Respondent Ex. 24 at 2.

⁴¹ Tr. at 217 (***) ; Petitioner Ex. 8; Respondent Ex. 24 at 1.

⁴² Petitioner Ex. 1; Petitioner Ex. 16 at 22.

⁴³ Petitioner Ex. 1; Petitioner Ex. 37 at 7.

⁴⁴ Tr. at 415-417, 419-421, 484-486 (***) .

⁴⁵ Tr. at 421 (***) .

⁴⁶ Tr. at 423 (***) .

22. When Mother registered Student for school in August 2014, she provided *** staff with a note from Student's psychiatrist, Dr. ***, in hopes that a Section 504 meeting for Student would be expedited. Dr. *** advised, "I have evaluated [Student] and [Student] is diagnosed with ADHD, Combined Type. [Student] would benefit from 504 accommodations. Please feel free to send any paperwork you need completed on Student's behalf by fax to ***."⁴⁷
23. After having been in a classroom at *** with one or two teachers for between four and six students, Mother thought Student might have difficulty transferring to a general education classroom at *** with 20 or so students, so sought Section 504 accommodations.⁴⁸
24. Mother did not request special education services at the beginning of the school year because she did not know Student was eligible for special education.⁴⁹
25. At the beginning of the school year, teachers gave their students a handbook that explains how parents can request special education testing if they feel their child needs to be evaluated.⁵⁰
26. Assistant Principal *** received Dr. ***'s letter within the first 2 weeks of school. She is aware that a child with ADHD can be identified for special education and related services. She was not particularly concerned by Dr. ***'s letter, because there are many students at *** with ADHD who do not receive special education services.⁵¹
27. At the beginning of the school year, Mother did not share Dr. ***'s 2012 psychiatric evaluation with the District, in which Dr. *** diagnosed Student with Mood Disorder, NOS; ADHD, NOS; Anxiety Disorder, NOS; and a History of ODD.⁵²
28. On *** 2014, ***, *** Principal *** conferenced with Mother regarding ***.⁵³
29. On *** 2014, ***, Student left the classroom without permission.⁵⁴
30. On *** 2014, administrators were called to the classroom because Student was ***, cussing, and refusing to follow directions. When Principal *** and Assistant Principal

⁴⁷ Tr. at 742, 769-771 (Mother); Petitioner Ex. 9 at 6; Petitioner Ex. 37 at 1.

⁴⁸ Tr. at 749 (Mother); Tr. at 156 (***) ; Tr. at 309, 349, 352 (***) ; Petitioner Ex. 9 at 6.

⁴⁹ Tr. at 742 (Mother).

⁵⁰ Tr. at 927 (***) .

⁵¹ Tr. at 73, 82, 103-104 (***) ; Petitioner Ex. 9.

⁵² Petitioner Ex. 9 at 2; Respondent Ex. 29 at 1-3; *see also* Petitioner Ex. 9 at 5.

⁵³ Respondent Ex. 19 at 3.

⁵⁴ Respondent Ex. 1 at 26.

*** went into the classroom, Student was sitting ***. When asked to *** and ***, Student stated, “***.” Student told the principal, “***.” After being asked multiple times to *** and come out of the classroom, Student stated, “***.” While in Principal ***’s office, Student continued to make racial slurs such as “***. ***,” ***, and ***. When a teacher entered the classroom to speak with Principal ***, Student told her to “***” and “***.” Other behaviors during this time including taking *** without permission, throwing a ***, and continuing to make remarks such as “***,” “***,” and “***.”⁵⁵

31. During *** of school at ***, Mother talked a lot with Principal *** and Assistant Principal ***. She had expected a spike in Student’s behavior because Student transferred to *** from ***, a therapeutic school, had difficulty with transitions, and struggled with depression. Mother told *** staff that Student had been diagnosed with ODD, Mood Disorder, Anxiety, and Depression.⁵⁶
32. On *** 2014, Principal *** had Mother sign regular release of records and confidential records release forms. He also asked Mother to provide the school with copies of Student’s evaluations and medical records.⁵⁷
33. On *** 2014, Mother signed a release form permitting *** staff to obtain Student’s records from ***, including academic history, medical reports, vision/hearing records, speech/language records, and behavior plan/psychological records, for the purpose of educational planning.⁵⁸
34. In *** 2014, Student was highly motivated to get kicked out of *** so Student could go back to ***. Mother and *** staff made it clear to Student that Student would not be going back to *** and Student’s misbehavior needed to stop.⁵⁹
35. Early in the school year, Mother arranged for Dr. *** to be available to talk to school staff including signing a release so that school staff could speak with her at any time. Dr. *** spoke with school staff via telephone, offered strategies to manage Student, and disclosed triggers that disrupted Student’s ability to function.⁶⁰
36. Dr. *** was concerned about whether Student could be successful in public school. After school started, she spoke with Principal *** about her concerns and provided ideas for ways Student could transition into the new environment. She told Principal *** about

⁵⁵ Petitioner Ex. 10 at 12; Respondent Ex. 19 at 3.

⁵⁶ Tr. at 744, 746 (Mother).

⁵⁷ Tr. at 771-772 (Mother); Tr. at 104 (***); Respondent Ex. 19 at 3.

⁵⁸ Tr. at 105 (***); Respondent Ex. 21.

⁵⁹ Tr. at 744, 747 (Mother); Petitioner Ex. 37 at 1.

⁶⁰ Tr. at 772-773 (Mother); Petitioner Ex. 37 at 1.

Student's sensory issues, difficulties with interpersonal relationships, and social and cognitive difficulties, and suggested some interventions that might work.⁶¹

37. Before attending *** grade at ***, Student had difficulty transitioning to *** and ***. At ***, Dr. *** was on site and saw Student regularly when Student struggled; teachers walked Student through situations and helped Student calm down; Student had a shortened school day; Mother was on campus, available to check in with Student and help Student calm down. Mother did not think the transition to *** would be easy, but Student had made such progress at *** that she thought public *** school should be tried before Student went into ***.⁶²
38. On *** 2014, Student refused to follow directions in *** class. Student would not remain seated on the floor with the other students, *** around the room *** after being asked to sit in one place, and *** to the door and walked out of the classroom without permission. Administrators were called and found Student ***. Student stated “***,” and chose to sit in the office until *** class was over.⁶³
39. On *** 2014, in their fifth conversation since the beginning of the school year, Assistant Principal Ms. *** spoke with Mother regarding Student's misbehaviors: cursing, racial slurs, ***, ***, ***, failing to follow instructions, leaving class without permission, and ***, all of which were disruptive to the teaching and learning environment.⁶⁴
40. On *** 2014, administrators were called to the classroom after Student refused to follow the teacher's redirection. Student was at the teacher's desk with Student's ***. Student walked away from ***. When the teacher asked Student to sit in a chair, Student said, “***” Assistant Principal *** gave Student the choice of remaining quietly in the classroom or leaving the classroom, and Student replied, “***” Assistant Principal *** *** Student jumped to the floor and walked out of the classroom ***. ***; Student said Student had been sitting ***. When Student ***, Student ***. A few minutes later, Student left *** without permission, stating, “***.” Student *** where a class was having a lesson ***. Student ***. Mother was called to take Student home for the rest of the day. Student collected Student's belongings and went into the office repeating, “***”⁶⁵
41. On *** 2014, Mother signed a “Notice and Consent for Initial Section 504 Evaluation.”⁶⁶

⁶¹ Tr. at 158-160, 167 (***).

⁶² Tr. at 748 (Mother).

⁶³ Petitioner Ex. 10 at 12; Petitioner Ex. 35 at 1-3; Respondent Ex. 19 at 3.

⁶⁴ Petitioner Ex. 10 at 12; Respondent Ex. 19 at 3.

⁶⁵ Petitioner Ex. 10 at 11-12; Respondent Ex. 19 at 2-3.

⁶⁶ Respondent Ex. 15 at 8.

42. On *** 2014, Student was referred to the office after disrupting the classroom by ***, and walking out of the classroom without permission.⁶⁷
43. Student was referred to the office a second time on *** 2014, this time for *** another student, ***. Student ***. Student was given a 1-day in-school suspension for the misbehavior.⁶⁸
44. In a *** 2014 response to the teacher's email about the *** 2014 incidents asking for ideas for helping Student pay attention and focus more during class, Mother suggested talking to Student quietly and privately about options before a situation arose; using a casual tone of voice with as little emotion as possible; or giving Student a job or responsibility related to assisting the teacher.⁶⁹
45. Mother was frequently at ***, sometimes up to five times per week. Many times she would sit with Student at lunch to help Student reset before Student attempted to make friends and to problem solve with Student to aid Student in the transition back to class.⁷⁰
46. On *** or ***, 2014, Mother had lunch in the cafeteria and spoke with ***, one of Student's teachers. She offered to supply him with books or articles that might help with Student's behavior. Mr. *** told her that if he needed that type of information, he would ask the special education department.⁷¹
47. On *** 2014, Mother filled out a Family History Form for the District, which indicated she believed Student's disruptive and impulsive behavior, and failure to follow directions, stemmed from anxiety and undiagnosed PDD, NOS.⁷²
- a. The Family History Form informed the District that, for *** years, Student had been ***.⁷³
 - b. On the Family History Form, Mother listed Student's strengths as "curiosity, sense of humor, and want to change."⁷⁴
48. By the beginning of *** 2014, Student's behaviors were severely interrupting the teaching and learning of students on a daily basis. Student's *** by the other students.

⁶⁷ Petitioner Ex. 10 at 11; Petitioner Ex. 33 at 8; Respondent Ex. 19 at 2.

⁶⁸ Petitioner Ex. 10 at 11; Respondent Ex. 19 at 2.

⁶⁹ Petitioner Ex. 33 at 8; Petitioner Ex. 33a at 1.

⁷⁰ Tr. at 749 (Mother); Petitioner Ex. 37 at 1.

⁷¹ Petitioner Ex. 37 at 1.

⁷² Petitioner Ex. 10 at 23; Respondent Ex. 20 at 3. PDD is a broad category used when a patient has some features consistent with Autism Spectrum Disorder. Tr. at 304.

⁷³ Petitioner Ex. 10 at 23; Respondent Ex. 20 at 4.

⁷⁴ Petitioner Ex. 10 at 25; Respondent Ex. 20 at 5.

- Student spent each day ***, some of which contained ***. Student frequently exhibited defiance, verbal aggression, and physical aggression at school. Student's behaviors were unpredictable, occurred *** days per week, and included ***, failing to follow directions, and eloping from class. Pursuant to the District's Student Code of Conduct, Student was removed from the classroom daily.⁷⁵
49. By *** 2014, Mother and Dr. *** both had reported to the District that Student was highly anxious and feared rejection, and that Student's "acting out" occurs when Student feels scared.⁷⁶
50. Student *** a lot in the classroom. Mother told Assistant Principal *** that Student *** in class as a coping mechanism.⁷⁷
51. At the beginning of the school year, Mother did not tell Assistant Principal *** that Student had a history of *** at Student's previous schools.⁷⁸
52. Mother began to suspect Student had an undiagnosed condition. Student had behavioral problems before transferring to ***, but now Student was more "shut down;" social interactions were worse; Student was more overwhelmed by the loudness of the school; Mr. *** said Student wanted to ***; and Student's anxiety was very high related to sensory issues. Mother thought Student needed an autism evaluation.⁷⁹
53. Student's behavior was more severe than Mother had seen in a year.⁸⁰
54. Based on information from Mother and Principal ***, and her ongoing therapy with Student, Dr. *** determined that Student was beginning to regress at *** and she asked Principal *** if the District was going to conduct a special education evaluation of Student to determine the best placement for Student.⁸¹
55. By *** 2014, the District had attempted to help Student by having multiple meetings with Mother; applying positive and negative reinforcements; using frequent redirections and warnings; speaking by telephone with Dr. ***; collaborating with the *** staff; and imposing consequences.⁸²

⁷⁵ Respondent Ex. 18 at 1.

⁷⁶ Respondent Ex. 18 at 1.

⁷⁷ Tr. at 112 (***).

⁷⁸ Tr. at 113 (***).

⁷⁹ Tr. at 743-744 (Mother).

⁸⁰ Tr. at 747 (Mother).

⁸¹ Tr. at 192, 196-197, 199-200 (***). Dr. *** did not testify as to when the conversation occurred.

⁸² Tr. at 89-90 (***); Respondent Ex. 4, Respondent Ex. 15; Respondent Ex. 18 at 1. *** is part of the District's *** program. Petitioner Ex. 15 at 8.

56. After multiple requests to both Mother and ***, Mother provided the District with Student's private clinical evaluation conducted by Dr. ***, clinical psychologist, in 2012.⁸³
57. On *** 2014, the District requested the assistance of a Licensed Specialist in School Psychology (LSSP) for the Section 504 meeting to be held *** 2014. The District needed the LSSP's assistance in reviewing Dr. ***'s evaluation.⁸⁴
- a. According to the evaluation, Dr. *** found Student, then age ***, to be *** with diagnostic impressions of ADHD, ODD, and Mood Disorder, NOS.⁸⁵ She explained that Student's diagnostic picture is a complex one and that, while Student's ultimate diagnoses might not have been clear at the time, it would be very important to continue to treat Student's self-regulation and affect modulation difficulties both pharmacologically and through psychotherapy to provide symptomatic relief.⁸⁶
 - b. During the evaluation, Student appeared to Dr. *** to be a highly *** learner, in that Student often *** while speaking with her, and appeared to seek this type of *** throughout the evaluation time.⁸⁷ Student's lowest Woodcock-Johnson III subtest score (**% percentile or low average range for grade) was on a listening task that required Student to simultaneously listen to and follow a set of multi-step directions of increasing levels of complexity.⁸⁸
 - c. Dr. *** noted that Student consistently displayed signs of impulsivity and self-regulation difficulties throughout the course of the 5-hour evaluation.⁸⁹
 - d. Dr. *** concluded that Student is an intellectually gifted child of exceptional verbal and perceptual reasoning abilities, and overall very superior intelligence. Dr. *** found no evidence of learning disabilities.⁹⁰
58. On *** 2014, Student received a day of in-school suspension for yelling from the back of the classroom, "****. ***, " as the teacher was presenting an assignment to the class.⁹¹

⁸³ Respondent Ex. 4; Respondent Ex. 18 at 1.

⁸⁴ Petitioner Ex. 7; Respondent Ex. 18.

⁸⁵ Petitioner Ex. 7 at 12; Respondent Ex. 4 at 9, 11.

⁸⁶ Petitioner Ex. 7 at 10.

⁸⁷ Petitioner Ex. 7 at 4.

⁸⁸ Petitioner Ex. 7 at 7.

⁸⁹ Petitioner Ex. 7 at 9-10.

⁹⁰ Petitioner Ex. 7 at 9-10.

⁹¹ Petitioner Ex. 10 at 11; Respondent Ex. 19 at 2.

59. On *** 2014, Student refused to leave the classroom and go to *** class with the rest of the students. The teachers asked administrators for assistance because Student was non-compliant and unresponsive to questioning. When Assistant Principal *** entered the classroom, Student was sitting at Student's desk with Student's head down. After multiple requests and counting to five, Student eventually stood up and walked to the office. Student remained there until *** class was over. Student then returned to the classroom and ***.⁹²
60. In a second incident on *** 2014, Student received a 1-day out-of-school suspension for leaving the *** without permission and returning to the ***. The teacher followed Student to say Student could not do that. Student responded, "****. ***." Student took Student's *** (which is what Student had left the *** to get) and called the teacher ***."⁹³
61. Between the first day of school and the first Section 504 meeting for Student, on *** 2014, Assistant Principal *** did not provide Parents with information about Child Find, but did provide them with information about Section 504 accommodations.⁹⁴
62. Prior to the Section 504 meeting in *** 2014, *** had a team of people working with Student in an attempt to de-escalate Student and help Student be successful in the general education setting. They collaborated with Parents; worked on finding out what incentives would get Student to complete Student's work; had private conversations with Student about what Student thought could help Student be successful at school; attempted to refer Student to District's *** (*** for counseling, but Mother rejected the idea; and looked at getting recommendations through the District's ***. Staff focused more on Student's behavior than on academics because Student was a *** child.⁹⁵
63. By the *** 2014 Section 504 meeting, Assistant Principal *** believed the District had not exhausted all of the regular education interventions for Student.⁹⁶
64. Prior to the Section 504 meeting, no Section 504 accommodations were in place for Student.⁹⁷
65. On *** 2014, the District held an initial Section 504 meeting for Student and determined Student met eligibility for Section 504 services. The meeting notes reflect that Student has medical diagnoses of ADHD, anxiety, and ODD. The notes also state that Student was failing all content; participated in class when Student was awake and present; cursed

⁹² Petitioner Ex. 10 at 11; Respondent Ex. 19 at 2.

⁹³ Petitioner Ex. 10 at 11; Respondent Ex. 19 at 2.

⁹⁴ Tr. at 90 (***).

⁹⁵ Tr. at 107-108, 111-112-115 (***); Respondent Ex. 17.

⁹⁶ Tr. at 114 (***).

⁹⁷ Tr. at 99 (***).

- ***; sometimes ***; had some friends but ***; and had left the *** without permission. Meeting notes state that behavior interventions had been inconsistent. Principal *** reported that parents of other students had called the school concerned about what their children were seeing and hearing from Student. Student's Parents asked to be copied on emails every day to be aware of Student's behaviors for the day and also requested copies of Student's work.⁹⁸
66. During the *** 2014 Section 504 meeting, Mother requested a special education evaluation⁹⁹ to determine if Student has Autism Spectrum Disorder. ***, LSSP, did not believe that an evaluation was warranted and instead recommended a Tier II (targeted group interventions) Behavior Intervention Plan (BIP), so Mother's request was declined.¹⁰⁰
67. Assistant Principal *** does not recall Mother requesting a special education evaluation during the *** 2014 Section 504 meeting or the LSSP in attendance telling Parents they should not have Student evaluated for special education. Such a request and reply are not in the minutes of the meeting.¹⁰¹
68. The District did not give Parents prior written notice of refusal to conduct the requested special education evaluation and Parents did not know they could dispute the refusal.¹⁰²
69. Mother requested the special education evaluation because Student was struggling with more issues than anxiety and she thought Student might be on the autism spectrum. Also, she had heard that the District had a program for students with autism; she hoped Student would be eligible for that program and possibly receive more support.¹⁰³
70. Parents did not receive special education information from the District before Student began *** grade at ***. They did not know they could have requested a special education evaluation before Student began *** grade. They were not aware that they could have asked the District for a special education evaluation of Student when Student, attended ***, a private school located in the District, and had behavioral problems.¹⁰⁴

⁹⁸ Petitioner Ex. 10 at 8-10, 17; Respondent Ex. 15 at 1, 1a, 2-3.

⁹⁹ Tr. at 368-369 (Father); Petitioner Ex. 13 at 3; Respondent Ex. 13 at 1a.

¹⁰⁰ Tr. at 754 (Mother); Tr. at 363 (Father); Petitioner Ex. 37 at 2; *see* Petitioner Ex. 16 at 11 for description of a Tier II behavior plan.

¹⁰¹ Tr. at 91-92; 131-132 (***).

¹⁰² Tr. at 363-364 (Father). The hearing officer notes that the failure to provide prior written notice occurred before the *** 2014 accrual date for this proceeding.

¹⁰³ Tr. at 750 (Mother). The District has a program for high functioning students with autism. Tr. at 617 (***). The record is silent as to whether Student, who is eligible for special education services as a child with Emotional Disturbance but not autism, would be permitted to participate in the District's program.

¹⁰⁴ Tr. at 361-363 (Father).

71. On *** 2014, Student refused to ***, instead telling the teacher Student was not interested in what she was saying. Student looked at her and said, “****.” Student then ***. The principal was called to get Student.¹⁰⁵
72. On *** 2014, Student received a 1-day in-school suspension for not following directions, mocking the teacher, calling the teacher a “****,” and yelling, “****” before leaving the classroom to go to the office.¹⁰⁶
73. On *** 2014, after *** for most of the morning, Student got all of Student’s work done.¹⁰⁷
74. During *** 2014, Student participated briefly in ***, the District’s *** program, 1 day per week.¹⁰⁸
75. On *** 2014, Mother and Student signed a form declining all *** services for Student. The reason for the decision, initiated by Parent, was that transitions and the bus ride to the *** program were too hard for Student, who was not ready for *** until Student’s grades improved and stabilized.¹⁰⁹
76. On *** 2014, Student *** *** all but *** hours of the day, yet managed to get all of Student’s work done.¹¹⁰
77. On *** 2014, Student was very disruptive, refused to do any work, and *** a classmate until ***.¹¹¹
78. On *** 2014, Student played with *** during instruction, ***, ***, and ***. Student did not follow teacher’s redirections.¹¹²
79. In a second incident on *** 2014, Student called ***. Student refused to sit down and walked away from the teachers. Student got ***. Administrators were called to retrieve Student. Student served a 1-day out-of-school suspension as a result of Student’s misbehavior.¹¹³

¹⁰⁵ Petitioner Ex. 10 at 13; Petitioner Ex. 35 at 4; Respondent Ex. 19 at 1-2.

¹⁰⁶ Petitioner Ex. 10 at 13; Respondent Ex. 19 at 1.

¹⁰⁷ Petitioner Ex. 33 at 14.

¹⁰⁸ Petitioner Ex. 15 at 8.

¹⁰⁹ Petitioner Ex. 10 at 13; Respondent Ex. 22.

¹¹⁰ Petitioner Ex. 33 at 15.

¹¹¹ Petitioner Ex. 33 at 16.

¹¹² Petitioner Ex. 10 at 13; Respondent Ex. 19 at 1.

¹¹³ Petitioner Ex. 10 at 13; Respondent Ex. 19 at 1.

80. During the *** 2014, Student's anxiety was very high. Student complained of ***, and was generally unwilling to go to school. Student often went several days *** and it did not seem to correlate with ***. Sometimes Student would *** and again, there was no correlation. Student was also having difficulty with emotional regulation. Student was ***.¹¹⁴
81. *** is not uncommon for children on the autism spectrum in moments of heightened anxiety.¹¹⁵
82. While Student was at ***, Dr. *** saw Student biweekly or weekly, depending on what was going on at the time.¹¹⁶
- a. She was concerned that Student was not in a small classroom setting, and that Student was becoming more anxious, more withdrawn, and unwilling to comply.¹¹⁷
 - b. Student was beginning to regress in the sense that Student was losing some of the skills that Student had attained at *** such as social/peer interaction, being able to be proud of Student's work, and being more admiring of ***self and Student's capabilities while relying on less positive reinforcement from others.¹¹⁸
 - c. Student's verbal aggression and physical aggression were primitive responses, which Student also exhibited when Student first started at ***.¹¹⁹
 - d. Student had a hard time describing Student's thoughts and feelings through words. While at ***, Student worked hard to be able to use Student's words.¹²⁰
83. By *** 2014, Mother had toured three other schools in search of an option for Student's 2015-2016 school year. While certain that Student was not being educated and knowing Student would not pass the *** grade, Mother felt Student could survive until Parents could make a decision regarding an alternate placement.¹²¹

¹¹⁴ Petitioner Ex. 37 at 4.

¹¹⁵ Tr. at 184 (***).

¹¹⁶ Tr. at 170 (***).

¹¹⁷ Tr. at 170 (***).

¹¹⁸ Tr. at 170 (***).

¹¹⁹ Tr. at 170-171 (***).

¹²⁰ Tr. at 170-171 (***).

¹²¹ Petitioner Ex. 37 at 3.

84. Before ***, Student told Mother that, at least twice, Student *** in the classroom *** with the ***. The teacher had left Student there and ***. Student woke up by ***self in the dark and ate at Student's desk. Student told Mother Student liked the quiet.¹²²
85. After the District declined Mother's *** 2014 request for a special education evaluation, and Parents suspected Student was on the autism spectrum, Parents made an appointment with the *** (***), an outside evaluator, and an evaluation of Student was completed in *** 2014. Parents paid \$2,430.00 for the evaluation.¹²³
- a. The *** team completed an Independent Educational Evaluation (IEE) on *** 2014.¹²⁴
 - b. The *** team's primary diagnosis of Student was Autism Spectrum Disorder, without accompanying language or intellectual impairments, Level One, which is the milder end of the spectrum.¹²⁵ Children on the higher end of the spectrum might not be identified until they are between *** and *** years old. The *** team felt that Student's deficits in cognitive flexibility, social functioning, and emotional behavior regulation were greater than for individuals who only have ADHD or ODD or mood issues, and that the deficits were better explained within the context of an Autism Spectrum Disorder diagnosis.¹²⁶
 - c. A number of tests, including the Autism Diagnostic Observation Schedule-Second Edition (ADOS-2), were administered during the IEE.¹²⁷ Student's Academic Skills cluster score was in the High Average range and no learning disability was identified.¹²⁸ While Student's *** Facts Fluency score was in the *** percentile, it was not low enough to identify a learning disability.¹²⁹ The evaluator concluded that Student is highly intelligent, evidencing a full scale IQ of ***.¹³⁰ Based on numerous other tests, the evaluator also concluded "[Student] is continuing to present with many symptoms consistent with Student's previous diagnostic classifications, but Student's deficits in cognitive flexibility, social functioning, and emotional and behavioral regulation appear to be greater than

¹²² Petitioner Ex. 37 at 4.

¹²³ Tr. at 364-366 (Father); Petitioner Ex. 12; Petitioner Ex. 24 at 1-2; Petitioner Ex. 37 at 2.

¹²⁴ Petitioner Ex. 12; Petitioner Ex. 24; Respondent Ex. 3.

¹²⁵ Tr. at 40, 42-43, 62 (***-***).

¹²⁶ Tr. at 36, 55-57, 59-60 (***-***).

¹²⁷ Petitioner Ex. 12 at 6; Respondent Ex. 3 at 6.

¹²⁸ Tr. at 42 (***-***); Petitioner Ex. 12 at 10.

¹²⁹ Petitioner Ex. 12 at 9-10.

¹³⁰ Petitioner Ex. 12 at 7; Petitioner Ex. 15 at 13-15; Respondent Ex. 3 at 7.

those typically seen in individuals with those diagnoses and are consistent with a diagnosis of Autism Spectrum Disorder.”¹³¹

- d. Student’s ***-grade homeroom and ***/*** teacher, ***, completed a Teacher Report Form for the *** team using the Achenbach Child Behavior Checklist. She stated that Student was “defiant” and “gets pleasure from bothering and being mean to adults and other students,” and that Student “***,”***. She stated Student typically *** during class. Behaviors she noted that were clinically significant were withdrawal/depressed behaviors, rule breaking, and aggressive behaviors. Ms. *** said Student was performing somewhat below grade level in *** and far below grade level in ***, ***, ***, and ***.¹³²
- e. The evaluator noted that, “[Student’s] challenges in emotional regulation and coordination with others continued to derail Student’s ability to fully access learning opportunities” and Student’s “challenges with self-regulation, social coordination, and academic consistency have continued.”¹³³
- f. The *** team concluded that individual instruction would continue to be important for aiding Student in attaining scholastic and interpersonal success.¹³⁴
- g. Recommendations included establishing self-regulation and self-awareness objectives, such as strategies for calming ***self when angry, upset, or anxious; becoming aware of Student’s affect and working with others to identify and monitor Student’s negative moods; learning to transition more flexibly and adapt to situations when prompted by an adult; learning and using tools to help Student pay attention, stay focused, and control Student’s body; and thinking about Student’s goals throughout the day and evening, rating ***self, and listening to what adults think about Student’s progress. Suggested social and relationship development objectives included paying attention to adults and doing what they ask; learning to wait and take turns; and thinking about how to talk and act so the person Student is with will stay connected to Student. Suggested academic objectives included regularly practicing skills adults tell Student Student should improve, and putting forth Student’s best efforts on all tasks, even those that seem too hard, recognizing that Student does not have to always be right while learning.¹³⁵

¹³¹ Petitioner Ex. 12 at 11-14, 18; Respondent Ex. 3 at 11-14, 18. Dr. *** described the ADOS-2, used by ***, as the “gold standard” for evaluating for Autism Spectrum Disorder. Tr. at 339, 343 (***).

¹³² Tr. at 49-51, 53 (***-***); Petitioner Ex. 12 at 14-15; Respondent Ex. 3 at 14-15.

¹³³ Petitioner Ex. 12 at 3; Respondent Ex. 3 at 3.

¹³⁴ Petitioner Ex. 12 at 18; Respondent Ex. 3 at 18.

¹³⁵ Petitioner Ex. 12 at 19-32; Respondent Ex. 3 at 19-32.

- h. ***'s written IEE report was not completed until *** 2015, when Mother provided the IEE report to the District.¹³⁶
86. Dr. *** agrees with ***'s determination that Student has Autism Spectrum Disorder. She explained that the autism diagnosis captures the array of diagnoses Student received from multiple professionals prior to the *** evaluation. Student's dysregulation, anxiety, sensory issues, delays in speech, and poor social communication make sense under the autism diagnosis. Student's ability to make eye contact and hold a conversation, as described in Dr. ***'s report, does not negate the autism diagnosis. She described Student's diagnosis as Autism Spectrum Disorder High Functioning, because Student is verbal and ***.¹³⁷
87. Dr. ***'s working diagnosis of Student is that Student is on the autism spectrum with secondary diagnoses around depression and anxiety. She agrees with the *** IEE that a child can be on the autism spectrum and also have depression, anxiety, and ODD.¹³⁸
88. Dr. *** does not disagree with the diagnoses of Dr. *** and Dr. ***. But over a period of time, Student has shown more of a manifestation within the diagnosis on the autism spectrum. The ODD, the ADHD, and the anxiety disorders are secondary, which is not uncommon for children who are on the autism spectrum.¹³⁹
89. On ***, 2015, while in ***, Student ***, saying later that Student *** because Student was angry that she asked Student to follow directions. Administrators and District police warned Student that *** is *** and the criminal process had changed for Student now that Student was ***. Student was suspended for 2 days.¹⁴⁰
90. On ***, 2015, Student was physically aggressive towards Student's teacher, Ms. ***, ***.¹⁴¹ During this incident, the teacher and Student had words. Student threatened to "****"; the teacher responded "****." Assistant Principal *** entered the classroom and restrained Student *** to prevent Student from *** Ms. *** ***. District police were called. Student was suspended for 3 days. The next day, Ms. *** ***.¹⁴²

¹³⁶ Petitioner Ex. 14.

¹³⁷ Tr. at 311-312, 330, 338, 346-348 (***); Respondent Ex. 4 at 3, 4.

¹³⁸ Tr. at 156-157 (***).

¹³⁹ Tr. at 187 (***).

¹⁴⁰ Tr. at 401-402 (Father); Petitioner Ex. 10 at 13; Respondent Ex. 19 at 1.

¹⁴¹ Petitioner Ex. 10 at 13; Respondent Ex. 13 at 30; Respondent Ex. 19 at 1.

¹⁴² Tr. at 405 (Father); Tr. at 774 (Mother); Petitioner Ex. 10 at 13; Petitioner Ex. 33 at 21-23; Petitioner Ex. 37 at 4; Respondent Ex. 19 at 1. Ms. *** confirmed to Assistant Principal *** that she had made the "****" comment. Petitioner Ex. 37 at 5.

91. Ms. ***, the District's expert witness in behavior management, believes it was not appropriate for police to be called to intervene with Student in the classroom at ***, but did not explain why.¹⁴³
92. Dr. *** was surprised by the ***, 2015 incident between Student and Student's teacher, because Student had worked so diligently on personal boundaries and respecting the boundaries of others when Student was at ***.¹⁴⁴
93. By ***, 2015, Student had five out-of-school suspensions totaling *** days and three in-school suspensions covering *** days. In addition to the *** days of suspension, there were a number of days when Parents were called because Student was excessive in Student's behavior, and other days when Mother checked Student out of school.¹⁴⁵
94. Student's Section 504 committee met on ***, 2015.
- a. The review meeting was held because Student had been suspended from school for *** Ms. ***.¹⁴⁶
 - b. All committee members, including Parents, agreed upon a special education referral.¹⁴⁷
 - c. Two placement options were offered pending completion of the Full and Individual Evaluation (FIE): Student could be moved to another teacher's classroom at ***, with a "shadow" adult, or Student could attend the *** program on a different campus as a behavior intervention, not as a disciplinary placement.¹⁴⁸
 - d. The committee acknowledged that Mother had requested a special education evaluation in *** 2014, which the District declined.¹⁴⁹
95. Student's Section 504 committee met again on ***, 2015, and decided Student would be transitioned to the *** program beginning *** 2015.
- a. Parents provided consent for the District to conduct an FIE of Student in the areas of autism, emotional disturbance, other health impairment, speech, and learning disability.¹⁵⁰

¹⁴³ Tr. at 608 (***)

¹⁴⁴ Tr. at 172 (***)

¹⁴⁵ Tr. at 101-102 (***); Respondent Ex. 19.

¹⁴⁶ Petitioner Ex. 13 at 23; Respondent Ex. 14.

¹⁴⁷ Petitioner Ex. 13 at 23; Respondent Ex. 14.

¹⁴⁸ Tr. at 138 (***); Petitioner Ex. 13 at 23; Respondent Ex. 14.

¹⁴⁹ Tr. at 751 (Mother); Petitioner Ex. 13 at 3-4, 23; Petitioner Ex. 37 at 5; Respondent Ex. 13 at 1a; Respondent Ex. 14.

¹⁵⁰ Respondent Ex. 30 at 1, 3, 19.

- b. The committee agreed that Student's special education assessments would begin once Student transitioned from *** to the *** program.¹⁵¹
96. On ***, 2015, Mother signed a receipt stating she had received a Notice of Procedural Safeguards, but she did not have a chance to read the information before signing the receipt.¹⁵²
97. In Assistant Principal ***'s opinion, Student was timely referred for a special education evaluation.¹⁵³
98. The FIE report completed on ***, 2015, identified Student as a child with an Emotional Disturbance who is eligible for special education services.¹⁵⁴
- a. Members of the multidisciplinary team who evaluated student included Ms. ***, Ms. ***, and ***, M.Ed., Educational Diagnostician.¹⁵⁵
- b. According to the FIE, Student had failed the ***-weeks grading period in ***, ***, and ***.¹⁵⁶
- c. The FIE stated that, by the date of the report, Student had 14 disciplinary infractions including: (1) refusal to follow adult directions; (2) profanity; (3) verbal threats; (4) leaving class without permission; (5) touching the teacher's instructional materials without permission; and (6) physical aggression toward ***.¹⁵⁷
- d. The team looked for all areas of disability in addition to autism, other health impairment, speech impairment, emotional disturbance, and a learning disability, as listed in the parental consent form.¹⁵⁸
- e. Because Parents raised concerns that Student might be exhibiting characteristics consistent with Autism Spectrum Disorder, the FIE multidisciplinary team administered the Autism Spectrum Rating Scales (ASRS). The team assessed Student's emotional and behavioral functioning using the Behavior Rating Inventory of Executive Function (BRIEF), observed Student in the *** classroom,

¹⁵¹ Tr. at 139 (***); Petitioner Ex. 13 at 8-9, 15; Respondent Ex. 13 at 1-1a, 9-10.

¹⁵² Tr. at 934-935 (***); Tr. at 937-939 (Mother); Respondent Ex. 30 at 4.

¹⁵³ Tr. at 123-124 (***).

¹⁵⁴ Respondent Ex. 2; Petitioner Ex. 15; *see also* Respondent Ex. 1 at 1, 19, 25.

¹⁵⁵ Petitioner Ex. 15 at 27.

¹⁵⁶ Respondent Ex. 2 at 10.

¹⁵⁷ Respondent Ex. 2 at 19.

¹⁵⁸ Tr. at 517 (***).

and obtained a self-report of Student's behaviors using a standardized behavior rating scale (BASC2-SRP).¹⁵⁹

- f. The multidisciplinary team concluded that Student did not meet the criteria for Autism Spectrum Disorder because the assessment data did not indicate verbal or nonverbal communication needs or the presence of restricted, repetitive patterns of behavior interests, or activities negatively impacting Student's educational functioning. The multidisciplinary team found that Student is best described as a child with poor emotional and behavioral regulation who meets criteria for Emotional Disturbance.¹⁶⁰
- g. The FIE team found Student to meet special education eligibility for Emotional Disturbance due to inappropriate feelings or behaviors under normal circumstances. "Normal circumstances" means there has been no significant trauma in Student's life over a long period of time that would cause the difficulty with emotional and behavioral regulation; the team ruled out sociological and physical problems.¹⁶¹
- h. The multidisciplinary team concluded that the intensity and severity of Student's emotional and behavioral deficits appear to be the primary cause of Student's educational difficulties and intensive intervention is necessary.¹⁶²
- i. Having worked with Student in the *** program at *** from *** through *** 2015, Ms. ***, a certified autism specialist, believes the FIE team correctly determined Student meets the criteria for Emotional Disturbance rather than falling on the autism spectrum.¹⁶³
- j. Ms. *** believes Student is not on the autism spectrum because Student did not exhibit restricted or repetitive behaviors in the educational setting that were impairing Student's learning, either currently or historically.¹⁶⁴

¹⁵⁹ Petitioner Ex. 15 at 20-24.

¹⁶⁰ Tr. at 596, 627-628 (***) ; Petitioner Ex. 15 at 3, 7, 16-17, 25-26; Respondent Ex. 2 at 25-26. While much evidence was presented regarding Student's Autism Spectrum Disorder diagnosis, the appropriateness of the FIE and hence, the multidisciplinary team's finding that Student is eligible for special education services as a child with an Emotional Disturbance but not autism, is not at issue in this proceeding.

¹⁶¹ Tr. at 557, 597-598 (***) .

¹⁶² Tr. at 596, 627-628 (***) ; Petitioner Ex. 15 at 3, 7, 16-17, 25-26; Respondent Ex. 2 at 25-26. While much evidence was presented regarding Student's autism spectrum diagnoses, the appropriateness of the FIE and hence, the multidisciplinary team's finding that Student is eligible for special education services as a child with an Emotional Disturbance and not autism, is not at issue in this proceeding.

¹⁶³ Tr. at 837 (***) .

¹⁶⁴ Tr. at 574-576, 580 (***) . The FIE team did not administer the ADOS paired with the Autism Diagnostic Review Revised, which Ms. *** described as the "gold standard" for autism evaluations. Tr. at 578 (***) . The *** team administered the ADOS to Student. Petitioner Ex. 12 at 6, 12-14.

- k. Ms. *** is certain that the multidisciplinary team reached the correct conclusion when determining that Student does not fall on the autism spectrum. She does not believe that Student's social deficits are related to autism. Student's receiving speech articulation therapy at the age of *** is irrelevant in determining whether Student is on the autism spectrum.¹⁶⁵
- l. When autism is one of the suspected areas of disability, Ms. *** looks at how the child is using language and communication across multiple contacts. Her assessment of Student involved Student's interaction with peers and adults in the *** program, where *** students were in the classroom.¹⁶⁶ She observed Student's verbal and nonverbal communication for about 3 hours per day on 2 separate days and also observed Student transitioning to ***.¹⁶⁷
- m. While Student is capable of using pragmatic language, Student might not do so in a volatile, stressful or emotionally-charged situation. Failure to use pragmatic language in an emotionally-charged situation does not necessarily mean that Student is on the autism spectrum.¹⁶⁸ Ms. *** observed Student kicking and yelling at a teacher three or four times, for about a minute per time, and said Student probably was not using appropriate language at the time to explain why Student was upset. She did not observe Student in an extended altercation and did not ask for any of Student's language samples from those situations.¹⁶⁹
- n. Mr. ***, Student's teacher in the *** general education classroom before Student was moved to the *** program, reported to Ms. *** that Student exhibited average receptive and expressive language skills.¹⁷⁰
- o. The scores on Student's standardized language assessment are not consistent with those of a child with autism. Student received an above-average score on the nonliteral language subtest and an average score on the pragmatic language subtest.¹⁷¹
- p. As part of the FIE, Ms. *** observed Student in the *** classroom on ***, 2014, during *** class. Initially, Student ***. Student *** appropriately participated in the class. She did not see Student engaged in any academic tasks, thus did not

¹⁶⁵ Tr. at 527-528, 556-557, 559 (***).

¹⁶⁶ Tr. at 518, 541 (***); *see* Respondent Ex. 2.

¹⁶⁷ Tr. at 535-536, 540 (***).

¹⁶⁸ Tr. at 550, 556 (***).

¹⁶⁹ Tr. at 551-552 (***).

¹⁷⁰ Tr. at 520 (***).

¹⁷¹ Tr. at 520-521, 523, 525 (***).

observe Student's reactions when the demand of school work completion was placed on Student.¹⁷²

- q. In conducting her portion of the FIE, Ms. *** reviewed Student's records from ***, spoke with Dr. ***, and administered the Vineland Adaptive Behavior Scales, Second Edition; the Behavior Assessment System for Children completed by Parents, two classroom teachers, and Student; Autism Spectrum Rating Scales; and the Behavior Rating Inventory of Executive Function, Incomplete Sentence Blank.¹⁷³

- r. Ms. *** observed Student doing Language Arts and Math activities in the *** classroom. During Math, Student was working with a preferred adult, and Student was having some difficulty getting through the assignment, so the adult was prompting Student. Ms. *** observed little engagement, some ***, some work refusal, and not a lot of work production by Student. Student's teachers were decreasing the work demands as a primary means of keeping Student calm and it did keep the aggression down.¹⁷⁴

- s. Ms. *** determined that Student "still demonstrates a persistent pattern of inattention, hyperactivity, impulsivity, angry and irritable mood, and argumentative, defiant behavior which is consistent with Student's previous diagnoses of ADHD and ODD."¹⁷⁵

- t. Ms. ***'s recommendations as contained in the FIE take into account Student's ADHD diagnosis. She recommended that a smaller student/teacher ratio, more structure, and routine such as offered in the *** program would benefit Student.¹⁷⁶

- u. In order to help the FIE team identify Student's problematic behaviors within the school setting, Student's classroom teachers completed standardized behavior rating scales (BASC/2-TRS). Scores fell within the clinically significant range in the following areas: Hyperactivity (the tendency to be overly active, rush through work or activities, and act without thinking); Aggression (the tendency to act in a physically or verbally hostile manner that is threatening to others); Conduct Problems (the tendency to engage in rule-breaking behavior); Atypicality (the tendency to behave in ways that are immature or considered odd); Withdrawal (the tendency to evade others to avoid social contact); and Social Skills

¹⁷² Petitioner Ex. 15 at 15-16.

¹⁷³ Tr. at 310, 589-591 (***); *see* Respondent Ex. 2 at 1-2.

¹⁷⁴ Tr. at 569-570 (***).

¹⁷⁵ Respondent Ex. 2 at 25.

¹⁷⁶ Tr. at 572 (***); Respondent Ex. 2 at 26-27.

(significant difficulty with the skills necessary to successfully interact with peers and adults).¹⁷⁷

- v. According to the FIE report, examples of items Student's teachers endorsed as problematic were: bothers other children when they are working; acts without thinking; has poor self-control; does not wait to take turn; argues when denied own way; loses temper too easily; defies teachers; ***; threatens to hurt others; annoys others on purpose; breaks the rules; disobeys; sneaks around; uses others' things without permission; gets into trouble; ***; acts strangely; refuses to join group activities; avoids other children; and has trouble making new friends.¹⁷⁸
- w. According to the FIE, school staff reported that when working with Student one-on-one, Student can be personable and enjoyable to talk with. School staff reported that Student has significantly more problems with Student's social and behavioral functioning in larger environments.¹⁷⁹
- x. The FIE multidisciplinary team recommended that the ARD committee consider eligibility for special education for Student in the area of Emotional Disturbance, noting that Student had developed some friends at school, responds appropriately to praise and rewards, and is creative and enjoys ***. The multidisciplinary team stated Student would need a highly-structured predictable environment with significant amounts of positive individual attention and immediate feedback regarding behavioral performance; regular opportunities for physical movement throughout the day ("brain breaks"); direct instruction in the areas of self-regulation and control by teaching, modeling, and practicing coping strategies and replacement behaviors to increase prosocial behaviors in the educational setting, starting with replacement behaviors for physical aggression, verbal aggression, and leaving Student's assigned area without permission, as these pose a significant safety risk to Student and others; a safe place to cool off; and social skills instruction with a focus on effectively resolving peer conflict and compromising with others. The multidisciplinary team also made recommendations to address Student's executive dysfunction.¹⁸⁰
- y. The FIE team recommended: (1) a highly-structured, predictable environment with positive individual attention with opportunity for physical movement; (2) direct instruction in the areas of self-regulation and behavioral control; (3) a safe place to cool off; (4) social skills instruction; and (5) accommodations to assist with executive functioning.¹⁸¹

¹⁷⁷ Petitioner Ex. 15 at 19-20.

¹⁷⁸ Petitioner Ex. 15 at 20.

¹⁷⁹ Petitioner Ex. 15 at 19.

¹⁸⁰ Petitioner Ex. 15 at 26-27. *** seems to soothe Student. Tr. at 360 (Father); Petitioner Ex. 2.

¹⁸¹ Respondent Ex. 2 at 26-27.

- z. The FIE recommendations and ***'s recommendations are essentially the same. The majority of the recommendations from *** are about emotional and behavioral regulation and social skills development as are the FIE recommendations.¹⁸²
- aa. Ms. ***'s recommendations did not include the use of restraints because they are not a form of behavior management, but rather to be used to protect the child or someone else.¹⁸³
99. A Functional Behavior Assessment (FBA) for Student was completed on ***, 2015.
- a. The FBA stated Student left the classroom without permission when demands or requests were made, consequences were imposed, or Student was subjected to correction or redirection.¹⁸⁴ Starting in *** 2014, Student left the classroom without permission two or three times per *** for between 10 minutes and 45 minutes at a time.¹⁸⁵
- b. According to the FBA, Student had engaged in verbal aggression at least once per *** for 1 or 2 minutes at a time since ***. Responses that seemed to decrease the behavior included avoiding power struggles, giving Student frequent breaks to ***, and a reinforcement system with short-term goals.¹⁸⁶
- c. According to the FBA, Student had engaged in physical aggression at least one or two times per ***, for 5 minutes at a time, since ***.¹⁸⁷
100. Formal and informal data collected between *** 2014 and *** 2015 suggested concerns with Student's emotional and behavioral regulation.¹⁸⁸
101. From *** 2014 to *** 2015, Student had *** referrals for noncompliance, profanity and threats, leaving class without permission, touching the teacher's materials without permission, and physical aggression.¹⁸⁹
102. An ARD committee meeting was held on ***, 2015, to consider the FIE and FBA, among other things. The ARD committee determined that Student met eligibility criteria

¹⁸² Tr. at 584 (***).

¹⁸³ Tr. at 611 (***); Tr. at 721 (***).

¹⁸⁴ Petitioner Ex. 16 at 29-30, 36-37; Respondent Ex. 1 at 26.

¹⁸⁵ Petitioner Ex. 16 at 29; Respondent Ex. 1 at 26.

¹⁸⁶ Petitioner Ex. 16 at 31-32, 36; Respondent Ex. 1 at 28.

¹⁸⁷ Petitioner Ex. 16 at 32-35; Respondent Ex. 1 at 29.

¹⁸⁸ Respondent Ex. 1 at 25.

¹⁸⁹ Respondent Ex. 1 at 25.

for special education with the primary disability of Emotional Disturbance.¹⁹⁰ Because Student's behavior impedes Student's own learning or that of others, a BIP was developed to modify the Student Code of Conduct for Student.¹⁹¹

- a. The ARD committee determined that Student's disability affected Student's progress in all general education curriculum classes¹⁹² and proposed placement in the *** program at ***.
 - b. Mother expressed concern about yet another transition for Student but ultimately agreed with Student's placement at *** because Ms. ***, a District Coordinator for Special Education, assured her that it was the best placement for Student, that Student would get what Student needed, and Student would improve a lot. Mother deferred to Ms. ***'s judgment because Ms. *** is an educator.¹⁹³
 - c. Parents wanted assurances that *** staff could handle Student without police involvement, because Student had been so traumatized by Student's interaction with police at *** and bringing police in would not de-escalate a situation. Ms. *** assured Parents that the special education teachers at *** are highly trained and that police intervention would not be necessary but that a *** teacher might be called in to assist if things got out of control.¹⁹⁴
103. A preponderance of the evidence establishes that the District was aware of Student's ADHD, Combined Type diagnosis as early as *** 2014.
104. A preponderance of the evidence establishes that by *** 2014, the District was aware of Dr. ***'s diagnoses of Student as a child with ADHD, Mood Disorder, and ODD, as well as ***.
105. A preponderance of the evidence establishes that Mother's request for a special education evaluation, due to her suspicion that Student has Autism Spectrum Disorder, was made and rejected at Student's Section 504 committee meeting on *** 2014.
106. A preponderance of the evidence establishes that, by the October *** 2014 accrual date for this proceeding, the District should have suspected that Student had areas of disability that had not been evaluated and for which Student might be eligible for special education and related services.

¹⁹⁰ Petitioner Ex. 16 at 1-2.

¹⁹¹ Petitioner Ex. 16 at 1-2.

¹⁹² Respondent Ex. 1 at 3.

¹⁹³ Tr. at 756 (Mother).

¹⁹⁴ Tr. at 757-758 (Mother). Mother refers to *** program staff in her testimony, but apparently meant *** staff. Student's FIE contained no statement that Student was traumatized by interaction with police on ***, 2015, at ***. At ***, Ms. *** was with Student twice when police were present and did not observe Student to be anxious. Once, Student was in Student's seat ***. Tr. at 810-812 (***).

107. A preponderance of the evidence establishes that despite being aware of Student's medical diagnoses no later than *** 2014, the District did not evaluate Student in all areas of suspected disability until *** 2015 and did not offer Student special education and related services until *** 2015.
108. The District did not timely refer Student for a special education evaluation.

Issue 2:

Did the District fail to provide a FAPE to Student during the 2014-15 school year?

109. Student was in the general education classroom at *** from ***, 2014, to ***, 2015; was moved to the *** program from *** 2015, to *** 2015, as a behavioral intervention while the District completed Student's FIE; and, on *** 2015, after ***, was placed in the *** program at ***, where Student finished the school year. Student has not returned to the District for school.
110. The general education classroom at *** was not appropriate for Student due to the class size, overstimulation, and unrealistic expectations placed on Student as a student. Student was expected to be ***, to be able to sit quietly in the classroom with Student's peers, and to be able to receive instruction like the other students. Student cannot do that successfully.¹⁹⁵
111. By *** 2014, Father believed that Parents were not always notified when Student got in trouble and that Student's teachers had given up on Student.¹⁹⁶
112. By *** 2015, before leaving ***, Student had failing grades and excessive absences due to Student's resistance to attending school, as well as multiple in-school and out-of-school suspensions for verbal aggression, physical aggression, and eloping from the classroom.¹⁹⁷
113. From ***, 2014, through ***, 2015, Student was absent *** times and tardy *** times.¹⁹⁸
114. On ***, 2015, Student's Section 504 committee decided, with Parents' approval, that Student would move to the *** program effective *** 2015.

¹⁹⁵ Tr. at 172-173 (***).

¹⁹⁶ Petitioner Ex. 22 at 137-138.

¹⁹⁷ Tr. at 714, 716 (***); Petitioner Ex. 13 at 8-9, 15; Respondent Ex. 2 at 10; Respondent Ex. 13 at 1-1a, 9-10; Respondent Ex. 19.

¹⁹⁸ Petitioner Ex. 35 at 5.

- a. Of concern were Student's failing grades and excessive absences, as well as multiple out-of-school suspensions and Student's recent physical aggression towards ***.¹⁹⁹
- b. The committee completed a re-evaluation that included a number of academic and behavioral accommodations such as daily communication with Parents.²⁰⁰
- c. The committee created a BIP identifying target behaviors as: (1) complete assigned tasks with no more than three verbal prompts; (2) use appropriate school language instead of profanity, threats, or other forms of verbal aggression; and (3) when emotionally escalated, access a safe place to cool down.²⁰¹
- d. The BIP was put in place before Student went to the *** program to make sure Student was as supported as possible knowing that *** staff had observed an increase in Student's misbehavior.²⁰²
- e. An initial transition plan was developed for Student to attend the *** program for full days beginning on ***, with ***, as a way for Student to stay in school.²⁰³
- f. Parents were concerned that moving Student to the *** program would be disruptive and tough on Student, but did not want to send Student back to *** even with a different teacher because Student had been traumatized by the incident of physical aggression with *** and Parents felt Student was in a cycle in which the escalating behavior would continue if Student returned to ***.²⁰⁴
- g. Mother asked the Section 504 committee if, instead of going to the *** program, Student could have a teacher work one-on-one with Student at home. The Section 504 committee rejected the suggestion.²⁰⁵

115. Student attended the *** program from *** 2015, to *** 2015.

- a. Formally, the District's *** program is a disciplinary alternative education program (DAEP) for *** students. *** is a therapeutic environment to help students get back on track with their behavior.²⁰⁶

¹⁹⁹ Tr. at 714, 716 (***) ; Petitioner Ex. 13 at 8-9, 15; Respondent Ex. 13 at 1-1a, 9-10.

²⁰⁰ Petitioner Ex. 13 at 18-21; Petitioner Ex. 33 at 24-26; Respondent Ex. 13 at 12-13; *see* Petitioner Ex. 15 at 8-9.

²⁰¹ Petitioner Ex. 13 at 18-21; Petitioner Ex. 33 at 24-26; Respondent Ex. 13 at 12-13; *see* Petitioner Ex. 15 at 8-9.

²⁰² Tr. at 725-726 (***) .

²⁰³ Tr. at 607 (***) ; Petitioner Ex. 13 at 16; Respondent Ex. 13 at 10, 17.

²⁰⁴ Tr. at 372, 379 (Father); Tr. at 752 (Mother); Petitioner Ex. 37 at 5.

²⁰⁵ Tr. at 774 (Mother).

²⁰⁶ Tr. at 704, 726 (***) ; Petitioner Ex. 13 at 2; Respondent Ex. 13 at 1a.

- b. Until the FIE could be completed, Student's Section 504 plan, including a BIP, remained in place.²⁰⁷
- c. Parents were not aware that, in the *** program, Student would sometimes spend time in an isolation room.²⁰⁸ The isolation room is a small office with a window where students may go with a teacher when a lighter environment was needed or the student needed to work without being distracted by others. The isolation room is a place for students to take a break from what is happening in the classroom and is not necessarily punitive. The teacher could have been referring to the small office when stating in Student's ***, 2015 progress note that Student was in the "isolation room, left at 11:00 a.m." and that Student spent the entire day there on ***, 2015, and again on ***, 2015.²⁰⁹
- d. The behavior chart was not being used properly when "isolation room" was written at the top. The purpose of the chart was for the teacher's assessment of Student and Student's self-assessment to match, so Student could become more self-aware of Student's behavior.²¹⁰
- e. In the beginning, in the *** program, Student mainly *** because Student was very stressed and traumatized. The *** classroom was ***, and Student was very scared about being that close to ***.²¹¹
- f. A school police officer could be called in when there was an emergency, but *** staff did not want to do that because Mother had expressed that Student was very anxious and *** staff was concerned about how Student would feel if Student saw a police officer in uniform.²¹²
- g. When Student was at the *** program, Student had access to the TEKS curriculum through work sent over by the *** teachers.²¹³
- h. In the *** program, Student was allowed not to complete assignments, which was not appropriate for Student.²¹⁴
- i. While Student was challenging at the beginning of Student's time in the *** classroom, by the end, Student began to bond with the teacher; Student was able

²⁰⁷ Respondent Ex. 13 at 2, 14-16.

²⁰⁸ Tr. at 379 (Father); Respondent Ex. 25 at 5.

²⁰⁹ Tr. at 706, 708, 710, 713; Petitioner Ex. 40; Respondent Ex. 25 at 5 (***).

²¹⁰ Tr. at 719-721 (***); Petitioner Ex. 40.

²¹¹ Petitioner Ex. 37 at 6.

²¹² Tr. at 717 (***).

²¹³ Tr. at 716-717 (***).

²¹⁴ Tr. at 606 (***).

to do a significant amount of work, and Student's grades went from F's to A's and B's.²¹⁵

- j. As of ***, 2015, Student's report card for the ***-weeks grading period reflected failing grades.²¹⁶ On ***, 2015, the District issued a correction to Student's grades for the ***-weeks period, during which time Student was at the *** program, showing grades ranging from *** to ***.²¹⁷
- k. Student was allowed to call Mother when Student was in the *** classroom.²¹⁸
- l. In a ***, 2015 email to school personnel, Mother stated that since starting in the *** program, Student had begun *** and there was an immediate improvement in Student's mood and anxiety level. She acknowledged there had been some tough days but said the improvement was a big change from the ***.²¹⁹ In addition, Student stopped *** as much, and began to exhibit much less anxiety and depression.²²⁰
- m. The *** facilitator and Student's teacher, ***, followed Student's Section 504 modifications. She had an opportunity to work with Student in a positive behavioral RtI environment. Student demonstrated a decrease in negative verbal responses toward others, increased engagement in movement opportunities, and positive social patterns during structural movement activities in a small setting with reduced antagonists. Student began to engage appropriately with classmates and family members, and *** *** in class due to increased physical activity opportunities at school. Student participated in *** to address specific needs for behavioral growth and development. Ms. *** described Student as a "bright, creative young *** who will function successfully in a small group environment with specially trained individuals to meet Student's specific needs for social engagement."²²¹
116. As of *** 2015, Student had been tardy *** times and absent *** times since the beginning of the school year,²²² missing only *** of school in the *** program.
117. On ***, 2015, the ARD committee met and determined Student was eligible for special education as a child with an Emotional Disturbance. The committee decided Student

²¹⁵ Respondent Ex. 13 at 17; Petitioner Ex. 37 at 6.

²¹⁶ Respondent Ex. 1 at 25.

²¹⁷ Petitioner Ex. 19 at 1-2.

²¹⁸ Tr. at 719 (***).

²¹⁹ Petitioner Ex. 33 at 32; Petitioner Ex. 37 at 6.

²²⁰ Petitioner Ex. 37 at 6.

²²¹ Petitioner Ex. 20; Petitioner Ex. 33 at 43. Ms. ***'s letter is dated ***, 2015.

²²² Respondent Ex. 1 at 25.

would be placed at the *** special education program at ***, effective *** 2015.²²³ Student moved a third time in the 2014-2015 school year, this time to the *** program at ***.

- a. When a student first enters the *** program, teachers establish structure by giving the student behavioral feedback at least every 15 minutes. Instead of using punishment to shape behavior, teachers try to develop relationships with students by talking about things the students enjoy.²²⁴
- b. *** staff did not conduct a written reinforcement inquiry of Parents to identify what reinforcements were motivating to Student. Conducting the survey is good practice but not a requirement.²²⁵
- c. Student had difficulty following directions. However, on good days, Student did well academically and mingled with Student's peers very well. Student loved to ***.²²⁶
- d. *** staff was aware that Student had been identified as ***, but none of Student's teachers were affiliated with *** program. No written curriculum was in place to address Student's *** potential in any of Student's academic areas at ***.²²⁷ None of the other students in the *** classroom at *** had been identified as ***.²²⁸
- e. To be successful, Student needs a low student/teacher ratio and a lot of one-on-one attention. On average, at ***, there were *** students per adult throughout the day.²²⁹
- f. Sometimes at ***, Student and teacher had a one-on-one lesson because Student needed to be more academically challenged due to Student's cognitive skills.²³⁰
- g. On at least one occasion, Student's teacher at *** sat with Student during a *** research assignment and offered instruction at a level higher than that offered to the other students. Student then worked with another *** grader on a project,

²²³ Petitioner Ex. 37 at 6.

²²⁴ Tr. at 924-925 (***).

²²⁵ Tr. at 847-848 (***).

²²⁶ Tr. at 631 (***).

²²⁷ Tr. at 846-847, 902, 906 (***).

²²⁸ Tr. at 908 (***).

²²⁹ Tr. at 829-830 (***); Tr. at 640 (***).

²³⁰ Tr. at 830 (***).

enriching the language of the project based on what Student had researched with the teacher.²³¹

- h. Ms. *** communicated by telephone with Mother every day to inform her of Student's behavioral progress.²³²
- i. Student did not do well in the *** program at ***. Student's anxiety increased. Student dreaded school and tried to avoid going. Student had *** problems. Student's *** came back, and Student ***.²³³
- j. After some time at ***, Student was so regressed in Student's therapy that it was difficult for Student to desire to learn or even go to school. It was unrealistic for Student to do any work because Student was so fragile after certain experiences Student had. For Student to physically be at school was a job in itself for the day. Student would have to feel safe and comfortable being there before Student could invest in doing more.²³⁴
- k. Due to Student's heightened anxiety, a ***-day plan was implemented for the ***, in which Student would attend school from *** until ***.²³⁵
- l. On or about ***, 2015, after the shortened school day was implemented, Mother spoke with the special education coordinator and the special education diagnostician. She requested that Student return to the *** program for the remainder of the school year. Ms. ***, one of the District's special education coordinators, and Ms. ***, Administrative Intern for the District's ***, advised that could not be done because Student was now a special education student and the *** program is a general education program.²³⁶ In addition, Ms. *** told Mother that Student was receiving more intensive support in the *** classroom.²³⁷ The District would not return Student to the *** program, a DAEP for *** students, because Student's behavior was being addressed at ***.²³⁸
- m. Student's school day was shortened to *** hours for ***.

²³¹ Tr. at 906-907 (***).

²³² Tr. at 671 (***). Student's behavioral issues and consequences, including being restrained *** times, are detailed under "Issue 3" in this Decision.

²³³ Petitioner Ex. 37 at 6.

²³⁴ Tr. at 200-201, 203 (***).

²³⁵ Tr. at 384 (Father); Petitioner Ex. 37 at 7. More detailed information is under "Issue 7" in this Decision.

²³⁶ Tr. at 357-358 (***); Tr. at 380 (Father); Tr. at 758-759 (Mother); Petitioner Ex. 37 at 7.

²³⁷ Tr. at 930-931 (***).

²³⁸ Tr. at 932 (***).

- n. Due to Student's increased anxiety, Dr. *** recommended that Student *** ***, 2015, and not attend ***, 2015.²³⁹
- o. Student's last day at *** was ***, 2015.²⁴⁰
- p. Out of *** days in Ms. ***'s classroom, Student exhibited at least one of the targeted behaviors on *** of the *** days. The highest behavior level Student ever achieved was Level 1, the lowest behavioral level.²⁴¹
- q. Student did not complete the *** grade curriculum, even though Ms. *** taught every *** grade subject.²⁴² Student nevertheless mastered Student's academic IEP goals.²⁴³
118. In the ***-weeks grading period, Student was absent *** days and tardy *** days.²⁴⁴
119. Grades are one measure of Student's educational progress.²⁴⁵
120. At the end of *** grade, Student had passing grades in all subjects except ***, in which Student had a *** average. Student had a *** average in *** for the ***-weeks grading period, considered to be an inadequate level of comprehension and application.²⁴⁶
121. In a *** 2015 progress report, Student's special education teacher, Ms. ***, reported that progress was sufficient at that time for Student to reach Student's academic goals by the next annual ARD committee meeting date of ***, 2016.²⁴⁷
122. By ***, Student had not met the behavior goals set out in Student's IEP.²⁴⁸ In a *** 2015 progress report, Ms. *** reported that progress was not sufficient at that time for

²³⁹ Petitioner Ex. 37 at 7.

²⁴⁰ Tr. at 648 (***).

²⁴¹ Tr. at 680, 683 (***); At Level 1, students are taught about rules, expectations, how to access help, what kind of replacement behaviors to use, and how to negotiate needs and wants with the teacher. Often children new to the program have difficulty with self-regulation and need a very structured, specialized program. IEP behavioral goals might be difficult for a child with self-regulation issues but are written to be met over 36 weeks. Tr. at 807-808,819 (***).

²⁴² Tr. at 683-684 (***).

²⁴³ Tr. at 631-632 (***).

²⁴⁴ Respondent Ex. 26 at 9.

²⁴⁵ Tr. at 904 (***).

²⁴⁶ Tr. at 904-905 (***); Petitioner Ex. 19 at 3; Respondent Ex. 5 at 1; Respondent Ex. 26 at 9.

²⁴⁷ Respondent Ex. 8 at 1-2.

²⁴⁸ Respondent Ex. 12 at 39.

Student to reach Student's behavior goals by the next annual ARD committee meeting date of ***, 2016.²⁴⁹

123. *** grade, Student exhibited overall unsatisfactory conduct, showing slow progress of improvement.²⁵⁰
124. Petitioner proved by a preponderance of the evidence that the District did not provide Student a FAPE during the 2014-2015 school year. The District did not timely fulfill its Child Find duty as to Student. Student, who is ***, had a failing *** grade at the end of the year and had not completed the *** grade curriculum; was not expected to achieve Student's behavioral IEP goals by the next annual ARD committee meeting; and was only at school *** hours per day for ***, in contradiction to the full day required by Student's IEP.

Issue 3:

Did the District fail to consider providing Student with positive behavioral supports and interventions, including counseling?

Counseling

125. On ***, 2014, the District attempted to refer Student to ***, due to Student's deteriorating classroom behavior, but Mother would not sign the referral.²⁵¹ The District made no further attempts to provide Student with counseling services.
126. Dr. *** had recommended that Parents follow-up with the *** suggestion in order to have a long-term plan to assist Student.²⁵²
127. The FIE multidisciplinary team did not recommend providing counseling to Student as a related service and the ARD committee did not consider providing Student with counseling as a related service.²⁵³
- ***
128. The Section 504 Individual Services and Accommodation Plan included with the *** 2014 Section 504 meeting notes stated that Student had a BIP. The BIP was not included in the meeting notes.²⁵⁴

²⁴⁹ Tr. at 903 (***); Respondent Ex. 8 at 2-3.

²⁵⁰ Respondent Ex. 5 at 2-3; Respondent Ex. 26 at 9.

²⁵¹ Respondent Ex. 17.

²⁵² Tr. at 183 (***).

²⁵³ Petitioner Ex. 16; Respondent Ex. 1; Respondent Ex. 2.

²⁵⁴ Petitioner Ex. 10 at 19-20; Respondent Ex. 15 at 4.

- a. The BIP developed at the *** 2014 Section 504 meeting was a Success Chart that identified three target behaviors for improvement; Student had input in developing the Success Chart and agreed with the behaviors chosen to be targeted.²⁵⁵
- b. From ***, 2014, through *** 2015, Student's teacher at *** used the Success Chart to motivate Student to complete Student's work, not curse, and not leave the classroom without the teacher's permission. If Student earned seven "smiles" in a day, Student could have Student's choice of the reward of ***.²⁵⁶
129. While at ***, Student was allowed a lot of flexibility, given Student's situation, the behaviors Student was exhibiting, and *** staff's daily collaboration with Parents. By the end of the fall semester, Student was no longer held to the standards of District's Student Code of Conduct.²⁵⁷
130. As of *** 2014, Student was participating in weekly group social skills building sessions at school.²⁵⁸
131. As of *** 2014, Student was attending weekly counseling sessions with Student's private therapist, Dr. ***. Student and Parents had seen Dr. *** since 2013.²⁵⁹

***** program**

132. While in the *** program from ***, through ***, Student worked toward accomplishing four academic/behavioral goals: (1) refraining from using inappropriate verbal and physical behavior, including gesturing, language, and touching (Be Nice); (2) complying with classroom rules/procedures (3) staying in assigned area; and (4) completing modified work.²⁶⁰
133. To assist Student in reaching the four goals, the following activities were followed with respect to each of the goals: (1) remove Student from activity; (2) teacher turn/Student turn in 10-minute increments, and persistent reminder of the rule with removal of the distraction or activity after the third reminder; (3) provide *** with minimal distractions and antagonists; and (4) provide modified work with 10-minute time for completion, provide ***, and verbally remind Student of what is next.²⁶¹

²⁵⁵ Tr. at 120-121 (***).

²⁵⁶ Respondent Ex. 13 at 24-29.

²⁵⁷ Tr. at 100 (***).

²⁵⁸ Petitioner Ex. 12 at 2.

²⁵⁹ Petitioner Ex. 12 at 2; Petitioner Ex. 17 at 1.

²⁶⁰ Respondent Ex. 25.

²⁶¹ Respondent Ex. 25.

134. During the week of ***, 2015, Student stayed in Student's assigned area for *** of the days, but met none of the other goals. On ***, 2015, Student *** most of the day and on ***, 2015, did not receive credit for staying in Student's assigned area, due to ***.²⁶²
135. During the week of ***, 2015:
- a. Student's daily progress for the first goal varied from a high of *** percent on *** 2015, to a low of *** percent on ***, 2015, when Student ***. Student's daily progress for the second goal varied from *** percent to *** percent. Student's daily progress for the third goal ranged from *** percent to *** percent. Student's daily progress for the fourth goal ranged from *** percent to *** percent.²⁶³
 - b. On ***, 2015, Student spent all day in the isolation room.²⁶⁴
 - c. Progress notes indicate that the more movement Student engaged in, the more work Student completed.²⁶⁵
 - d. Student went for the "wow" factor in *** sometimes, telling Student's teacher that the acting out was worth the consequences.²⁶⁶
136. During the week of ***, 2015:
- a. Student's overall daily averages ranged from *** percent (when Student would not record Student's progress then lost the progress sheet) to *** percent.²⁶⁷
 - b. On ***, 2015, Student called Student's teacher a "****" and wrote an apology letter stating, "****." On that same day, Student ***. Also on ***, 2015, Student ***.²⁶⁸
 - c. On Student's first day at the *** program, Student was unable to ***; Student could now ***. For the first time, Student ***; ***. On the same page, Student ***.²⁶⁹

²⁶² Respondent Ex. 25 at 1-2.

²⁶³ Respondent Ex. 25 at 3-4.

²⁶⁴ Petitioner Ex. 40 at 1.

²⁶⁵ Respondent Ex. 25 at 3-4.

²⁶⁶ Respondent Ex. 25 at 3-4.

²⁶⁷ Respondent Ex. 25 at 6.

²⁶⁸ Respondent Ex. 25 at 6.

²⁶⁹ Respondent Ex. 25 at 6.

137. For the week of ***, 2015, Student's overall daily averages toward meeting the four behavior/academic goals ranged from *** percent to *** percent.²⁷⁰
138. For the week of ***, 2015:
- a. Student's overall daily averages toward meeting the four behavior/academic goals ranged from *** percent on ***, 2015, when Student ***, to *** percent on ***, 2015, when Student spent time in isolation.²⁷¹
 - b. On ***, 2015, Student spent all day in the isolation room. When Student was supposed to be in isolation, Student ***, finally moving to a chair in the isolation room after about ***minutes.²⁷²
 - c. Student's *** were less violent.²⁷³
 - d. Student did not always stay in Student's assigned area: Student ***.²⁷⁴
139. For the week of ***, 2015:
- a. Student's overall weekly average toward meeting the four behavior/academic goals was *** percent.²⁷⁵
 - b. On ***, 2015, Student was ***.²⁷⁶
140. For the week of ***, 2015, Student's final week in the *** program:
- a. Student's overall weekly average toward meeting the four behavior/academic goals was *** percent.²⁷⁷
 - b. Student began ***, a behavior Student had not displayed since Student's first week in the *** program.²⁷⁸
 - c. Student was dismissed early on ***, 2015, due to aggression toward ***.²⁷⁹

²⁷⁰ Respondent Ex. 25 at 8-10.

²⁷¹ Respondent Ex. 25 at 11-13.

²⁷² Petitioner Ex. 40 at 2.

²⁷³ Respondent Ex. 25 at 11-13.

²⁷⁴ Respondent Ex. 25 at 11-13.

²⁷⁵ Respondent Ex. 25 at 14-16.

²⁷⁶ Respondent Ex. 25 at 14-16.

²⁷⁷ Respondent Ex. 25 at 17-19.

²⁷⁸ Respondent Ex. 25 at 17-19.

141. Student attended school in the *** classroom at *** from *** 2015, through ***, 2015, missing *** school, which ***, 2015, upon the advice of Dr. *** due to Student's heightened anxiety.²⁸⁰
142. The *** program addresses student's relationships with other people by trying to build strong relationships with the teaching staff, having project-based activities with the other children, and addressing inappropriate interactions.²⁸¹
143. The *** program is a positive behavior program with individualized strategies and resources.²⁸²
144. The ***, 2015 ARD committee determined that *** staff would manage Student's behavior by providing: clearly defined limits; frequent reminders of rules; positive reinforcement; frequent eye contact/proximity control; frequent breaks; private discussion about Student's behavior; supervision during transition activities; and a cooling-off area. *** staff was to follow Student's BIP and consult with an LSSP to assist with the BIP.²⁸³
145. Ms. *** was the sole LSSP for the *** unit and was there 3 days per week for some part of the day. When she interacted with Student, Student was mostly cooperative. Except for when Student was in crisis, Student was a student like any other.²⁸⁴
146. If there was no physical aggression for a specific number of consecutive days, at the end of the day, Student would be allowed to *** supplied by Mother. If Student earned a certain number of points, Student would be allowed to *** with a school ***, which worked for Student.²⁸⁵
147. *** is a reinforcer as well as a calming strategy for Student. Student was allowed to *** during the 10-minute reinforcement time at the end of each ***-minute class period, if Student had done what Student was supposed to do, or sooner, if Student finished Student's work for the class. But even when Student acted out, Student was allowed to *** during the Take Five or Take Ten time-outs.²⁸⁶

²⁷⁹ Respondent Ex. 25 at 17-19.

²⁸⁰ Petitioner Ex. 37 at 7; Respondent Ex. 26 at 9.

²⁸¹ Tr. at 823-824 (***).

²⁸² Tr. at 820 (***); Tr. at 639 (***).

²⁸³ Respondent Ex. 1 at 8.

²⁸⁴ Tr. at 789-790 (***).

²⁸⁵ Tr. at 639 (***).

²⁸⁶ Tr. at 894-897 (***); Tr. at 638 (***).

148. After Mother expressed concern about the paraprofessional with whom Student had issues, Ms. *** modeled to the paraprofessional how to make requests and how to redirect Student.²⁸⁷
149. Student's Behavioral Management Plan Progress Summary Report (Report), covering from the plan start date of *** 2015, through ***, 2015, showed that Student met behavioral goals on *** of the *** days Student was at ***, with *** absences.²⁸⁸
- a. According to the Report, Student complied with classroom rules, such as following directions and staying on task, between *** percent of the time over the ***-day period.²⁸⁹
 - b. Neither Student's IEP goals nor Student's FBA contain a baseline percentage to measure against Student's performance for each goal over the course of Student's time at ***.²⁹⁰
 - c. In *** 2015, Student scored *** percent on all three of Student's IEP goals.²⁹¹
 - d. According to the Report, by the end of the year, Student scored *** percent overall on the IEP goal of expressing anger appropriately, not quite reaching the goal related to verbal aggression.²⁹²
 - e. According to the Report, by the end of the year, Student scored *** percent overall on reaching the IEP goal of remaining in Student's designated area. Student's assigned area was ***. If Student left the assigned area without permission, Student would be redirected to stay in the area, as a way of teaching Student the rules.²⁹³
 - f. According to the Report, by the end of the year, Student scored *** percent overall on the IEP goal of choosing a replacement behavior when angry or frustrated as relates to Student's physical aggression goal.²⁹⁴

²⁸⁷ Tr. at 790-791 (***).

²⁸⁸ Tr. at 801, 872-873 (***); Respondent Ex. 9 at 8. The *** on which the session was not completed is not counted, leaving *** days counted. Tr. at 805 (***).

²⁸⁹ Respondent Ex. 9 at 8.

²⁹⁰ Tr. at 877-879 (***); Respondent Ex. 1 at 6, 26-29.

²⁹¹ Tr. at 874-875 (***); Respondent Ex. 9 at 8.

²⁹² Tr. at 805-806 (***); Respondent Ex. 9 at 8.

²⁹³ Tr. at 805-806, 852-854 (***); Tr. at 640 (***); Respondent Ex. 9 at 8; Petitioner Ex. 41.

²⁹⁴ Tr. at 805-806 (***); Respondent Ex. 9 at 9. Ms. *** explained that the goal could not be 100 percent because Student was new to the *** program and it would not be fair to expect 100 percent of Student's behavior to be correct. Tr. at 815 (***). She also said you must teach a child replacement behaviors before a crisis, although you might model the behaviors, such as taking a deep breath, during the crisis. Tr. at 817-818 (***).

- g. Using the *** percent achievement rate for *** 2015 as a baseline, the data shows Student was making progress toward mastering Student's IEP goals by the time Student left *** in *** 2015.²⁹⁵
- h. According to the Report, Student verbally threatened peers and adults on *** of the scored *** days; moved out of Student's assigned area without teacher permission on *** days; and physically attacked peers or adults on *** days.²⁹⁶
- i. According to the Report, Student had *** in-class incidents and *** office referrals during the ***-day period.²⁹⁷
150. At ***, Student's teacher, Ms. ***, tracked Student's behavior in 15-minute increments throughout the day, with the possibility of Student earning four points per hour or 28 points for the ***-hour day.²⁹⁸
151. Ms. *** used an impulse control system, beginning with redirection, then a warning, followed by two warnings, and time-out. If a student refuses to go to time-out, the student is subject to automatic time-out, then to automatic isolation; then to office referral, which means that the administrator would come into the room and try to use calming techniques to de-escalate the student. When the student is ready to start Student's time, Student goes to re-entry.²⁹⁹
152. Over Student's *** days at ***, Student was sent to automatic time-out on *** days, for what could have been more than one time per day. The time-out desk is *** and is not a separate room.³⁰⁰
153. On ***, Student's first day in the special education classroom at ***, Student engaged in name calling, cursing, backtalk, disobedience, leaving Student's seat without permission, and off-task behavior for 3 hours.³⁰¹
154. On ***, 2015, Ms. *** emailed Ms. ***, the LSSP assigned to ***, and asked for intervention or strategy suggestions, noting that Student was having a rough time adjusting, had been verbally aggressive with teachers, had not responded to positive reinforcement, and was ***.³⁰²

²⁹⁵ Tr. at 876 (***) ; Respondent Ex. 9.

²⁹⁶ Tr. at 806 (***) ; Respondent Ex. 9 at 9. Ms. *** said Student never physically attacked another child. The goal is written to include peers so as to address physical aggression in its totality. Tr. at 806 (***) .

²⁹⁷ Respondent Ex. 9 at 9.

²⁹⁸ Respondent Ex. 10.

²⁹⁹ Tr. at 673, 676 (***) ; *see also* Tr. at 802 (***) .

³⁰⁰ Tr. at 662, 666 (***) ; Respondent Ex. 9-8.

³⁰¹ Petitioner Ex. 41 at 290-292.

³⁰² Petitioner Ex. 41 at 293; Respondent Ex. 12 at 1.

155. Student's BIP included with Student's IEP does not state that restraints would be used.³⁰³
156. Ms. *** verbally informed Parents that restraints would be used in the classroom, but did not inform them in writing. Parents claim they were not aware until after the fact that restraints would be used on Student at ***.³⁰⁴
157. Restraints may be used when there is an imminent risk of harm to the student or others.³⁰⁵
158. Having minimal or maximum restraints during the year is normal for students in the *** unit. The main goal of restraints is to keep the child safe from ***self and from hurting peers or staff members. One of Student's behaviors is physical aggression, so if Student was physically aggressive and was hurting ***self or others, Ms. *** restrained Student.³⁰⁶
159. Dr. *** does not recommend restraints for Student. Restraints can be very difficult for Student, due to Student's sensory issues. Student is going to feel trapped and unable to feel in control of Student's body. Student will react by fighting to free ***self and escape; those restraining Student will probably maintain the restraint.³⁰⁷
160. Ms. *** provided Mother with a Written Summary of Restraint Use (First Summary) dated ***, 2015. The First Summary stated that Student was restrained twice between *** and *** on ***, 2015, after *** both her and ***, ***. The restraints were prompted due to imminent serious physical harm to Student or others and imminent serious property destruction.³⁰⁸ According to the First Summary, Ms. *** notified Parent of the restraint via telephone call on ***, 2015.³⁰⁹
161. Ms. *** provided Mother with a second Written Summary of Restraint Use (Second Summary) on ***, 2015.³¹⁰ According to the Second Summary, the two-person side body support was performed on Student four times between the hours of *** and *** on ***, 2015, by Ms. *** and Ms. ***.³¹¹ The Second Summary states that Student was sent to automatic time-out at *** on ***, 2015, after threatening to ***. During time-out, Student tried to ***. When the teachers tried to keep Student safe, Student ***. The

³⁰³ Tr. at 660 (***).

³⁰⁴ Tr. at 653 (***); Tr. at 382 (Father).

³⁰⁵ Tr. at 887 (***); Tex. Educ. Code § 37.0021(d).

³⁰⁶ Tr. at 642, 653, 656, 659 (***); Tr. at 887 (***).

³⁰⁷ Tr. at 173-174 (***).

³⁰⁸ Respondent Ex. 11 at 1-4; Petitioner Ex. 41 at 295.

³⁰⁹ Respondent Ex. 11 at 4.

³¹⁰ Respondent Ex. 11 at 5-8.

³¹¹ Respondent Ex. 11 at 6.

- first restraint was performed after physical aggression occurred multiple times.³¹² Student was restrained due to the threat of imminent serious physical harm to ***self and the teachers, and the imminent threat of serious property destruction.³¹³ Ms. *** spoke with Mother about the restraint at *** on ***, 2015.³¹⁴
162. For *** beginning at *** on ***, 2015, and for *** minutes beginning at *** that day, Student engaged in name calling, cursing, leaving Student's seat without permission, and failure to follow directions in the classroom. Student served time-out three times and used the replacement behavior of *** for 5 minutes.³¹⁵
163. In incidents lasting *** minutes *** and for *** at *** on ***, 2015, Student ***, used profanity, engaged in backtalk, and failed to follow directions. Student *** in class. In ***, Student was asked *** times between *** and *** if Student was ready to serve Student's time in time-out before Student said Student was ready; ***, Student was asked at least twice before stating Student was ready.³¹⁶
164. Student was placed in a ***-minute time-out on ***, 2015, for name calling, cursing, and failing to follow directions.³¹⁷
165. Beginning at *** on ***, 2015, Student was sent to time-out for cursing and failing to follow directions. Student did not finish serving the ***-minute and ***-minute time-outs until ***, after refusing to cooperate, *** for *** minutes, continuing to use profanity all afternoon, and being told five times that if Student did not complete the time-outs, Student would not be allowed to ***.³¹⁸
166. For *** minutes of class time on *** 2015, Student engaged in name calling, cursing, disobedience, and did not follow directions.³¹⁹
167. Over a ***-hour period beginning at *** on *** 2015, Student engaged in verbal aggression. After being asked *** times from *** to *** if Student was ready to serve 10 minutes in time-out, Student stated Student was ready.³²⁰
168. On ***, 2015, Ms. *** prepared a third Written Summary of Restraint Use (Third Summary). According to the Third Summary, a bear hug restraint was used on Student

³¹² Petitioner Ex. 41 at 294; Respondent Ex. 11 at 6.

³¹³ Respondent Ex. 11 at 6.

³¹⁴ Respondent Ex. 11 at 8.

³¹⁵ Petitioner Ex. 41 at 300-301.

³¹⁶ Petitioner Ex. 41 at 303-304.

³¹⁷ Petitioner Ex. 41 at 296.

³¹⁸ Petitioner Ex. 41 at 297.

³¹⁹ Petitioner Ex. 41 at 298-299, 304-305.

³²⁰ Petitioner Ex. 41 at 306-307.

- from *** to *** on ***, 2015, after Student ***. The restraint was performed to prevent imminent serious harm to Student or others. Ms. *** notified Parent of the ***, 2015 restraint that same day, by telephone.³²¹
169. On ***, 2015, Ms. *** prepared a fourth Written Summary of Restraint Use (Fourth Summary). According to the Fourth Summary, Ms. *** performed a bear hug on Student from *** to *** on ***, 2015, after Student stated Student ***. The restraint was performed due to the imminent threat of serious physical harm to Student and others. Ms. *** notified Parent of the restraint via telephone on ***, 2015.³²²
170. Beginning at *** on ***, 2015, Student engaged in *** hours of cursing, off task behavior, being out of Student's seat, and failure to follow directions in the classroom.³²³
171. On ***, 2015, Student *** *** for *** minutes.³²⁴
172. On ***, 2015, Student ***, engaged in backtalk, was disobedient, and failed to follow directions. Student was initially asked at *** to start time-out. Student did not agree that Student was ready for time-out until ***, after having been asked *** times in approximately ***-minute increments.³²⁵
173. Beginning at *** on ***, 2015, Student failed to follow directions and was given a warning. When Student still did not follow directions, Student was given a time-out. Student was asked *** times between *** and *** if Student was ready to serve the time-out. At ***, Student said Student was ready and Student served a total of *** minutes of time-out.³²⁶
174. In an email sent at *** on ***, 2015, Ms. *** reported that Student was currently on *** with Mother and was having a great day.³²⁷
175. Beginning at *** on ***, 2015, Student engaged in name calling, cursing, off task behavior, left Student's seat without permission, disobeyed, and failed to follow directions.³²⁸

³²¹ Respondent Ex. 11 at 9-11; Petitioner Ex. 41 at 308-309.

³²² Respondent Ex. 11 at 12-14; Petitioner Ex. 41 at 308-309.

³²³ Petitioner Ex. 41 at 311.

³²⁴ Petitioner Ex. 41 at 312.

³²⁵ Petitioner Ex. 41 at 313.

³²⁶ Petitioner Ex. 41 at 314.

³²⁷ Petitioner Ex. 41 at 315-316.

³²⁸ Petitioner Ex. 41 at 317.

176. Beginning at *** on ***, 2015, Student used profanity and engaged in physical teasing, almost hitting another student with Student's ***, then ***, endangering other students.³²⁹
177. For *** minutes beginning at *** on ***, 2015, Student engaged in cursing and backtalk, off-task behavior, disobedience, and failure to follow directions. Student *** in class from *** until *** During time-out, Student kicked ***.”³³⁰
178. In an ***, 2015 email exchange, Ms. *** and Ms. *** discussed arranging a conference with Parents, noting that the idea of having weekly conferences had not materialized because Mother was not available.³³¹ Although Mother was not available on the suggested dates for weekly meetings, she had numerous meetings with Ms. ***, Ms. ***, other teachers at ***, and the LSSP.³³²
179. Over a ***-minute period on ***, 2015, Student directly refused a teacher's request and engaged in verbal aggression.³³³
180. On ***, 2015, Ms. *** prepared a fifth Written Summary of Restraint Use (Fifth Summary). According to the Fifth Summary, Ms. *** and Ms. *** performed a two-man side partner restraint on Student from *** to *** on ***, 2015, after Student charged ***. Prior to the restraint, an administrator who had been called into the room while Student was still escalating used Mandt techniques to help Student regain control. Student did not choose to keep Student's hands to ***self. On ***, 2015, Ms. *** notified Parent of the restraint via telephone call. During the altercation, District police were called. The District police officer asked Student if Student wanted to go to jail and if Student remembered why Student had been placed in the police car last time, referring to the ***, 2015 incident at ***. Student replied it was for ***. The police officer asked Student if Student was in control or if the teachers were and Student responded, “***.”³³⁴
181. The police officer's interaction with Student was not a positive behavioral intervention.³³⁵
182. During Student's time at ***, a *** teacher was called in at least once to assist the special education teachers with Student's behavior, and police were brought in at least *** times.³³⁶

³²⁹ Petitioner Ex. 41 at 318.

³³⁰ Petitioner Ex. 41 at 319-320.

³³¹ Respondent Ex. 12 at 23.

³³² Tr. at 759-760 (Mother); Tr. at 831-832 (***).

³³³ Petitioner Ex. 41 at 323.

³³⁴ Petitioner Ex. 18 at 9-12; Respondent Ex. 11 at 15-18; Petitioner Ex. 41 at 324.

³³⁵ Tr. at 884 (***).

³³⁶ Tr. at 757-758, 774 (Mother); Tr. at 882-884 (***).

183. Student reacted to police interventions with heightened anxiety manifested by ***. While Student had exhibited those behaviors prior to police interventions, the behaviors were intensified after police interventions.³³⁷
184. After Student's interaction with the police officer on ***, 2015, Mother met with *** staff and a ***-day plan was developed for Student.³³⁸
185. On ***, 2015, Mother and *** staff agreed that Student was approved for *** in a ***-day plan to begin on ***, 2015. Student would *** and leave at the regular time, and *** of physical activities such as ***, to help Student "wake up" for the instructional day ahead.³³⁹ Once Student accumulated *** for no physical aggression, Student would be given a special reward.³⁴⁰
186. Ms. *** notified Ms. *** via email on ***, 2015, that the ***-day plan for Student had been approved.³⁴¹
187. On ***, 2015, Ms. *** prepared a sixth Written Summary of Restraint Use (Sixth Summary). According to the Sixth Summary, Ms. *** and Ms. *** placed Student in a bear hug restraint from *** to *** on ***, 2015, after Student used profanity, ***, then charged ***. Verbal redirection, calming techniques, reduced verbal interaction, and providing choices were unsuccessfully used to de-escalate the situation. Ms. *** spoke with Mother about the restraint at *** on ***, 2015.³⁴²
188. On ***, 2015, Ms. *** prepared a seventh Written Summary of Restraint (Seventh Summary).³⁴³ According to the Seventh Summary, Student was placed in a bear hug from *** to *** on ***, 2015, after Student kept repeating "****," then charged at her. Student also ***. Attempts to de-escalate the situation were not successful. At some point, Father arrived. Father was notified of the restraint in person. Student was relaxed when Student sat next to Father. Student cleaned up Student's area ***. Student went home with Father at about ***.³⁴⁴
189. For *** minutes beginning at *** on ***, 2015, Student engaged in abusive language, disorderly conduct, bullying, disobedience, disrespect to staff, threats of violence and

³³⁷ Tr. at 775, 777 (Mother).

³³⁸ Tr. at 916 (***).

³³⁹ Tr. at 822, 825-826, 916 (***); Petitioner Ex. 41 at 325-326; Respondent Ex. 12 at 24-25.

³⁴⁰ Respondent Ex. 12 at 25; Petitioner Ex. 41 at 326.

³⁴¹ Respondent Ex. 12 at 24; Petitioner Ex. 41 at 325-326.

³⁴² Tr. at 884 (***); Petitioner Ex. 18 at 1-4; Respondent Ex. 11 at 19-22; Petitioner Ex. 41 at 324, 327-328. The first page of the Sixth Summary states the restraint was on "****/****/2015." The rest of the summary references a ***, 2016 incident. The date on the first page appears to be in error.

³⁴³ Petitioner Ex. 18 at 5-8; Respondent Ex. 11 at 23-25. The first page of the summary states the incident occurred on "****/****/2015" and the second page states the incident occurred on "****/****/2015." ***, 2015, appears to be the correct date.

³⁴⁴ Respondent Ex. 11 at 24-26; Petitioner Ex. 41 at 327-331.

- intimidation, physical assault, and an attempt to cause injury. Student told Ms. ***, “***.” When Ms. *** asked Student what would calm Student down, Student replied, “***.” Student punched *** and bit ***. The teachers placed Student in a restraint. Student did not respond positively to directives to calm down or to Ms. ***’s statement that the teachers were there to help Student, and that the teachers would let go of Student if Student was safe towards others and ***self. Because Student was not exhibiting enough self-control to ***, Mother picked Student up from school.³⁴⁵
190. For *** minutes beginning at *** on ***, 2015, Student engaged in abusive language, disrespected staff, disobeyed, and ***. Beginning at ***, Student was asked 13 times if Student was ready to start time-out; at ***, Student said Student was ready and Student completed 15 minutes of time-out.³⁴⁶
191. On ***, 2015, Ms. *** prepared an eighth Written Summary of Restraint Use (Eighth Summary). According to the Eighth Summary, Student was placed in a bear hug restraint from *** to *** on ***, 2015, after Student kicked and punched ***, and bit ***. Attempts to de-escalate the situation prior to the restraint were not successful. Attempts included reminding Student that if Student had no incidents of physical aggression, Mother would *** and Ms. *** asking Student what the teachers could do to make it better for Student and reminding Student that accommodations were in place for Student. Student responded, “***.” Student then charged ***. On ***, 2015, Ms. *** notified Parent in person of the restraint.³⁴⁷
192. For *** minutes beginning at *** on ***, 2015, Student engaged in cursing and backtalk, off-task behavior, left Student’s seat without permission, disobeyed, and failed to follow directions.³⁴⁸
193. For *** minutes beginning at *** on ***, 2015, Student engaged in abusive language, bullying, obscenity, racial slurs, threats of violence, intimidation, and physical assault. Ms. *** attempted to de-escalate the situation by asking Student to use appropriate school words, telling Student the teachers were there to protect Student and guide Student from harm, and telling Student to make a good choice or Student would be guided out for Student’s safety (after Student put ***). Student told Ms. ***, “***.” Student calmed down after Student was guided away for Student’s safety, and served 15 minutes in time-out.³⁴⁹
194. Over a ***-minute period beginning at *** on ***, 2015, Student engaged in pushing and shoving, cursing and backtalk, off-task behavior, disobedience, and failure to follow directions. When Ms. *** told Student there were strategies Student could use to relax,

³⁴⁵ Petitioner Ex. 41 at 332-333.

³⁴⁶ Petitioner Ex. 41 at 334-335.

³⁴⁷ Respondent Ex. 11 at 27-30; Petitioner Ex. 41 at 336, 338.

³⁴⁸ Petitioner Ex. 41 at 337.

³⁴⁹ Petitioner Ex. 41 at 339-340.

- Student asked to ***. Ms. *** walked to Student's area to ***, and discovered that the *** Student had *** were inappropriate for school because they *** and ****. Student chose an appropriate *** for *** minutes then took Student's chair to time-out for 10 minutes.³⁵⁰
195. Over a ***-minute period beginning at *** on ***, 2015, Student engaged in backtalk, disobeyed, and failed to follow directions. Ms. *** gave Student an assignment and Student told her, "****"***. Between *** and ***, Student was asked eight times if Student was ready to go to time-out. At ***, Student picked up Student's head and said Student was ready to start Student's time. Student successfully served 15 minutes of time-out.³⁵¹
196. Student likes boundaries but the boundaries imposed as part of the *** program at *** may have been excessive for Student, leading to heightened anxiety and increases in behaviors such as ***.³⁵²
197. At ***, Student, who is very smart and verbal, was provided positive feedback such as "I like the way you are doing this," which Ms. *** believes was encouraging to Student.³⁵³
198. While Student was at ***, Ms. *** administered the *** and *** sections of the State of Texas Assessments of Academic Readiness (STAAR) test to Student. During the *** assessment, Student ***. Student ***, so Ms. *** gave Student *** and encouraged Student by saying, "You ***, but I think if you choose to take the assessment you're going to do great." Once Student ***, Student completed the test in about an hour. Student *** during the *** assessment, and completed the test.³⁵⁴
199. In *** 2015, Student received a satisfactory score on the *** portion of the STAAR test. In *** 2015, Student received a satisfactory score on the *** portion of the STAAR test and *** of the test.³⁵⁵
200. Student's behavioral data indicates Student was responding to behavioral interventions at ***, with the possibility of continued progress over time.³⁵⁶
201. Petitioner established by a preponderance of the evidence that the District did not offer Student the related service of counseling after the *** 2014 accrual date. But neither the FIE multidisciplinary team nor the *** team recommended counseling as a related

³⁵⁰ Petitioner Ex. 41 at 341.

³⁵¹ Petitioner Ex. 41 at 342.

³⁵² Tr. at 778-779 (Mother).

³⁵³ Tr. at 828 (***).

³⁵⁴ Tr. at 828, 845-846 (***).

³⁵⁵ Respondent Ex. 6; Respondent Ex. 16 at 10.

³⁵⁶ Tr. at 831, 912 (***); Tr. at 646 (***); Tr. at 926 (***).

service so it is not surprising that the ARD committee did not consider counseling as a related service.³⁵⁷

202. Petitioner did not prove by a preponderance of the evidence that the District failed to consider providing Student with positive behavioral supports and interventions. The behavioral goals in Student's IEP consisted solely of positive behavioral supports.³⁵⁸

Issue 4:

Did the District fail to provide Parents with prior written notice when it refused to evaluate Student?

203. After Mother's request for a special education evaluation of Student was declined at the *** 2014 Section 504 meeting, the District did not provide Parents with prior written notice of its refusal to evaluate Student.³⁵⁹
204. The alleged violation occurred before the October 28, 2014 accrual date for this proceeding.

Issue 5:

Did the ARD committee fail to consider Student's PLAAFPs and how Student's disability affected Student's involvement in the general education curriculum?

205. In developing Student's IEP, the ***, 2015 ARD committee considered Student's PLAAFPs in Reading, Written Expression, Math, Science, Social Studies, and behavior.³⁶⁰
- a. Student did not participate in State assessments while attending private schools from *** through *** grades. In benchmark testing conducted in *** 2014, Student passed Reading with a benchmark of *** percent, failed Math with a benchmark of *** percent, and failed Science with a benchmark of *** percent.³⁶¹
 - b. In *** 2015, Student took the Stanford Achievement Test at school, with resulting scores that showed Student's Spelling, Social Science, and Science Skills were very strong; that Student had a solid foundation in listening and problem solving; and that Student needed support in Student's total *** skills.³⁶²

³⁵⁷ Respondent Ex. 2; Petitioner Ex. 12.

³⁵⁸ Respondent Ex. 1 at 2, 8.

³⁵⁹ Respondent Ex. 11 at 1-4.

³⁶⁰ Respondent Ex. 1 at 2, 19.

³⁶¹ Petitioner Ex. 13 at 15; Petitioner Ex. 15 at 10; Respondent Ex. 13 at 9.

³⁶² Respondent Ex. 7.

206. According to the PLAAFPs, Student was demonstrating grade-level ability in academic subjects; positive behavioral signs, such as developing some friendships, responding appropriately to praise and rewards, and enjoying ***; and a need to extinguish physical aggression, verbal aggression, and to stay in Student's assigned area.³⁶³
207. The ARD committee determined that Student's disability affected Student's progress in all general education curriculum classes.³⁶⁴
208. The ARD committee decided that Student's verbal and physical aggression in the general education setting created a negative effect on the general education classroom, disrupting the instructional process.³⁶⁵
209. The ARD committee found that placement in the general education classroom would have prevented Student from achieving all goals in Student's IEP because Student needs small group instruction in a highly-structured behavior setting in order to succeed.³⁶⁶
210. Petitioner did not prove by a preponderance of the evidence that the District failed to consider Student's PLAAFPs or how Student's disability affected Student's involvement in the general education curriculum.

Issue 6:

Did the District fail to provide Parents with requisite notice when Student was twice restrained in *** 2015?

211. On ***, 2015, Assistant Principal *** was called to Ms. ***'s classroom where she twice pulled Student back to prevent Student from hitting ***. She did not file a report of restraint because she is not required to do so for a child who is not in special education.³⁶⁷
212. The District did not provide Parents with notice when Student was twice restrained in *** 2015.
213. Petitioner proved that the District did not provide Parents with notice after Student was restrained twice on ***, 2015, but did not prove that such notice was required, given that Student's placement was in a general education setting with Section 504 accommodations and not in special education.

Issue 7:

Did the District fail to provide Student with a commensurate school day?

³⁶³ Respondent Ex. 1 at 2.

³⁶⁴ Respondent Ex. 1 at 3.

³⁶⁵ Respondent Ex. 1 at 11.

³⁶⁶ Respondent Ex. 1 at 11.

³⁶⁷ Tr. at 131 (***).

214. Beginning ***, Student spent Student's instructional day in the *** program at ***, with 1800 minutes (30 hours) of instruction per week.³⁶⁸
215. By *** 2015, Mother was ready to pull Student out of *** due to escalating behavioral issues. Ms. *** suggested a shorter school day, which had worked for Student during times of crisis at ***, for *** days of school. Mother agreed with the plan. Ms. *** explained to Mother that the ARD committee would have to approve the change. The change was made, with Student at school from *** to the ***, without an ARD committee meeting ever being held.³⁶⁹
216. The ***-day plan was developed by Mother, Ms. ***, and Ms. *** as a way to help Student be successful for *** given all that was happening and following Student's interaction with a campus police officer the previous day. Student was already ***. Student also had been *** on several days for different reasons. Ms. *** supported the shortened school day plan.³⁷⁰
217. On the ***-day plan, Student did not receive the same number of hours of education per day as the other students in the *** classroom or general education classrooms in the District.³⁷¹
218. On ***, 2015, following a long conversation with Mother, Ms. ***, Coordinator for Special Education, notified Ms. *** and others via email that Student would attend school from *** in order to "survive" the *** of school, and that Mother would be available to *** Student. Ms. *** noted that a brief ARD committee meeting would be necessary to officially institute the change.³⁷²
219. On ***, ***, 2015, Mother mentioned to Ms. *** that she believed the District was arranging an ARD committee meeting to be held on ***, 2015.³⁷³
220. On ***, ***, 2015, Ms. *** and others were notified via email that the ARD committee meeting would be scheduled for the following Monday or Tuesday, *** or ***, 2015.³⁷⁴
221. The ARD committee meeting was canceled on ***, ***, 2015, and was never held, so Student's ***-day plan and later, the ***-hour school day, were never approved by the ARD committee.³⁷⁵

³⁶⁸ Petitioner Ex. 16 at 15.

³⁶⁹ Tr. at 761-764, 775-776 (Mother); Respondent Ex. 12 at 24-25, 28, 30. There is conflicting evidence as to whether Student's school day began at *** or at ***

³⁷⁰ Tr. at 898-899 (***) ; Tr. at 641-642 (***) .

³⁷¹ Tr. at 899 (***) .

³⁷² Tr. at 761-763 (Mother); Tr. at 899 (***) ; Respondent Ex. 12 at 32.

³⁷³ Respondent Ex. 12 at 33.

³⁷⁴ Respondent Ex. 12 at 34.

³⁷⁵ Tr. at 822, 869-871 (***) ; Respondent Ex. 12 at 38.

222. Petitioner proved by a preponderance of the evidence that the District failed to offer Student a commensurate school day for at least the *** days of the 2014-2015 school year.

Issue 8:

Did the District fail to develop an IEP for Student?

223. An IEP was developed for Student at a ***, 2015 ARD committee meeting.³⁷⁶
224. In developing the IEP, the ARD committee considered Student's FIE, teachers' information, medical and health records, Parents' information, school records, and classroom observations.³⁷⁷
225. In developing the IEP, the ARD committee considered Student's PLAAFPs in Reading, Written Expression, Math, Science, Social Studies, and behavior.³⁷⁸
226. The IEP included goals for Reading, Writing, Math, Science, and Social Studies.³⁷⁹
227. The IEP included a BIP to address Student's verbal aggression, physical aggression, and leaving the classroom without permission.³⁸⁰
228. Student's behavior goals included choosing replacement behaviors to use when Student was angry or frustrated; expressing anger appropriately, without using threats, profanity, or name calling; and remaining in Student's designated area.³⁸¹
229. A number of accommodations were included in the IEP including altering assignments, adapting instructions, and managing Student's behavior, as well as for taking the STAAR test.³⁸²
230. The LRE section of the *** 2015 ARD committee report concluded that Student received both academic and nonacademic benefit from the *** program and the general education setting as a whole, but committee members were concerned that Student's verbal and physical aggression in the general education setting created a negative effect on the general education classroom, disrupting the instructional process.³⁸³

³⁷⁶ Petitioner Ex. 16 at 4-10; Respondent Ex. 1 at 4-19.

³⁷⁷ Respondent Ex. 1 at 20.

³⁷⁸ Respondent Ex. 1 at 2, 19.

³⁷⁹ Respondent Ex. 1 at 4-6.

³⁸⁰ Respondent Ex. 1 at 31-34.

³⁸¹ Respondent Ex. 1 at 6-7, 31-34.

³⁸² Petitioner Ex. 16 at 9-10; Respondent Ex. 1 at 8-9, 19, 40.

³⁸³ Respondent Ex. 1 at 11.

231. Placement in the general education classroom would have prevented Student from achieving all of the goals in Student's IEP because Student needs small group instruction in a highly-structured behavior setting.³⁸⁴
232. Student's IEP prevented Student from participating with Student's peers at meals, and in Fine Arts, athletics and regular transportation, stating Student requires a more restrictive environment for success in the educational setting.³⁸⁵
233. The ARD committee recommended that Student attend a centralized program at *** in a self-contained environment with frequent and intense behavioral interventions away from Student's home campus beginning on *** 2015.³⁸⁶
234. Student was to attend *** for the duration of the 2014-2015 school year and the *** program at *** (***) for the 2015-2016 school year.³⁸⁷
- a. At ***, the District could offer a small ratio of students to teachers, but not exclusively one-on-one instruction such as Student currently receives at ***.³⁸⁸
 - b. On *** 2015, Mother was invited to tour the *** classroom at ***, where Student would be attending in the fall of 2015.³⁸⁹
 - c. After the Amended Complaint was filed in *** 2016, Parents toured the *** program at *** (rather than at ***) and determined the program would not meet Student's unique behavioral, emotional, and social needs or Student's academic needs as a *** student with "****" intelligence.³⁹⁰
235. The ARD committee developed five measurable annual IEP goals for Student in academic areas, with corresponding objectives, to be completed by ***, 2016, the next annual ARD committee meeting date.³⁹¹
- a. The FIE, considered by the ARD committee in developing Student's IEP, noted that despite Student's above-average intelligence, Student had produced limited work all school year and, as of *** 2015, had failing grades. The FIE goes on to

³⁸⁴ Respondent Ex. 1 at 11.

³⁸⁵ Respondent Ex. 1 at 13.

³⁸⁶ Respondent Ex. 1 at 16-17, 19.

³⁸⁷ Respondent Ex. 1 at 39.

³⁸⁸ Tr. at 392 (Father).

³⁸⁹ Respondent Ex. 12 at 36. The record is silent as to whether Mother toured the *** *** classroom.

³⁹⁰ Tr. at 391 (Father); Petitioner Ex. 33 at 46, 48, 49; Respondent Ex. 27 at 2.

³⁹¹ Respondent Ex. 1 at 4-6.

state that Student has difficulty initiating and completing work independently and Student struggles to keep Student's academic work and materials organized.³⁹²

- b. Student's academic IEP goals for Reading, Writing, Math, Science, and Social Studies were to be implemented by general education teachers and special education teachers and the methods of evaluation were to include data collection and work samples, with progress reports concurrent with the issuance of report cards.³⁹³
236. On ***, 2015, the ARD committee developed three measurable annual IEP goals related to Student's behavior, with corresponding objectives, to be completed by ***, 2016, the next annual ARD committee meeting date.³⁹⁴
- a. There was no baseline for Student's behavioral goals.³⁹⁵
 - b. Student's IEP goals related to behavior were to be implemented by special education teachers and the methods of evaluation were to include data collection (point sheets), with progress reports issued concurrently with report cards.³⁹⁶
237. Student's IEP provided for no related services.³⁹⁷
238. A preponderance of the evidence establishes that the District devised an appropriate IEP for Student in accordance with relevant law although the academic goals could have been more challenging given Student's status as a *** child.³⁹⁸

Issue 9:

Did the District fail to implement Student's IEP?

239. In a *** 2015 progress report, Ms. ***, reported that progress was sufficient at that time for Student to reach Student's academic goals by the next annual ARD committee meeting date of ***, 2016.³⁹⁹
240. At the end of *** grade, Student had passing grades in all subjects except ***, in which Student had a *** average. For the ***-weeks grading period, Student's *** average was ***, considered to be an inadequate level of comprehension and application.⁴⁰⁰

³⁹² Respondent Ex. 2 at 25.

³⁹³ Respondent Ex. 1 at 4-6.

³⁹⁴ Respondent Ex. 1 at 6-7.

³⁹⁵ Respondent Ex. 1.

³⁹⁶ Respondent Ex. 1 at 6-7.

³⁹⁷ Respondent Ex. 1 at 4-7.

³⁹⁸ See 34 C.F.R. § 300.324(a)(iv) regarding the requirement to meet a child's academic needs.

³⁹⁹ Respondent Ex. 8 at 1-2.

241. By the end of the year, Student had not met the behavior goals set out in Student's IEP.⁴⁰¹ In a *** 2015 progress report, Ms. *** reported that progress was not sufficient at that time for Student to reach Student's behavior goals by the next annual ARD committee meeting date of ***, 2016.⁴⁰²
- a. By the end of *** grade, Student's overall conduct was unsatisfactory, showing slow progress toward improvement.⁴⁰³
 - b. While it was represented to Parents that Student had made some behavioral improvement at ***, Parents did not agree with that assessment. Father saw Student come home from *** every day saying how much Student hated it; had to drag Student kicking and screaming to school in the morning; Student and Mother were called to the school "all the time;" and there were incidents with Student at *** in which the campus police were involved.⁴⁰⁴
242. Student's behavioral data was collected and input by *** staff for computation of charts and trend lines.⁴⁰⁵
- a. One of Student's target behaviors was verbal threats to peers and adults. There was a high incidence of the behavior on ***, 2015; not a single incidence of the behavior from ***, 2015; and a spike in the behavior on ***, 2015. The trend line shows Student was having a lesser frequency of verbal threats to peers and adults.⁴⁰⁶
 - b. Regarding Student's target behavior of leaving Student's assigned area without teacher permission, the trend line was going up, not showing a diminishment in the behavior. But Ms. *** believes the trend line could have been skewed by Student's behavioral incident on ***, 2015.⁴⁰⁷
 - c. Target behavior of physically attacking peers and adults: high incidence on ***, 2015, and ***, 2015, but overall, the trend line is down. Between ***, 2015, and ***, 2015, there was no incident of physical aggression at all.⁴⁰⁸

⁴⁰⁰ Tr. at 904-905 (***) ; Petitioner Ex. 19 at 3; Respondent Ex. 5 at 1; Respondent Ex. 26 at 9.

⁴⁰¹ Respondent Ex. 12 at 39.

⁴⁰² Tr. at 903 (***) ; Respondent Ex. 8 at 2-3.

⁴⁰³ Respondent Ex. 5 at 2-3; Respondent Ex. 26 at 9.

⁴⁰⁴ Tr. at 382 (Father).

⁴⁰⁵ Tr. at 871-872 (***) ; Respondent Ex. 9; Respondent Ex. 9A.

⁴⁰⁶ Tr. at 795-796 (***) ; Respondent Ex. 9A at 2.

⁴⁰⁷ Tr. at 796-797 (***) ; Respondent Ex. 9A at 3.

⁴⁰⁸ Tr. at 797 (***) ; Respondent Ex. 9A at 4.

243. Student's episode duration decreased from crisis behavior for *** hours and *** minutes on Student's first day at *** and *** hours and *** minutes on Student's second day, down to about *** minutes for the next incident which did not occur until a month later. The frequency of incidents increased in ***, but they were about *** minutes each.⁴⁰⁹
244. Student's IEP did not include the use of restraints. Under the "Strategies/Supports/Interventions to prevent or decrease behavior," avoiding power struggles and providing more space are recommendations that are not consistent with the use of restraints.⁴¹⁰
245. *** staff initially followed Student's FBA and BIP adopted by the ARD committee and then analyzed how Student was responding to the behavioral interventions. For Student, *** staff, with approval of Mother, devised a ***-day plan for ending the school year. So for Student, there were at least three written plans plus ongoing discussions and adjustments.⁴¹¹
246. Under the ***-day plan, which was not considered or approved by an ARD committee, Student did not begin school until *** and was not provided a commensurate school day, as required by Student's IEP.
247. Petitioner proved by a preponderance of the evidence that Student's IEP was not fully implemented and, in fact, was modified without approval of the ARD committee.
248. Petitioner proved by a preponderance of the evidence that, despite Student's *** status, Student did not make meaningful academic progress in the *** grade. Student did not complete the *** grade curriculum, finished the year with a failing *** grade, and was barely passing two other classes.
249. A preponderance of the evidence establishes that the District's failure to fully implement accommodations and modifications on a regular basis was more than *de minimis*.⁴¹² Student was subjected to time-outs even though time-outs were not listed in Student's IEP, as required if they are to be used. Also, Student was not provided a commensurate school day for *** days of school.

Issue 10:

Did the District fail to educate Student in the LRE?

250. At the ***, 2015 meeting, the ARD committee determined that the potential harmful effects of removing Student from the general education curriculum included a lack of

⁴⁰⁹ Tr. at 816-817 (***).

⁴¹⁰ Tr. at 615-616 (***); *see* Respondent Ex. 1 at 31.

⁴¹¹ Tr. at 820-821 (***).

⁴¹² *Bobby R.*, 200 F.3d at 349.

opportunity for appropriate role models and diminished access to a full range of curriculum. The ARD committee anticipated harmful effects from removing Student from the general education setting, but decided the benefits outweighed anticipated harmful effects.⁴¹³

251. Prior to the ***, 2015 ARD committee meeting, Student had received Section 504 accommodations, general education classroom core instructional interventions (Tier I), and had attended the *** program, all of which provided an instructional day in the general education setting. The ARD committee determined that these efforts to modify and supplement Student's participation in the general education setting were not sufficient.⁴¹⁴
252. Members of the ***, 2015 ARD committee were concerned that Student's presence in the general education classroom was creating a negative effect due to Student's ongoing behaviors including verbal and physical aggression. The ARD committee addressed those concerns by considering a change of placement in order to eliminate any continued disruption to the instructional process in the general education classroom.⁴¹⁵
253. The ***, 2015 ARD committee decided Student required specialized instruction not available in the general education classroom, including access to small group instruction in a highly-structured behavior setting to accomplish the IEP with specialized instruction, methodology, or content. After considering educating Student in a general education setting with supplementary aids and services, this option was rejected because Student's behaviors/needs are such that Student requires a structured/specialized environment for implementation of the IEP and BIP and/or Student and/or other students would not benefit satisfactorily from instruction in the general education classroom.⁴¹⁶
254. The ARD committee decided that Student would be placed in an *** classroom at ***, in a centralized program away from Student's home campus.⁴¹⁷
255. Student's placement in the *** classroom at *** prevented Student from participating with students without disabilities in nonacademic activities including ***, regular transportation, and general education routines such as homeroom assignments and ***. The ARD committee determined Student's placement was necessary because Student required a more restrictive environment in order to be successful in an educational setting.⁴¹⁸

⁴¹³ Petitioner Ex. 16 at 13.

⁴¹⁴ Petitioner Ex. 16 at 11.

⁴¹⁵ Petitioner Ex. 16 at 11.

⁴¹⁶ Petitioner Ex. 16 at 12.

⁴¹⁷ Petitioner Ex. 16 at 16.

⁴¹⁸ Petitioner Ex. 16 at 13-14.

256. According to Student's IEP, from *** 2015, to ***, 2015, Student's instructional day in the *** classroom at ***, a centralized program away from Student's home campus would consist of 1800 minutes per week, with courses in Fine Arts, Health Fitness, Language Arts, Math, Science, and Social Studies.⁴¹⁹
257. Petitioner did not prove by a preponderance of the evidence that the District failed to educate Student in the LRE. The ARD committee appropriately considered placement options before arriving at the decision to place Student at ***.

Issue 11:

Did the District fail to incorporate recommendations from evaluations into Student's initial ARD committee report to address Student's educational needs?

258. At the ***, 2015 meeting, the ARD committee discussed the differences between the FIE and the private outside evaluation (*i.e.* ***'s diagnosis of Autism Spectrum Disorder) and the similarities in the recommendations for intervention (emotional and behavioral regulation).⁴²⁰
259. The FIE considered by the ARD committee included information from previous evaluations of Student, including a *** 2007 FIE completed by the *** Independent School District, due to concerns related to speech articulation; Dr. ***'s ***, 2012 psychological evaluation; Dr. ***'s ***, 2014 letter to *** staff; and ***'s evaluation conducted on *** 2014.⁴²¹
260. A preponderance of the evidence establishes that the District considered recommendations from outside evaluations but did not incorporate all of those recommendations.
261. The ARD committee was required to consider outside evaluations but was not required, under the law, to incorporate recommendations from those outside evaluations.⁴²²

Issue 12:

Did the District fail to ever convene an ARD committee meeting to discuss Parent's request that Student be returned to the *** program and fail to issue prior written notice concerning that refusal?

262. On or about ***, 2015, Mother requested that Student be returned to the *** program for the remainder of the school year. Ms. ***, one of the District's special education coordinators, and Ms. ***, Administrative Intern for the District's ***, advised that could

⁴¹⁹ Petitioner Ex. 16 at 15.

⁴²⁰ Petitioner Ex. 16 at 19.

⁴²¹ Respondent Ex. 2 at 2-3.

⁴²² 34 C.F.R. § 300.502(c)(1).

not be done because Student was now a special education student and the *** program is a general education program.⁴²³

263. In addition, Ms. *** told Mother that Student was receiving more intensive support in the *** classroom.⁴²⁴ She said the District would not return Student to the *** program, a DAEP for *** students, because Student's behavior was being addressed at ***.⁴²⁵
264. Parents did not request an ARD committee meeting to discuss returning Student to the *** program.
265. The District did not, on its own, convene an ARD committee meeting to discuss Mother's request that Student be returned to the *** program.⁴²⁶
266. The District was not required to issue prior written notice to Parents for not convening an ARD committee meeting to discuss Student's possible return to the *** program.⁴²⁷

Issue 13:

Did the District fail to ever convene an ARD committee meeting or respond to Parents' constructive notice and request for placement and tuition reimbursement at ***?

267. In *** 2015, while touring the *** program with Ms. ***, Mother asked about the possibility of an outside placement for Student because that is something that Dr. *** had told her could be done. Ms. *** told Mother that an outside placement was something the District could do legally.⁴²⁸
268. In *** 2015, before Student's school day at *** was shortened, Mother mentioned outside placement for Student to Ms. *** in an informal meeting and Ms. *** told her "We don't like to do that."⁴²⁹ Ms. *** does not recall having the conversation with Mother.⁴³⁰
269. Mother did not know that if Parents wanted the District to pay for Student to attend a nonpublic day school, they had to notify the District in writing.⁴³¹

⁴²³ Tr. at 357-358 (***); Tr. at 380 (Father); Tr. at 758-759 (Mother); Petitioner Ex. 37 at 7.

⁴²⁴ Tr. at 930-931 (***).

⁴²⁵ Tr. at 932 (***).

⁴²⁶ Tr. at 413 (Father).

⁴²⁷ Tex. Educ. Code § 37.004(a)(c); 19 TAC §§ 89.1011(b), 89.1050(e)(2).

⁴²⁸ Tr. at 765 (Mother).

⁴²⁹ Tr. at 765, 776 (Mother).

⁴³⁰ Tr. at 933 (***).

⁴³¹ Tr. at 776 (Mother).

270. In response to Ms. ***'s suggestion that Student obtain *** tutoring over the summer, Parents placed Student at ***.
271. Over the summer of 2015, while Student was attending ***, Mother spoke with Ms. *** who told her the District could move Student back to a general education setting in the fall and work with Student there. But Mother was not willing to have Student, who was happy and doing well at ***, return to the District.⁴³²
272. Over the summer of 2015, Mother told Ms. ***—but did not put it in writing—that she would hire an attorney to pursue private school placement for Student. She believes Ms. *** must have communicated the information to someone at the District, because about 2 days later, the principal of *** sent her an email. However, the email was in Mother's junk email folder and she did not see it until about a month later.⁴³³
273. Parents decided not to send Student to the *** *** program given the failure of ***'s *** program for Student and how well Student was doing at ***.⁴³⁴
274. On ***, 2015, Mother notified the *** counselor via email that Student would not be attending school there in the fall. The email did not state that Student would be attending *** in the fall or that Parents wanted tuition reimbursement for Student's unilateral placement at the private school.⁴³⁵
275. In *** 2015, although they had been provided with a Notice of Procedural Safeguards on ***, 2015, Parents were not aware that they could have requested an ARD committee meeting to discuss having the District pay for Student's placement at ***.⁴³⁶
276. The list of possible placements contained in the ARD document provided to Parents includes nonpublic day schools.⁴³⁷
277. Except for a statement in the ARD committee report, the District did not inform Parents of the possibility of Student being placed in a nonpublic day school.⁴³⁸
278. Had Parents known about TEA's list of approved nonpublic day schools, they might have looked into whether any of those schools could have worked for Student.⁴³⁹

⁴³² Tr. at 767 (Mother).

⁴³³ Tr. at 766-768 (Mother); Tr. at 723-724 (***).

⁴³⁴ Tr. at 388, 391-392 (Father).

⁴³⁵ Tr. at 388 (Father); Petitioner Ex. 33 at 44.

⁴³⁶ Tr. at 389 (Father).

⁴³⁷ Tr. at 935 (***); Respondent Ex. 1 at 12.

⁴³⁸ Tr. at 358-359, 933, 935 (***); Tr. at 371, 386 (Father); Respondent Ex. 1 at 12.

⁴³⁹ Tr. at 388 (Father); Petitioner Ex. 28.

279. The ARD committee would consider a nonpublic day school placement if the District was not able to meet the educational needs of a student at school.⁴⁴⁰
280. The nonpublic day school arrangement/setting provides special education and related services through a contractual agreement between the District and a nonpublic day school for special education. The District submits required, related information to TEA. TEA determines the number of contract students reported in full-time equivalents and pays state funds to the District according to the formula prescribed by law.⁴⁴¹
281. If the District was not providing FAPE to a child and was considering nonpublic day school placement, either the administrator of the ARD or coordinator would provide the approved list to parents.⁴⁴²
282. For the 2015-2016 school year, *** did not qualify as a nonpublic day school because it is a private school that was not on the TEA list of approved nonpublic day schools.⁴⁴³
283. If a nonpublic day school is not on the TEA list, a school district may request that the school be considered for approval.⁴⁴⁴
284. TEA makes payments to school districts for students placed by that district in a nonpublic day school. The formula is 1.7 times the adjusted allotment for that school district, with adjusted allotments typically being about \$5,500. TEA only provides funding for students placed in approved facilities. To Mr. ***'s knowledge, TEA has never paid for placement at a nonpublic day school that was not on the approved list.⁴⁴⁵
285. Another requirement for funding is that TEA must approve the IEP for the student placed in the nonpublic day school. TEA's guidance is designed to ensure that nonpublic day schools comply with the IDEA and provide students a FAPE.⁴⁴⁶
286. If the District refuses nonpublic school placement for a student, that refusal should be explained to parents in prior written notice.⁴⁴⁷
287. There is no evidence that Parents requested in writing that Student be placed at *** at the District's expense prior to filing the Complaint on October 28, 2015, in which

⁴⁴⁰ Petitioner Ex. 28 at 16, 64 (*** deposition).

⁴⁴¹ Petitioner Ex. 29a.

⁴⁴² Petitioner Ex. 28 at 31 (*** deposition).

⁴⁴³ Tr. at 271-272 (***); Petitioner Ex. 28 at 64, 75-76 (*** deposition, referencing Deposition Ex. 1); Petitioner Ex. 29 at 30-40; *see* TEA Nonpublic School Review Process, Petitioner Ex. 29 at 42-56.

⁴⁴⁴ Tr. at 271-272 (***).

⁴⁴⁵ Tr. at 277, 279, 284 (***).

⁴⁴⁶ Tr. at 282-284 (***).

⁴⁴⁷ Petitioner Ex. 28 at 24 (*** deposition).

reimbursement for summer 2015 tuition at an unnamed private school is one of the requested remedies.

288. There is no evidence that Parents requested in writing that Student be placed at *** at the District's expense prior to filing the Amended Complaint on February 22, 2016, in which tuition reimbursement for Student's placement at *** is one of the requested remedies.
289. As of the May 2016 due process hearing dates, the District had not convened an ARD committee meeting to discuss Student's placement at *** or tuition reimbursement for Student's placement there.
290. A preponderance of the evidence establishes that Mother's *** 2015 email notifying the District that Student would not be attending school at *** in the fall was too vague to constitute written notification that Student would be unilaterally placed at *** and that Parents would seek tuition reimbursement.
291. A preponderance of the evidence establishes that Petitioner's requested remedy of tuition reimbursement for Student's placement at an unnamed private school, as set out in the Complaint, does not constitute a written notification that Student would be unilaterally placed at *** and that Parents would seek tuition reimbursement.
292. A preponderance of the evidence establishes that Petitioner's requested remedy of tuition reimbursement for Student's placement at ***, as set out in the Amended Complaint, does not constitute a written notification that can be resolved by the ARD committee as the proposed remedy is before the hearing officer.
293. A preponderance of the evidence establishes that the District was not required to convene an ARD committee meeting to address Mother's *** 2014 email or the remedies proposed in the Complaint and Amended Complaint.

Issue 14:

Did the District fail to provide Student with a FAPE during the summer of 2015, and the 2015-2016 school year, and is the District continuing to deprive Student of a FAPE designed to meet Student's unique educational needs?

Summer of 2015

294. At the ***, 2015 meeting, the ARD committee discussed Extended School Year (ESY) services, and both Parents and school committee members decided not to recommend ESY services.⁴⁴⁸
295. The District did not provide Student with ESY services for the summer of 2015.

⁴⁴⁸ Petitioner Ex. 16 at 15.

296. At the end of the year at ***, Ms. *** expressed concern to Parents that Student was behind in *** and recommended that Student get *** help over the summer, which is what led Parents to ***.⁴⁴⁹
297. On ***, 2015, Student started summer school at ***, a one-on-one private school. Parents enrolled Student for summer school because they were worried that going back to school in the fall might be difficult for Student after spending a summer at home, given the traumatic school year Student had in the District. Student has a friend of similar temperament who had success at ***, and Student had no problems during one-on-one lessons with tutors.⁴⁵⁰
298. A student qualifies for ESY services if “the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression” in one or more critical areas addressed in the student’s current IEP goals and objectives “that cannot be recouped within a reasonable period of time.”⁴⁵¹
299. There is no evidence that Student would exhibit or be expected to exhibit severe or substantial regression in a critical area of Student’s IEP over the summer or that such regression could not be recouped within a reasonable period of time if Student was not provided ESY services in the summer of 2015.
300. A preponderance of the evidence establishes that the District did not fail to provide Student with a FAPE in the summer of 2015.

2015-2016 School Year

301. Parents’ enrollment of Student at *** was a unilateral placement without written notice to the District.⁴⁵²
302. When a child is a parentally-placed private school student, the only issue that may be raised in a due process hearing request is that the school district did not fulfill its Child Find duties.⁴⁵³
303. As long as Student remains in a unilateral private school placement, Petitioner has no legal basis to complain that the District failed to provide a FAPE to Student in 2015-2016 and is continuing to do so.⁴⁵⁴

⁴⁴⁹ Tr. at 386 (Father); Tr. at 765-766 (Mother).

⁴⁵⁰ Petitioner Ex. 37 at 7.

⁴⁵¹ 19 TAC § 89.1065(2).

⁴⁵² Tr. at 393 (Father).

⁴⁵³ 34 C.F.R. §§ 300.130, 300.140.

⁴⁵⁴ 34 C.F.R. §§ 300.130, 300.140.

V. APPLICABLE LAW, ANALYSES, AND CONCLUSIONS

A. The IDEA and Its Implementing Regulations

The IDEA, the Texas Education Code, and the rules promulgated by the Texas Commissioner of Education and the State Board of Education require the District to guarantee certain procedural and educational rights to parents of children with disabilities. Under the IDEA, and its implementing regulations, school districts in Texas must afford children with disabilities a [FAPE], which is defined as “special education and related services that: [a]re provided at public expense, under public supervision and direction, and without charge; [m]eet the standards of the [State educational agency] . . . ; [i]nclude an appropriate preschool, *** school, or secondary school education in the State involved; and [a]re provided in conformity with the [IEP] that meets the requirements of [34 C.F.R.] §§ 300.320 through 300.324.”⁴⁵⁵

B. Issues

1. Did the District violate its Child Find obligations by failing to identify Student as a child with a disability prior to March 2015?

a. Applicable Law

Under Child Find, the District has an affirmative, ongoing obligation to evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and a need for special education as a result of those disabilities.⁴⁵⁶ The Child Find obligation includes children who are suspected of being children with disabilities under 34 C.F.R. § 300.8 and in need of special education, even if they are advancing from grade to grade.⁴⁵⁷ A request for an initial evaluation may be made by either the parent or the district.⁴⁵⁸

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

⁴⁵⁶ 34 C.F.R. § 300.111.

⁴⁵⁷ 34 C.F.R. § 300.111(c).

⁴⁵⁸ 34 C.F.R. 300.301(b).

But, because the Child Find obligation is an affirmative one, a parent is not required to request that the district identify and evaluate a child.⁴⁵⁹ Also, there is not any requirement that a parent's request for an evaluation be in writing.⁴⁶⁰

Child Find applies equally to *** students, where there is reason to suspect a disability and a need for special education and related services.⁴⁶¹ A district can violate its Child Find duty by repeatedly referring a student for interventions rather than evaluating the student's need for special education and related services.⁴⁶²

The IDEA describes three circumstances under which the district will be deemed to have knowledge that a student has a disability. As applicable to this proceeding, one of the circumstances is that the parent requested an FIE and another of the circumstances is that the teacher of the child, or other district personnel, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.⁴⁶³ Once the evaluation is requested, it must be conducted in an expedited manner.⁴⁶⁴

Texas law expressly calls for school districts to consider regular education interventions, such as RtI, prior to a referral for special education. If the student continues to experience difficulty in the general education classroom after the provision of interventions, district personnel must refer the student for an FIE.⁴⁶⁵ The Office of Special Education Programs has

⁴⁵⁹ *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012, unpublished); *C.C. Jr. v. Beaumont Indep. Sch. Dist.*, 65 IDELR 109 (E.D. Tex. 2015).

⁴⁶⁰ *District of Columbia Pub. Schs.*, 115 LRP 16744 (SEA DC 03/11/15).

⁴⁶¹ Memorandum to State Dirs. of Special Educ., 65 IDELR 181 (OSEP 2015).

⁴⁶² *El Paso Indep. Sch. Dist. v. Richard R.*, 50 IDELR 256 (W.D. Tex. 2008, aff'd in part, rev'd in part, 53 IDELR 175 (5th Cir. 2009)).

⁴⁶³ 34 C.F.R. § 300.534(b).

⁴⁶⁴ 34 C.F.R. § 300.534(d)(2)(1).

⁴⁶⁵ 19 TAC § 89.1011.

explained that providing RtI prior to a referral for an FIE does not conflict with the IDEA's Child Find requirements.⁴⁶⁶

b. Analysis and Conclusion

Petitioner proved that the District violated its Child Find obligation when it waited until *** 2015 to refer Student to special education. By the October 28, 2014 accrual date for this proceeding, the District should have suspected that Student was a child with a disability who might be eligible for special education. By the *** 2014 Section 504 meeting, it was apparent that general education behavioral interventions were not working. In addition, Student, who had been ***, had failing grades. The District was aware that Student had been diagnosed with ADHD, ODD, and Mood Disorder, disabilities that fall under the IDEA. Instead of referring Student to special education pursuant to Mother's request, the *** 2014 Section 504 committee decided to try Section 504 behavioral interventions. The District should have suspected that Student's behavioral issues were affecting Student's ability to learn in the classroom and conducted the FIE in the autumn of 2014.

Starting in *** 2014, despite having Section 504 behavioral interventions in place, Student continued to engage in verbal and physical aggression, which should have alerted the District that it was time for the FIE. But it was not until *** 2015, after Student ***, that the District finally arranged for an FIE. The FIE was not completed until the end of ***; the ARD committee did not meet until ***, 2015, to consider the FIE. It was not until ***, that Student's special education services began.

Despite having every reason to suspect Student had a disability that might need to be addressed with special education services by October 28, 2014, the District failed to evaluate Student in a timely manner. The intervening months were crucial as Student not only had failing grades, but Student was suspended numerous times and ultimately engaged in physical aggression against *** in *** 2015. This *** child experienced loss of educational opportunity

⁴⁶⁶ Office of Special Education and Rehabilitative Services, Letter to Ferrera, (2012). <https://www2.ed.gov/policy/speced/guid/idea/letters/2012-1/ferrara022912rtiq2012.pdf>.

due to suspensions and exclusions, being detained by police, changing programs three times, failing classes at ***, and failing *** grade *** at the end of the school year. Student was regressing in Student's therapeutic progress, according to Dr. ***. The District's own FIE completed in *** 2015 states: "Student's emotional and behavioral difficulties have inevitably impacted the quality of Student's social relationships at school. In addition, despite [Student's] above average intellectual ability, Student has produced limited work all school year and Student struggles to keep Student's academic work and materials organized."⁴⁶⁷ Thus, the District's delay in fulfilling its Child Find duty denied Student a FAPE from the first day of school until at least ***, when Student began the *** program at ***.

Because of the delay in Student's identification, Student is entitled to a remedy of compensatory education for this entire period of time, approximately 7 months.⁴⁶⁸

2. Did the District fail to provide a FAPE to Student during the 2014-15 school year?

a. Applicable Law

The IDEA defines 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, *** school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.⁴⁶⁹

⁴⁶⁷ Petitioner Ex. 15 at 25.

⁴⁶⁸ Because the District denied Student a FAPE in 2014-2015, as discussed *infra*, the overall compensatory education award is for the length of one school year.

⁴⁶⁹ 34 C.F.R. § 300.17.

The U.S. Supreme Court has ruled that a 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.⁴⁷⁰ The Fifth Circuit has summarized the *Rowley* standard:

[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).⁴⁷¹

The Fifth Circuit has set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the LRE; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders;" and (4) positive academic and nonacademic benefits are demonstrated.⁴⁷²

b. Analysis and Conclusion

Petitioner proved Student was denied a FAPE in the 2014-2015 school year. From ***, 2014, until *** 2015, Student was denied a FAPE because the District did not timely identify Student as eligible for special education and related services. After Student's placement at ***, Student continued to be denied a FAPE through the end of the school year because Student's IEP was not correctly implemented.

⁴⁷⁰ *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).

⁴⁷¹ *Bobby R.*, 200 F.3d at 347, citing to *Cypress-Fairbanks*, 118 F.3d at 247-48.

⁴⁷² *Bobby R.*, 200 F.3d at 347-348, citing to *Cypress-Fairbanks*, 118 F.3d at 253.

Student's academic benefit for 2014-2015 was *de minimis*. At the end of the fall semester, Student was failing all core subjects. After Student was moved to the *** program, Student's teachers there decreased Student's work demands, such as allowing Student not to complete assignments, as a primary means to keep Student calm. It is unclear how Student could have earned A's and B's while in the *** program, as reflected in Student's corrected ***-weeks report card. Student's academic IEP goals did not reflect Student's ability as a *** child. Student did not complete the *** grade curriculum, Student failed *** for the year, and Student barely passed two other subjects.

Similarly, Student's nonacademic benefit at *** was *de minimis*. Although Student's IEP contained only positive methods for attaining Student's behavioral goals and objectives, Student was subjected to numerous time-outs, at least eight restraints, and up to four police interventions. In order to get Student to attend school at all, the District implemented a ***-day plan (with Mother's approval) for *** days of school, allowing Student to start school at ***. When even the ***-day plan did not work, the District agreed to shorten Student's school day to *** hours without ARD committee consideration or approval. Student was so regressed in Student's therapy by the end of the year that, upon the advice of Dr. ***, Student ***. Ms. *** reported on *** 2015, that Student was not likely to reach Student's behavioral goals by the next annual ARD committee meeting, to be held on ***, 2016.

Petitioner proved that from *** 2014 through ***, 2015, the District denied Student a FAPE by not timely meeting its Child Find obligation and that from *** 2015, to the end of the school year, the District denied Student a FAPE while Student was at ***. That the *** program was administered in the LRE and the services were provided in a coordinated and collaborative manner by the key "stakeholders" does not overcome the inadequate IEP and lack of positive academic and nonacademic benefits. Petitioner prevails on this issue.

- 3. Did the District fail to consider providing Student with positive behavioral supports and interventions, including counseling?**
 - a. Counseling**

While an ARD committee can always recommend more or different supports, such as counseling, an IEP need not provide every special service necessary to maximize a child's potential.⁴⁷³

As set out in the Findings of Fact, the ARD committee considered recommendations contained in the FIE and the *** evaluation. Neither the FIE multidisciplinary team nor the *** team recommended counseling for Student. As such, the ARD committee had no reason to offer counseling as a related service.

b. Positive Behavioral Interventions

In developing an IEP, the IDEA requires that the ARD committee address behavior management whenever a student's behavior is interfering with the child's ability to benefit from Student's educational programming. The ARD committee must consider the child's need for the use of "positive behavioral interventions and supports" in the case of a student with a disability whose "behavior impedes Student's learning or that of others."⁴⁷⁴

The evidence shows Student's IEP contained positive behavioral supports and interventions, which were followed, but not exclusively. Student also was subjected to time-outs, restraints, and police interventions while at ***, none of which were mentioned in Student's IEP. The use of time-out must be included in a student's IEP;⁴⁷⁵ the word "time-out" appears nowhere in Student's IEP.

At ***, from *** 2014 until Student's Section 504 accommodations were in place in *** 2014, Student was held to the Student Code of Conduct. Before and after the Section 504 accommodations were in place, Student was frequently suspended, and subject to police intervention when Student ***. Student also was sent home due to misbehavior when Student was not formally suspended.

⁴⁷³ *Rowley*, 458 U.S. at 199.

⁴⁷⁴ 34 C.F.R. § 300.324(a)(2)(i).

⁴⁷⁵ 19 TAC § 89.1053(g)(2).

No meaningful Section 504 behavior plan was developed ***, 2015, as Student moved to the *** program. The *** program staff attempted positive behavioral supports but also used isolation to control Student's behavior.

The IEP to be used at *** beginning *** 2015, contained positive behavioral supports and did not mention time-out, isolation, restraints, or police intervention, all of which were used at ***. Dr. *** testified that restraint should not be used with Student. The *** program staff did not restrain Student and *** staff has not restrained Student.

The IDEA specifically allows school districts to refer students with disabilities to law enforcement and juvenile authorities notwithstanding their disability status.⁴⁷⁶ However, where a student with a disability clearly does not pose a threat of harm to ***self or others, school personnel should first implement the behavioral interventions contained in Student's IEP before calling the police.⁴⁷⁷ The record is silent either as to whether Student posed a threat of harm to ***self or others or whether the IEP behavioral interventions were attempted before police intervened at ***.

Nevertheless, Petitioner did not prove that the District failed to consider providing Student with positive behavioral supports and interventions. The RtIs, Section 504 accommodations, and the behavioral goals in Student's IEP consist solely of positive behavioral supports.

4. Did the District fail to provide Parents with prior written notice when it refused to evaluate Student?

A school district must provide notice to the parents of a child with a disability when it refuses to evaluate the child.⁴⁷⁸ State law clarifies that the IDEA's notice requirement is only

⁴⁷⁶ 34 C.F.R. § 300.535.

⁴⁷⁷ See *C.B. v. Sonora Sch. Dist.*, 54 IDELR 293 (E.D. Cal. 2010).

⁴⁷⁸ 34 C.F.R. § 300.503(a)(2).

triggered upon a *written* request for an FIE made to a director of special education or to a district administrative employee (emphasis added).⁴⁷⁹

Mother's request for a special education referral, presented at the *** 2014 Section 504 meeting, was not in writing. Because there is no legal obligation to provide prior written notice upon a verbal request, Petitioner fails to state a claim upon which relief may be granted. In addition, the alleged violation occurred before the accrual date for this proceeding. Therefore, this issue is decided in the District's favor.

5. Did the ARD committee fail to consider Student's PLAAFPs and how Student's disability affected Student's involvement in the general education curriculum?

a. Applicable Law

As relevant to this proceeding, each IEP must contain "[a] statement of the child's [PLAAFPs], including (1) how the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.* the same curriculum as for nondisabled children)[.]"⁴⁸⁰ If PLAAFPs do not identify the unique needs of the child or establish a baseline for setting goals and monitoring progress, then the IEP may be found to deny a FAPE.⁴⁸¹ The lack of baseline data makes it impossible to determine if a student made adequate progress.⁴⁸²

With respect to behavioral needs, the PLAAFPs must clearly describe the behavior at issue, so that the IEP can include appropriate goals and services for the student to reach them.

b. Analysis and Conclusion

⁴⁷⁹ 19 TAC § 89.1011(b)((2).

⁴⁸⁰ 34 C.F.R. § 300.320(a)(1).

⁴⁸¹ See, e.g., *Friedman v. Vance*, 24 IDELR 654 (D. Md. 1996); *Portland Pub. Schs.*, 24 IDELR 1196 (SEA ME 1996).

⁴⁸² 34 C.F.R. § 300.320(3); *Dover-Eyota Indep. Sch. Dist. #533*, 113 LRP 23875 (SEA MN 02/13/13).

As set out in the Findings of Fact, the ARD committee considered Student's PLAAFPs and how Student's disability affected Student's involvement in the general education curriculum. However, the PLAAFPs were too general to establish a baseline for measuring Student's progress toward meeting Student's goals. As such, the IEP goals were lacking. However, the issue presented is whether the ARD committee considered Student's PLAAFPs; the ARD committee did consider the PLAAFPs. The ARD committee should have requested more information from Student's teachers so that baselines could be established for Student's goals. Petitioner did not prevail on the issue as presented.

6. Did the District fail to provide Parent with requisite notice when Student was twice restrained in * 2015?**

a. Applicable Law

The "decision of whether to use [restraint] is left, under the IDEA, to individual states."⁴⁸³ The use of restraint is permissible under Texas law, which provides school districts with the authority to adopt necessary rules, such as those related to the use of restraint, "for the safety and welfare of students, employees, and property."⁴⁸⁴ The Commissioner of Education is required to "adopt procedures for the use of restraint . . . in the case of a student with a disability receiving special education services under subchapter A, Chapter 29."⁴⁸⁵

b. Analysis and Conclusion

Petitioner presented no evidence of the District's policy regarding what notification, if any, is required for parents of students in general education, even of students receiving Section 504 accommodations, if their child is restrained at school. The evidence shows that reporting and notification requirements apply to students who receive special education services under the IDEA. In *** 2015, Student was not receiving special education services. Petitioner did not

⁴⁸³ *Letter to Weiss*, 55 IDELR 173 (ED 2010).

⁴⁸⁴ Tex. Atty. Gen. Op. No. RQ-0459-JC (2002)(citing Tex. Educ. Code § 37.102(a)).

⁴⁸⁵ Tex. Educ. Code § 37.0021(d).

prove that the District was required, under its own policy adopted pursuant to Texas law, to provide Parents with notice of Student's restraints. Petitioner did not prevail on this issue.

7. Did the District fail to provide Student with a commensurate school day?

a. Applicable Law

The Texas Administrative Code requires "students with disabilities [to] have available an instructional day commensurate with that of students without disabilities. The ARD committee must determine the appropriate instructional setting and length of day for each student, and these must be specified in the student's IEP."⁴⁸⁶ The ARD committee "has the authority to decide whether to shorten a student's instructional day, and, if so, how to shorten it[.]" with deliberations including "meaningful input from the student's parents."⁴⁸⁷

In making changes to an IEP after the annual ARD committee meeting for the school year, a parent of a child with a disability and a district may agree not to convene an ARD committee meeting for the purposes of making those changes, and may develop a written document to amend or modify the child's current IEP. The district must ensure that the ARD committee is informed of the changes.⁴⁸⁸

b. Analysis and Conclusion

For *** days of the 2014-2015 school year, the District failed to provide Student with a commensurate school day. Under the ***-day plan, Student's school day did not begin until ***. Mother and *** staff agreed to implement the ***-day plan, and Mother even advocated for the shortened day given Student's success with shortened days at ***. Then, for *** days of school, Student's school day was shortened to *** hours without ARD committee

⁴⁸⁶ 19 TAC § 89.1075(e).

⁴⁸⁷ Texas Education Agency, *Guidance Regarding Temporary Absences of Students with Disabilities*, tea.texas.gov/WorkArea/DownloadAsset.aspx?id=25769820647 (referencing 19 TAC § 89.1075(e)).

⁴⁸⁸ 34 C.F.R. § 300.324 (a)(i)(ii).

consideration or approval. The shortened school day was not approved by the ARD committee and there is no evidence that the ARD committee was informed of the change. The ***-day plan and ***-hour day denied Student access to the full day of special education services approved by the ARD committee when it developed Student's IEP.

Even if the plans for a shortened school day could be viewed strictly as a procedural violation, it was a denial of FAPE. A procedural violation may amount to a denial of FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (3) caused a deprivation of educational benefit.⁴⁸⁹ Here, Student was deprived of educational benefit by having a shortened instructional day and thus, was denied a FAPE. Petitioner prevailed on this issue.

8. Did the District fail to develop an IEP for Student?

a. Applicable Law

The U.S. Supreme Court has ruled that a 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.⁴⁹⁰ As set forth *supra*, the Fifth Circuit has summarized the *Rowley* standard and has established four factors to determine whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA.⁴⁹¹

Was the substance of the IEP reasonably calculated to enable Student to receive educational benefits? The four factors to consider in answering the question are: (1) was the program individualized on the basis of the student's assessment and performance? (2) was the program administered in the LRE? (3) were the services provided in a coordinated and

⁴⁸⁹ 34 C.F.R. § 300.513.

⁴⁹⁰ *Rowley*, 458 U.S. at 181.

⁴⁹¹ *Bobby R.*, at 347-349, citing to *Cypress-Fairbanks*, 118 F.3d at 247-248, 253.

collaborative manner by the key “stakeholders?” and (4) were positive academic and nonacademic benefits demonstrated?⁴⁹²

The IEP must comply with the requirements of 34 C.F.R. §§ 300.320 and 300.324.⁴⁹³ All members of the ARD committee must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARD committee concerning required elements of the IEP must be made by mutual agreement if possible.⁴⁹⁴

b. Analysis and Conclusion

Petitioner seems to complain that because the FIE did not identify Student’s disability as autism, the IEP could not be correctly developed. The appropriateness of the FIE is not at issue in this proceeding and will not be addressed by the hearing officer.

The ARD committee substantially complied with the 34 C.F.R. §§ 300.320 and 300.324 requirements and developed an IEP reasonably calculated to provide a meaningful educational benefit under the IDEA according to the four factors set out by the Fifth Circuit.⁴⁹⁵ As set forth *supra*, two of the four factors were met: the program was administered in the LRE and services were provided in a coordinated and collaborative manner by the key “stakeholders.” As previously discussed, a third factor—positive academic and nonacademic benefits—was not demonstrated.

The first of the four factors also was not met, in that the program was not individualized on the basis of the student’s assessment and performance. The ARD committee did not develop an IEP to address the academic needs of Student, *** child. The IEP’s academic goals underestimated Student’s ability as a *** child and proposed no meaningful academic growth.

⁴⁹² *Bobby R.*, 200 F.3d at 347-348, citing to *Cypress-Fairbanks*, 118 F.3d at 253; see also *Michael F.*, 118 F.3d at 253.

⁴⁹³ 19 TAC § 89.1055(a).

⁴⁹⁴ 19 TAC § 89.1050(g).

⁴⁹⁵ *Bobby R.*, at 347-349, citing to *Cypress-Fairbanks*, 118 F.3d at 247-248, 253.

However, an IEP is to be judged as to its appropriateness at the time it was written, and not with respect to subsequently obtained information about the student.⁴⁹⁶ There is no evidence that the ARD committee could have foreseen that the positive behavioral interventions included in Student's IEP would not be exclusively followed, resulting in *de minimis* nonacademic benefit, or that Student, who had grade-level ability, would fail *** and barely pass two other classes, resulting in *de minimis* academic benefit.

Thus, the ARD committee developed an IEP reasonably calculated to provide a meaningful educational benefit under the IDEA. Petitioner does not prevail on this issue.

9. Did the District fail to implement Student's IEP?

a. Applicable Law

A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Failure to implement a material portion of the IEP amounts to denial of a FAPE.⁴⁹⁷

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.⁴⁹⁸ The local education agency must implement a student's IEP with all required components.⁴⁹⁹ To prevail on a claim that the District failed to implement Student's IEP,

⁴⁹⁶ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), reh'g en banc denied, 110 LRP 65965 (1st Cir. 09/14/90), cert. denied, 499 U.S. 912, 110 LRP 66026 (1991). (“[A]n IEP is a snapshot, not a retrospective,” and “must take into account what was objectively reasonable at the time the IEP was drafted.”)

⁴⁹⁷ *Bobby R.*, 200 F.3d. 348-349.

⁴⁹⁸ 34 C.F.R. § 300.323(c).

⁴⁹⁹ 34 C.F.R. § 300.323(c).

Petitioner must show that the lack of implementation amounted to a substantial or significant failure to provide services under the IEP.⁵⁰⁰

b. Analysis and Conclusion

The District failed to implement Student's IEP when *** staff adopted the ***-day plan without ARD committee approval or a change to Student's IEP. Under the ***-day plan, which was not considered or approved by an ARD committee, Student did not begin school until *** and was not provided a commensurate school day, as required by Student's IEP. For *** days of school, Student's school day was reduced to *** hours, again without consideration or approval of the ARD committee.

It is undisputed that the behavioral interventions in Student's IEP were not always correctly implemented. The IEP required *** staff to use a calm interaction style with Student and to minimize verbal interactions. Student was to have access to a cooling off period. Staff was to avoid "power struggles." Yet *** staff repeatedly used time-outs, used at least eight physical restraints, and 16 automatic isolations.⁵⁰¹ In addition, campus police were called on up to four occasions, the last occasion being so traumatic for Student that Student was placed on a ***-day plan, shortening school days, just to get Student through the end of the school year.

Petitioner proved by a preponderance of the evidence that Student's IEP was not fully implemented and, in fact, was modified without approval of or notification to the ARD committee.

10. Did the District fail to educate Student in the LRE?

a. Applicable Law

⁵⁰⁰ *Bobby R.*, at 348-349.

⁵⁰¹ The use of time-out must be included in a student's IEP. 19 TAC § 89.1053(g)(2). The word "time-out" appears nowhere in Student's IEP. Petitioner Ex. 16; Respondent Ex. 1.

The LRE requirement is one of the central concepts of appropriate placement under the IDEA. Compliance with the IDEA's LRE provision essentially 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 students' nondisabled peers and community.⁵⁰² The removal of a child from a regular education environment should only occur when 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.⁵⁰³

Generally, courts have held that the general education classroom is the appropriate setting for educating a child with a disability when the child can be educated satisfactorily in that setting. The most-often articulated LRE standard is found in *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). The *Oberti* standards are: (1) whether the school district has made reasonable efforts to accommodate the child in a general education classroom. (2) the educational benefits available to the child in a general education class, with appropriate supplementary aids and services, as compared to the benefits provided in a special class. (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.⁵⁰⁴

In fact, the LRE provisions of the 2006 IDEA regulations and interpretive guidelines essentially provide the equivalent of the *Oberti* test: (1) whether the child's IEP can be implemented in the regular classroom with the use of appropriate aids and supports;⁵⁰⁵ (2) whether placement in the regular classroom will result in any potential harmful effect on the child or on the quality of services that Student needs;⁵⁰⁶ and (3) whether the IEP

⁵⁰² 34 C.F.R. § 300.114(a).

⁵⁰³ 20 U.S.C. § 1412(a)(5)(A).

⁵⁰⁴ See also *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989)

⁵⁰⁵ 34 C.F.R. §§ 300.114(a)(2)(ii), 300.116(b)(2).

⁵⁰⁶ 34 C.F.R. § 300.116(d).

must include positive behavioral interventions and supports in the case of a child whose behavior impedes the child's learning or that of others.⁵⁰⁷

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.⁵⁰⁸

b. Analysis and Conclusion

As set out in the Findings of Fact, the ARD committee met all legal requirements in determining that the LRE for Student was the *** program at ***. Accordingly, this issue is decided in the District's favor.

11. Did the District fail to incorporate recommendations from evaluations into Student's initial ARD committee report to address Student's educational needs?

a. Applicable Law

There is no requirement that a district "incorporate" anything from private evaluations. Instead, the duty is to "consider" the evaluations.⁵⁰⁹

b. Analysis and Conclusion

⁵⁰⁷ 34 C.F.R. § 300.324(a)(2)(i).

⁵⁰⁸ 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).

⁵⁰⁹ 34 C.F.R. § 300.502(c)(1).

The evidence shows that the ARD committee considered the outside evaluations as addressed in Student's FIE. Not only did the District's multidisciplinary team hold the FIE open to ensure consideration of ***'s evaluation, but the FIE recommendations and *** recommendations for Student were essentially the same. Petitioner did not prevail on this issue.

12. Did the District fail to ever convene an ARD committee meeting to discuss Parent's request that Student be returned to the * program and fail to issue prior written notice concerning that refusal?**

It is undisputed that no ARD committee meeting was held to discuss Student's return to the *** program. Parents did not request that such a meeting be held. The District did not have a legal obligation to convene an ARD committee meeting or to provide prior written notice based on the informal conversation between Mother and Ms. *** regarding Student's placement.

The District contends that Ms. *** did not tell Mother that Student could not return to the *** program.⁵¹⁰ But even if Ms. *** told Mother that Student could not return to the *** program, the District's prior written notice duty would not have been triggered because Ms. ***, alone, could not make a placement decision for Student. Only the ARD committee can make a placement decision for a student who is receiving special education services.⁵¹¹ Further, there are only two situations in which the law requires the issuance of prior written notice based on something that occurred outside an ARD committee meeting, and both involve a written request from a parent, either for referral to special education or for convening an ARD committee meeting.⁵¹² There was no legal obligation for the District to provide prior written notice in this situation.

In addition, returning Student to the *** program, pursuant to Mother's request, is not permitted by state law. Texas law prohibits placing a student with a disability who receives special education services in an alternative education program solely for educational purposes.⁵¹³

⁵¹⁰ See Respondent's Closing Argument at 15-16.

⁵¹¹ Tex. Educ. Code § 37.004(a).

⁵¹² 19 TAC §§ 89.1011(b), .1050(e)(2).

⁵¹³ Tex. Educ. Code § 37.004(c).

Petitioner did not prevail on this issue.

13. Did the District fail to ever convene an ARD committee meeting or respond to Parent's constructive notice and request for placement and tuition reimbursement at *?**

a. Applicable Law

Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures of 34 C.R.F. §§ 300.504 through 300.520.⁵¹⁴

When the parents of a student with a disability are dissatisfied with the public school program, they have the option of placing their child in a private school program and then seeking tuition reimbursement from the school district. Reimbursement may be required if a hearing officer finds that the school district had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate even if it does not meet the State standards that apply to education provided by the State education agency or local education agency.⁵¹⁵

The IDEA provides that the cost of reimbursement for private school placement can be reduced or denied if: (1) at the most recent ARD committee meeting before the child's removal from school, the parents did not inform the ARD committee that they were rejecting the school's proposed placement, including their concerns and their intent to privately place the child at public expense; or (2) at least 10 business days prior to the removal of the child, the parents did not give written notice to the school of their intent and their concerns.⁵¹⁶

⁵¹⁴ 34 C.F.R. § 300.148(b).

⁵¹⁵ 34 C.F.R. § 300.148(c).

⁵¹⁶ 34 C.F.R. § 300.148(d)(1)(i)(ii).

b. Analysis and Conclusion

At the most recent ARD committee meeting prior to Student's unilateral placement at ***, committee members, including Parents, ended the meeting in mutual agreement. There was no suggestion by Parents at the ARD committee meeting that they were dissatisfied with the proposed IEP.

In addition, Parents did not provide the requisite written notice of the unilateral placement and their request for tuition reimbursement. The "constructive" notice at issue appears to be an ***, 2015 email from Mother to the District, in which she states, "Sorry for the late notice. [Student] will not be attending *** in the fall of 2015."⁵¹⁷ The email articulates no concerns, request for an ARD committee meeting, or any indication of an intention to privately place Student at public expense.

The "constructive notice" in the Complaint filed on October 28, 2015, proposed tuition reimbursement for Student's placement at an unnamed private school. The more definite notice contained in the Amended Complaint filed on February 22, 2016, in which *** is named and specific dates are mentioned for tuition reimbursement, is presented as a proposed remedy for the hearing officer's consideration. As such, it would not be proper for the ARD committee to address the proposed remedy pending the hearing officer's decision.

Accordingly, Petitioner did not prevail on this issue.

14. Did the District fail to provide Student with a FAPE during the summer of 2015, and the 2015-16 school year, and is the District continuing to deprive Student of a FAPE designed to meet Student's unique educational needs?

a. *Summer of 2015*

Petitioner alleges a denial of a FAPE on the basis of the lack of ESY services during the summer of 2015. ESY services are "individualized instructional programs beyond the regular

⁵¹⁷ Petitioner Ex. 33 at 44.

school year for eligible students with disabilities.”⁵¹⁸ The need for ESY services must be determined on an individual basis by the ARD committee. The need for ESY services must be documented from formal or informal evaluations provided by the district or the parents.⁵¹⁹ To demonstrate the requisite need, the documentation must demonstrate that “the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression” in one of more critical areas addressed in the student’s current IEP goals and objectives “that cannot be recouped within a reasonable period of time.”⁵²⁰

If a student requires a significant amount of time to recoup acquired critical skills, then the ARD committee must discuss whether the student needs extended educational or related services during school breaks. If the loss of acquired critical skills would be particularly severe or substantial, or if such loss results, or reasonably may be expected to result, in immediate physical harm to the student or others, ESY services may be justified without consideration of the period of time for recoupment of such skills.⁵²¹ A skill is considered “critical” when the loss of that skill results, or is reasonably expected to result, in placement in a more restrictive setting; significant loss of acquired skills necessary to make appropriate progress in the general education curriculum; significant loss of self-help skills proven by an increase in the number of direct service staff and the amount of time required to provide special education or related services; loss of access to community-based independent living skills instruction or an independent living environment provided by non-educational sources; or loss of access to on-the-job training or productive employment as a result of regression in skill.⁵²² The district will provide ESY services to maintain the student’s current skills and/or behavior, but not to teach new skills or behaviors (such as working on addition, subtraction, or reading over the summer).⁵²³

⁵¹⁸ 19 TAC § 89.1065; 34 C.F.R. § 300.106.

⁵¹⁹ 19 TAC § 89.1065 (1)(2).

⁵²⁰ 19 TAC § 89.1065(2); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986) (an ESY program is required when the benefits accrued during the school year may be significantly jeopardized in the absence of a summer program).

⁵²¹ Petitioner Ex. 32 at 1-2; 19 TAC § 89.1065.

⁵²² Petitioner Ex. 32 at 4; 19 TAC § 89.1065(4).

⁵²³ Petitioner Ex. 32 at 4.

OSEP advised that a determination for ESY services based solely on a “lack of progress” would be inconsistent with the court’s enunciation of either of two factors that must be considered: significant regression or detrimental effect on progress toward a goal.⁵²⁴ Nothing in federal law or the corresponding regulations requires students with disabilities who do not meet their IEP goals to participate in ESY.⁵²⁵ As in other areas of special education, ESY services are not meant or required to maximize a student’s educational benefit.⁵²⁶

b. 2015-2016 School Year and Beyond

The District has a duty to make a FAPE available to all children with disabilities between the ages of 3 and 21 who reside within its boundaries.⁵²⁷ Assuming Student resides within the District’s boundaries, the District has a duty to make a FAPE available to Student. However, the District’s role changed after Parents withdrew Student from the District and unilaterally placed Student at ***. Student is now a “parentally-placed” private school student.⁵²⁸ As such, due process is not applicable except as to Child Find. Due process hearing procedures do not apply to a complaint that a school district failed to provide special education services to the child.⁵²⁹

c. Analysis and Conclusion

Summer of 2015

In *** 2015, Mother received copies of both “Notice of Procedural Safeguards” and “A Guide to the Admission, Review, Dismissal Process,” which provide information about ESY and should have informed Parents about ESY services. Further, ESY was discussed at the ARD

⁵²⁴ *Letter to Given*, 39 IDELR 129 (OSEP 2003).

⁵²⁵ *Letter to Kleczka*, 30 IDELR 270 (OSEP 1998).

⁵²⁶ *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), *cert denied*, 499 U.S. 938 (1991).

⁵²⁷ 34 C.F.R. §§ 300.101, 300.201.

⁵²⁸ 34 C.F.R. § 300.130.

⁵²⁹ 34 C.F.R. § 300.140.

committee meeting in *** 2015 and neither Parents nor the school recommended the services. Regarding the summer of 2015, there is no evidence in the record suggesting Student would have exhibited any regression over the summer, much less severe or substantial regression. Petitioner does not prevail on the issue of whether the District failed to provide a FAPE to Student in the summer of 2015.

2015-2016 School Year and Beyond

As a parentally-placed private school student, Petitioner's assertion that the District deprived Student of a FAPE in 2015-2016 and continues to do so is not within the hearing officer's jurisdiction to consider. As such, Petitioner does not prevail on this issue.

C. Remedies

1. Compensatory Education

In the 2014-2015 school year, the District did not timely fulfill its Child Find obligation and did not fully implement Student's IEP, denying Student a FAPE. As such, Student is entitled to a school year of compensatory education. Some courts have held that compensatory education may be provided in the form of private placement. For example, the Eleventh Circuit Court of Appeals held that nothing in the IDEA precludes an award of compensatory education in the form of placement in a private school.⁵³⁰ Accordingly, the hearing officer finds that Student should be awarded one school year of compensatory education at ***, to be fulfilled in the 2016-2017 school year.

2. Tuition Reimbursement

Private school tuition reimbursement is a remedy available under the IDEA where a hearing officer finds that the public agency did not make FAPE available to the student in a

⁵³⁰ *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).

timely manner prior to the private enrollment and the private placement is appropriate. A parental placement can be appropriate, even if it does not meet State standards.⁵³¹

While Parents did not provide the District with the required written notice of their intention to place Student at ***, the requested amount of tuition reimbursement need not be denied or reduced in this instance. The requested reimbursement may, at the hearing officer's discretion, not be reduced or denied for failure to provide notice if compliance would likely result in serious emotional harm to the child.⁵³²

Student's return to the District for the 2015-2016 school year could have resulted in serious emotional harm to Student. If Student had returned to the District in the fall of 2015, Student would have been placed in the *** program at *** under the same IEP that was in place at ***. According to Dr. ***, Student was so regressed in Student's therapy after some time at *** that it was difficult for Student to learn or even go to school. Mother and *** staff agreed to a ***-day plan of shortened school days and ultimately a ***-hour school day just to get Student through the end of the year. Even so, Student's anxiety was so high before the end of the year that Dr. *** advised Student should not ***. At the May 2016 due process hearing, Dr. *** testified that returning to school in the District under any of the programs provided to Student in 2014-2015 would be very detrimental to Student's continued developmental growth, both academically and socially.⁵³³

Although Student has not received special education services at ***, Student has received an academic benefit from the one-on-one individualized instruction and a nonacademic benefit from the opportunity to interact with both non-disabled and disabled peers, an opportunity Student did not have at ***.⁵³⁴

⁵³¹ 34 C.F.R. § 300.148(c); *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

⁵³² 34 C.F.R. § 300.148(e)(2)(ii).

⁵³³ Tr. at 175 (***).

⁵³⁴ Unilaterally placed students need not receive services pursuant to an IEP in order to obtain an award of tuition reimbursement. The IEP requirements do not apply to a child with a disability who is unilaterally placed by the child's parents. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (U.S. 1993); see also *Frank G. and Dianne G. v. Board of Educ. of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), cert. denied, 552 U.S. 985 (2007) (ruling that

For reasons set out in this decision, Student's placement in the District was not appropriate. Student's placement at *** is appropriate for the following reasons:

1. At ***, the educational experience is personalized. Students can *** and ***. Classes are self-paced, and course material is presented in ways that suit each student's individual interests, strengths, and learning style. *** uses the creativity of *** programs to help students connect more deeply with their friends, family, community, and themselves.⁵³⁵
2. *** uses the *** as a basis for knowledge acquisition. The academy is committed to ensuring that each child masters the material before moving on to the next class level. While some students complete all the standards in a typical amount of sessions, others may need *** to ensure proficiency or to account for absences during the course of a semester. To guarantee concept understanding of the Course Standards (State and/or Common Core Standards) each student must attain at least a 70 percent comprehension and proficiency in all classes as assessed by the course instructor and/or ***.⁵³⁶
3. *** teachers have the opportunity to participate in between 150 hours and 180 hours of professional development per year, on topics such as dyslexia, dysgraphia, ADHD, autism, eating disorders, mental health first aid. They are required to participate in 70 percent of the training offered.⁵³⁷
4. The *** is a place for students to gather and complete their homework under teacher supervision. Students do not take homework home thus eliminating nightly homework battles.⁵³⁸
5. ***'s classes meet State and Common Core standards, but lessons are tailored to suit each student's unique interests.⁵³⁹
6. *** complements the academic experience. The *** consists of 20 sessions across *** wellness elements: ***. *** also offers Therapeutic Support to students and their families.⁵⁴⁰

although the private placement did not provide the student with an individual aide or consulting services, the student received an educational benefit from the small class size and the individualized instruction).

⁵³⁵ Petitioner Ex. 21 at 1-2.

⁵³⁶ Respondent Ex. 26 at 1, 33.

⁵³⁷ Tr. at 482-483 (***).

⁵³⁸ Petitioner Ex. 21 at 2.

⁵³⁹ Petitioner Ex. 21 at 3.

⁵⁴⁰ Petitioner Ex. 21 at 3, 6.

7. In a ***, 2015 letter “To Whom It May Concern,” Dr. *** recommended a dyadic instructional environment (one-on-one academic setting) and positive reinforcements for Student. She stated that in an academic setting, Student exhibits an intellectual ability to complete tasks, but struggles with containing affect regulation. Examples of anxiety triggers are physical touch, loud unexpected sounds, social struggles with peers, and difficulty remaining calm under provocations.⁵⁴¹
8. In the fall of 2015, *** staff interacted with Dr. *** to find out if there was anything staff could do to better support Student.⁵⁴²
9. Student spends about *** hours per day at school: *** hours in class and *** hours in ***. Monday/Wednesday classes are the same and Tuesday/Thursday classes are the same.⁵⁴³
10. Since enrolling at ***, Student looks forward to attending school; likes Student’s teachers; reads for class assignments; reads for fun, which Student never used to do; and is proud of the progress Student has made in ***, even though Student does not like *** very much. At home, Student is *** better, ***, and gets up in the morning ready to get dressed and go to school. Student still occasionally has challenges with ***, but Student is generally happy, not depressed, not angry, and not engaging in outbursts.⁵⁴⁴
11. Student has reported to Dr. ***, who has been Student’s psychiatrist since 2012, that Student likes the smaller environment and one-on-one classes at ***.⁵⁴⁵ Her current ***.⁵⁴⁶ ***.⁵⁴⁷ She noted that, since Student began attending ***, Student seems calmer and Student’s mood seems to be generally better as compared to when Student attended school in the District.⁵⁴⁸
12. Mother believes *** is a good fit for Student because Student is motivated by Student’s relationships with others; does not respond well to loud, noisy classes or the institutional environment of public school; and needs instructors to take time to explain and problem-solve both assignments and when Student gets “stuck,” frustrated, or obstinate.⁵⁴⁹

⁵⁴¹ Tr. at 161 (***) ; Petitioner Ex. 17 at 1.

⁵⁴² Tr. at 441, 486 (***) .

⁵⁴³ Tr. at 445 (***) .

⁵⁴⁴ Tr. at 394-395 (Father).

⁵⁴⁵ Tr. at 314 (***) .

⁵⁴⁶ Tr. at 312, 347-348 (***) ; Petitioner Ex. 30 at 5.

⁵⁴⁷ Tr. at 315, 324 (***) ; Petitioner Ex. 30 at 5.

⁵⁴⁸ Tr. at 324 (***) .

⁵⁴⁹ Respondent Ex. 26 at 29, 50.

13. Mother regularly gets updates from Student's teachers at ***, and all the updates are related to academics, not to behavior issues.⁵⁵⁰
14. In the summer of 2015, Student took *** with a final grade of ***; *** with a final grade of A+; and *** with a final grade of A+.⁵⁵¹
15. When Student returned to *** for *** grade in the fall of 2015, Student took *** academic courses, ***.⁵⁵²
16. Progress reports from *** 2015 indicate Student had been punctual for every *** and *** class, ready to learn; had taken what Student had learned and applied it, teaching others, and discussing it freely; and that the teacher could refocus Student easily by request when Student's mind wandered.⁵⁵³
17. The *** 2015 progress report from *** indicated Student had A's in all of Student's courses.⁵⁵⁴
18. By *** 2016, Student had earned A's in three *** and ***, a B+ in ***, and had not yet finished the *** course.⁵⁵⁵
19. An End of Course Confirmation is provided to Parents whenever Student completes a course because, due to ***'s ***, there is no ***.⁵⁵⁶
 - a. In a ***, 2015 End of Course Confirmation, Student's *** teacher stated that, after a few struggles, Student worked extra hard to catch up and passed the class with flying colors. She said Student displayed determination and efficient work effort once Student realized Student had fallen behind in class.⁵⁵⁷
 - b. In an End of Course Confirmation letter dated ***, 2016, Student's *** teacher commented that Student showed great skill in assignments, though at times Student struggled to stick with a project to the end, at times wanting to move on to a new topic or assignment before seeing the previous assignment through to completion. She said the quality of Student's in-class discussion, understanding of topics, and work was high, with room to improve.⁵⁵⁸

⁵⁵⁰ Petitioner Ex. 37 at 8.

⁵⁵¹ Petitioner Ex. 22 at 62; Respondent Ex. 26 at 12-17; 24.

⁵⁵² Respondent Ex. 26 at 11.

⁵⁵³ Petitioner Ex. 22 at 59-61.

⁵⁵⁴ Petitioner Ex. 22 at 63.

⁵⁵⁵ Petitioner Ex. 22 at 64-69; Respondent Ex. 26 at 50.

⁵⁵⁶ Tr. at 429 (***).

⁵⁵⁷ Petitioner Ex. 22 at 64.

⁵⁵⁸ Petitioner Ex. 22 at 67.

- c. In an End of Course Confirmation letter dated ***, 2016, Student's *** teacher stated that in ***, Student can pick up on even the most subtle ***, and Student can make inferences and predictions on the same level as *** students. He said Student will advocate for ***self when Student has trouble in the class, and that he believes he and Student have built a good relationship. They have talked about how to have positive interactions with other students.⁵⁵⁹
- d. In a ***, 2016 End of Course Confirmation letter, Student's *** teacher stated Student works through concepts that are difficult to master, even when the process is frustrating, and that Student is continuing to recognize times when *** will be necessary to ***.⁵⁶⁰
20. Student has had improved behavior at ***.
- a. Student had no behavioral incidents at *** between *** and ***, 2015.⁵⁶¹
- b. In ***, there was a huge increase in student enrollment and the dynamics changed in ***, and Student went from taking *** and *** to more academic-oriented classes. The transition could have caused Student to be involved in 12 incidents of misbehavior between *** 2015, and *** 2015.⁵⁶²
- c. On ***, 2015, Student said ugly things to ***; agitated ***; and, ***, Student slammed the door, threw ***, and ***.⁵⁶³
- d. Most incidents occurred during unstructured time, so Student's schedule was changed as of *** 2015, to eliminate unstructured time.⁵⁶⁴
- e. From *** 2015 through *** 2016, Student had 15 behavioral incidents at ***, including refusing to attend class, walking out of class, ***, and *** when prohibited.⁵⁶⁵
- f. During the 2015-2016 school year, Student did not engage in physical aggression at *** or hit ***.⁵⁶⁶

⁵⁵⁹ Petitioner Ex. 22 at 68.

⁵⁶⁰ Petitioner Ex. 22 at 69.

⁵⁶¹ Tr. at 438, 447 (***).

⁵⁶² Tr. at 438, 447 (***).

⁵⁶³ Tr. at 460 (***); Respondent Ex. 28 at 1.

⁵⁶⁴ Tr. at 437 (***); Respondent Ex. 26 at 18.

⁵⁶⁵ Tr. at 479 (***); Respondent Ex. 26 at 51.

⁵⁶⁶ Tr. at 449-450, 490-491 (***).

- g. Student has never been suspended from ***, but *** staff has asked Parents to pick Student up from school when parental assistance was needed to de-escalate a situation.⁵⁶⁷
- h. *** staff has never called the police to intervene with Student.⁵⁶⁸
21. In the spring of 2016, Student took ***, ***, ***, ***, ***, ***, and ***.⁵⁶⁹
22. In a *** 2016 email to Parents, one of Student's teachers commented that Student was extremely polite and gracious in Student's interactions around campus that day, using "please" and "thank you" repeatedly and offering compliments.⁵⁷⁰
23. In the spring of 2016, Student earned A's in three *** and ***, a B+ in ***, and had not yet completed ***.⁵⁷¹
24. If Student returns to the District in the fall of 2016, an ARD committee meeting will be convened to consider Student's current needs.⁵⁷²
25. If Student returns to the District in the fall of 2016, Student will be placed in the *** program at ***.⁵⁷³
26. In *** 2016, Parents toured the *** program at *** (rather than at ***) and determined the program would not meet Student's unique behavioral, emotional, and social needs or Student's unique academic needs as a *** student with "****".⁵⁷⁴
27. Student's success at *** was so immediate and Student's academic advancement so significant that Parents do not want to risk placing Student in an *** program, as the District suggests. In the *** program at ***, Student made some marginal progress but the effect on Student's emotional wellbeing was detrimental.⁵⁷⁵
28. Removing Student from ***, where Student is finally enjoying academic success and a state of emotional well-being, would be detrimental to Student's emotional and academic

⁵⁶⁷ Tr. at 439, 490 (***).

⁵⁶⁸ Tr. at 490 (***).

⁵⁶⁹ Petitioner Ex. 22 at 72, 75; Respondent Ex. 26 at 47.

⁵⁷⁰ Petitioner Ex. 22 at 74.

⁵⁷¹ Respondent Ex. 26 at 50; *see also* Petitioner Ex. 22 at 75-76, 80-82, indicating Student's final grades at *** in *** and *** were ***.

⁵⁷² Respondent Ex. 27 at 1.

⁵⁷³ Respondent Ex. 27 at 2.

⁵⁷⁴ Tr. at 391 (Father); Petitioner Ex. 33 at 46, 48-49; Respondent Ex. 27 at 2.

⁵⁷⁵ Petitioner Ex. 37 at 8.

- development, especially in light of the District's apparent inability to offer Student a similar program.⁵⁷⁶
29. In the fall of 2015, Parents paid *** \$24,150 for tuition⁵⁷⁷ and \$1,950 in tutoring and mentoring costs for Student.⁵⁷⁸
 30. Parents paid \$24,150 tuition for Student to attend *** in the spring of 2016.⁵⁷⁹
 31. Petitioner proved by a preponderance of the evidence that Student's placement at *** was not appropriate and that placement in the *** program at *** for the 2015-2016 school year, as set out by the ARD committee, would have been emotionally detrimental to Student.⁵⁸⁰
 32. Petitioner proved by a preponderance of the evidence that Student's placement at *** is appropriate.⁵⁸¹
 33. Parents are entitled to tuition reimbursement of \$50,250 from the District.

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 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, except for the District's counterclaim. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
4. The 1-year statute of limitations applies to this proceeding. 19 Tex. Admin. Code § 89.1151(c).

⁵⁷⁶ Respondent Ex. 27 at 2-3.

⁵⁷⁷ Respondent Ex. 26 at 23.

⁵⁷⁸ Respondent Ex. 26 at 22.

⁵⁷⁹ Respondent Ex. 26 at 19-21, 47.

⁵⁸⁰ 34 C.F.R. § 148(e).

⁵⁸¹ *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).

5. In *** 2015, the District determined that Student is a child with one of the IDEA-enumerated disabilities, who by reason thereof, is eligible for special education and related services, which Student receives as a child with Emotional Disturbance. 34 C.F.R. § 300.8(a)(1); 19 Tex. Admin. Code § 89.1040(a), (c)(4).
6. The District did not fulfill its Child Find obligation as to Student. 34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1011.
7. The District did not provide Student with a FAPE in 2014-2015. 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); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347-348 (5th Cir. 2000).
8. The District considered providing Student with positive behavioral supports and interventions. 34 C.F.R. § 300.324(a)(2)(i).
9. The District's was not required to provide Parents with prior written notice when its refused to evaluate Student following Mother's verbal request for an evaluation. 34 C.F.R. § 300.503(a)(2); 19 Tex. Admin. Code § 89.1011(b)(2).
10. In developing Student's IEP, the ARD committee considered Student's PLAAFPs and how Student's disability affected Student's involvement in the general education curriculum. 34 C.F.R. § 300.320(a)(1).
11. The District was not required to provide Parents with notice when Student was twice restrained in *** 2015. *Letter to Weiss*, 55 IDELR 173 (ED 2010); Tex. Atty. Gen. Op. No. RQ-0459-JC (2002)(citing Tex. Educ. Code § 37.102(a)); Tex. Educ. Code § 37.0021(d).
12. The District did not provide Student with a commensurate school day for *** days of the 2014-2015 school year. 19 Tex. Admin. Code § 89.1075(e).
13. The District developed an appropriate IEP for Student. 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; *see also Michael F.*, 118 F.3d at 253.
14. The District failed to fully implement Student's IEP as written. 19 TAC § 89.1075(e).
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. v. State Board of Education*, 874 F.2d 1036, 1039, 1046-1047 (5th Cir. 1989).
16. There is no requirement that an ARD committee incorporate information from private evaluations when developing an IEP. Instead, the ARD committee is to consider the

private evaluations. The District's ARD committee considered private evaluations when preparing Student's IEP. 34 C.F.R. § 300.502(c)(1).

17. The District did not have a legal obligation to convene an ARD committee meeting or to provide prior written notice to Parents that an ARD committee meeting would not be convened to discuss Mother's request that Student be returned to the *** program. Tex. Educ. Code § 37.004(a)(c); 19 Tex. Admin. Code §§ 89.1011(b), 89.1050(e)(2).
18. The District did not have a legal obligation to convene an ARD committee meeting to discuss Parents' request for tuition reimbursement for *** when Parents did not provide the District with the required written notice of their intention. 34 C.F.R. § 300.148.
19. The District did not fail to provide Student a FAPE during the summer of 2015 because Student did not meet the criteria for ESY services. 19 Tex. Admin. Code § 89.1065.
20. Petitioner's allegation that the District denied Student a FAPE in 2015-2016 and continues to do so is not within the hearing officer's jurisdiction to consider because Student is a parentally-placed private school student. 34 C.F.R. §§ 300.130, 300.140.
21. The District should reimburse Parents for Student's tuition at *** for the 2015-2016 school year. 34 C.F.R. § 300.148; *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).
22. As a form of compensatory education, Student's placement at *** at the District's expense for the 2016-2017 school year is appropriate. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).
23. Student's placement is proper at *** even though *** is not on TEA's list of approved nonpublic day schools. *Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993) (rejecting district's defense that parents were not entitled to reimbursement of unilateral private school costs because private school was not on state's approved list).

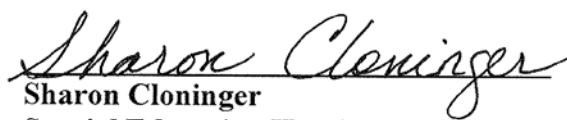
ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the hearing officer hereby orders as follows:

Petitioner's requested relief is denied in part and granted in part. The District is to reimburse Parents \$50,250 in tuition and tutoring fees for Student's 2015-2016 school year at

***. Student is to remain at *** for the 2016-2017 school year and the District is to reimburse Parents for the 2016-2017 tuition. All other requested relief is denied.

SIGNED August 3, 2016.


Sharon Cloninger
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of the 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.⁵⁸²

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