

DOCKET NO. 080-SE-1119

**STUDENT, B/N/F PARENT,
Petitioner**

v.

**MESQUITE INDEPENDENT SCHOOL
DISTRICT,
Respondent**

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER FOR

THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, Student, by Petitioner’s next friend Parent (Student or, collectively, Petitioner), filed a request for an impartial due process hearing (Complaint) under the Individuals with Disabilities Education Act (IDEA) on November 6, 2019, with Notice of the Complaint issued by the Texas Education Agency (TEA) on November 7, 2019. The Respondent to the Complaint is the Mesquite Independent School District (Respondent or District).

The main issue in this case is whether the District has provided Student a Free Appropriate Public Education (FAPE) in Student’s Least Restrictive Environment (LRE). The Hearing Officer concludes the District has not provided Student a FAPE in Student’s LRE.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Student’s authorized non-attorney representative, Carolyn Morris. The District was represented throughout this litigation by its attorney, Gary Grimes.

III. DUE PROCESS HEARING

The due process hearing was conducted remotely via Zoom June 8-9, 2020. The parties were not able to have an in-person hearing due to safety concerns related to COVID-19. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's authorized non-attorney representative, Carolyn Morris. Student's mother also attended the due process hearing.

Respondent continued to be represented by its legal counsel, Gary Grimes. In addition, ***, the Executive Director of Special Education for the School District, as well as *** and ***, Special Education Coordinators for the District, attended the hearing as party representatives. Both parties filed written closing briefs in a timely manner. The Decision in this case is due on August 10, 2020.

IV. ISSUES

A. Petitioner's Issues

Petitioner confirmed the following IDEA issues for decision in this case:

1. Whether the District is educating Student in Student's LRE.
2. Whether the District held an Admission, Review, and Dismissal (ARD) Committee meeting in October 2019 without all necessary personnel from the District present.
3. Whether the District has provided Student a FAPE, particularly in regards to issues with Student's behavior and providing appropriate Individualized Education Plan (IEP) goals for Student.
4. Whether the District failed to provide Student a Functional Behavioral Assessment (FBA) when such an evaluation was necessary.
5. Whether the District has provided Student's parents with timely and appropriate IEP progress reports.

6. Whether the District has appropriately implemented the IEP, particularly in regards to providing counseling services to Student.

B. Respondent's Legal Position and Additional Issues

The District generally and specifically denies Petitioner's allegations and denies responsibility for providing any of Petitioner's requested relief.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. Order the District to place Student in a general education setting.
2. Order the District to provide private tutoring services to Student as compensatory education.
3. Order the District to provide counseling as a related service with a qualified counselor.
4. Order the District to reimburse Student's parent for any out-of-pocket expenses she has incurred due to the District's alleged failure to provide Student a FAPE.
5. Order the District to provide Student's parent IEP progress reports every three weeks.
6. Order the District to adjust Student's IEP goals so that they are measurable and have mastery criteria for 80% mastery.

VI. FINDINGS OF FACT

Educational Evaluation History

1. Student is *** years old. Student enjoys ***.¹ Student will be entering *** grade at *** in the District when the 2020-21 school year begins.² Student has been a student at *** since Student was in the *** grade during the 2018-19 school year. Student has been a student in the District since *** into the 2015-16 school year, when Student transferred from the *** Independent School District.³
2. The District initially referred Student for a Full Individual Evaluation (FIE) in October 2015 due to Student's parent's concern over Student's lack of progress in mainstream classes. She suspected Student might have a learning disability in reading and she was concerned about Student's behavior issues.⁴
3. The District completed the FIE in December 2015. The evaluation recommended Student receive special education and related services as a student with an Emotional Disturbance due to Student's tendencies to *** in a way that interferes with Student's learning.⁵ The ARD Committee accepted those findings during an initial ARD Committee meeting on December ***, 2015.⁶
4. The District conducted a separate evaluation for Dyslexia in January 2016. The District found Student did not have Dyslexia. Student's academic difficulties throughout Student's time in the District have been caused by issues with Student's behavior. Student does not have any type of learning or intellectual disability.⁷
5. The District conducted a reevaluation in December 2018. The 2018 FIE again recommended Student be found eligible for special education and related services as a student with an Emotional Disturbance.⁸ The ARD Committee, including Student's parent, agreed with and accepted the FIE's recommendations.⁹ Additionally, the District has provided a form to Student's parent to find Student eligible for special education in the

¹ Due Process Hearing Transcript, pages 83, 280 (TR at ___).

² TR at 18.

³ Joint Exhibit 23, page 76 (JE ___ at ___).

⁴ JE 20 at 1.

⁵ *Id.* at 67-8.

⁶ JE 15.

⁷ JE 20 at 15; TR at 165, 394.

⁸ JE 17 at 36.

⁹ JE 5 at 20.

area of Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD).¹⁰

6. The District has made several attempts to hold an ARD Committee meeting to accept OHI as a new eligibility category in addition to Emotional Disturbance. Student's parent has been unwilling to return to an ARD Committee meeting for the ARD Committee to find Student eligible in the area of OHI.¹¹
7. In October 2019, without admitting any wrongdoing in its previous evaluations, the District granted Student's parent an Independent Education Evaluation (IEE) in the area of Emotional Disturbance.¹² Student's parent chose an independent evaluator to complete that evaluation.¹³ The IEE came to the same conclusion as the District—Student is eligible for special education and related services as a student with an Emotional Disturbance.¹⁴
8. The IEE provider did not conduct an FBA or any other evaluations. She did not make recommendations for improving Student's Behavior Intervention Plan (BIP) or for any behavior interventions that may help Student. She only examined whether Student should qualify for special education as a student with an Emotional Disturbance. She concluded that Student should.¹⁵

The 2018 FIE, the FBA, and the IEE

9. On the day of the classroom observation portion of the 2018 FIE, Student was *** instead of being in the general education environment. The District felt Student's behavior prevented Student from participating in Student's general education classes that day. That was not unusual, because Student has spent most of Student's time at *** *** in this *** setting.¹⁶
10. The FIE ultimately found Student eligible for special education as a student with an Emotional Disturbance due to inappropriate types of behavior or feelings under normal circumstances.¹⁷

¹⁰ TR at 283, 459.

¹¹ TR 282-83, 459.

¹² JE 16 at 1.

¹³ TR at 78.

¹⁴ JE 16 at 13.

¹⁵ TR at 118.

¹⁶ TR at 445.

¹⁷ JE 17 at 22.

11. The evaluation made a number of recommendations for helping Student improve Student's behavior, including: ***. The evaluation did not recommend a specific educational placement for Student.¹⁸
12. The District also conducted an FBA as part of the FIE. The FBA identified five problem behaviors: "****." It then identified ten specific interventions that had been attempted followed by "etc.," indicating there were other interventions that had also been attempted but were not specified. However, the FBA noted that "none appear to be consistently effective." The FBA did not recommend particular interventions for any of the five individual identified behaviors. It also did not eventually recommend interventions that might be more "consistently effective."¹⁹
13. The FBA concluded that the "behavior," while not specifying to which in particular of Student's behavioral issues it was referring, "serves as both emotional expression and a means of escape."²⁰ The FBA did not explain which behaviors served which of those two functions. It also did not explain specific positive behavioral supports that would encourage replacement behaviors.²¹
14. The District conducted a counseling evaluation as part of the FIE. The District recommended Student receive *** minutes of educational counseling every other week.²² Student receives counseling services from a qualified counselor *** minutes every *** as recommended.²³ Student also takes advantage of an additional counselor who is brought to help Student calm down and regulate when Student is upset. That counselor has a master's degree in counseling and is also qualified to provide counseling services.²⁴
15. The IEE granted by the District and completed in 2020 did not contain an FBA, because the IEE evaluator was not asked to provide one.²⁵ The IEE came to the same conclusion as the FIE about Student's eligibility for special education as a Student with Emotional Disturbance. The IEE recommended Student receive instruction in a more permanent, structured classroom setting.²⁶

Student's Educational Issues

¹⁸ *Id.*, at 36-7.

¹⁹ *Id.*, at 23.

²⁰ *Id.*, at 23-4.

²¹ *Id.*

²² TR at 42.

²³ JE 17 at 17; TR at 63; TR at 245; TR at 309.

²⁴ TR at 245-47.

²⁵ TR at 144.

²⁶ JE 16.

16. From the beginning of Student's experience in school, Student has experienced frustration and ***. School has always been difficult for Student and Student has always had both behavioral and academic issues.²⁷ Student can be polite, caring, and is "a sweet kid."²⁸ However, as early as *** grade, when Student was a student in a different school district, Student was referred to the Student Support Team for "****."²⁹
17. Since Student began receiving special education and related services as a *** grader in the District during the 2015-16 school year, Student has continued to struggle to control Student's behavior. Student has engaged in ***when frustrated. Student has also frequently engaged in ***. Student can ***.³⁰
18. From December 2018-December 2019, Student did not meet any of Student's annual IEP goals in academics or behavior. Student showed regression in nearly every IEP goal Student's ARD Committee set for Student at the December 2018 annual ARD Committee meeting.³¹ Student also did not pass the STAAR tests in any areas in the 2017-18 or 2018-19 academic years.³²
19. Student has a Full Scale Intelligence Quotient (IQ) of ***, which falls within the average range.³³ Student is "****."³⁴ Student is bright and capable of succeeding academically.³⁵ Student's behavioral issues are the reason for Student's inability to make any progress toward Student's IEP goals or pass the STAAR tests.³⁶
20. During the 2018-19 school year, the District entered at least ***, discipline referrals concerning Student for different violations of the District's Student Code of Conduct. Among those ***, referrals, on March ***, 2019, the District wrote a referral for Student for "****."³⁷ On February ***, 2019, Student ***.³⁸ On December ***, 2018, Student ***.³⁹

²⁷ JE 17 at 7.

²⁸ *Id.*, at 8; TR at 377.

²⁹ JE 20 at 6.

³⁰ TR at 34; JE 8 at 2, 4; JE 5 at 2-3.

³¹ JE 28; TR at 103.

³² TR at 396.

³³ JE 17 at 25; TR at 111.

³⁴ TR at 513.

³⁵ TR at 471.

³⁶ TR at 87.

³⁷ JE 35 at 29.

³⁸ *Id.* at 26.

³⁹ *Id.* at 22.

Student's Behavior Issues and Placement

21. The District held an annual ARD Committee meeting for Student on December ***, 2018. Student's parent was present for the meeting. A District representative, special education teacher, general education teacher, and someone who could interpret evaluations were present as well.⁴⁰
22. The IEP contained three annual behavior IEP goals, one social skills IEP goal, four academic IEP goals, and a counseling IEP goal. Goals in all areas were clearly stated and measurable. Each goal contained an explanation of how the goals would be measured and who would be responsible for collecting that data.⁴¹
23. The ARD Committee determined Student's placement would be in the general education environment for the majority of Student's school day. Student was placed in a special education setting for *** minutes per day for social skills training.⁴² The IEP stated Student would be able to participate with students without disabilities in "all nonacademic, extracurricular, and other activities."⁴³
24. According to the December 2018 IEP, Student would be monitored by a special education program called *** (***) , where special education staff would filter in and out of Student's general education classes to observe Student.⁴⁴ If a student in the *** program is exhibiting behavioral issues in the general education classroom to which that student is assigned, that student is taken into a special classroom called the *** classroom. The student is then reoriented and redirected before being placed back into the student's general education classroom.⁴⁵
25. The *** classroom is meant as a temporary space in which a student is redirected, not a permanent classroom.⁴⁶ The *** program is a program for children receiving special education to allow them to remain in general education.⁴⁷ There are typically *** students at *** in the program at any given time.⁴⁸
26. Students are not meant to stay alone in the *** classroom for an extended period of time. Any student who spends a significant amount of time alone in the *** classroom "is losing

⁴⁰ JE 5 at 21.

⁴¹ *Id.* at 6-9.

⁴² *Id.* at 17.

⁴³ *Id.* at 16.

⁴⁴ TR at 72-4.

⁴⁵ *Id.*

⁴⁶ TR at 72, 346, 444.

⁴⁷ TR at 384, 451.

⁴⁸ TR at 384.

social benefit [and] academic benefit, because *** is not designed to be a standalone, self-contained unit.”⁴⁹

The District’s BIP

27. In response to the behavior issues Student has had since entering the District, the District initially developed a BIP in March 2016.⁵⁰ Student’s teachers rely on Student’s BIP to manage Student’s behavior.⁵¹
28. The BIP developed in March 2016, when Student was in *** grade, is nearly identical to the BIP in place today. The BIP in March 2016 identified three problem behaviors: ***. It then listed four categories for interventions: classroom environment, classroom strategies, ***, and social skills training.⁵²
29. Within each of those categories, there were between three and seven check marks next to a general statement. For example, there were seven classroom strategies, each with a checked box, identified for ***. The identical strategies were then offered for Student’s other two behaviors.⁵³
30. By March 2018, the District BIP had three different target behaviors: ***. Despite the different target behaviors, the March 2018 interventions were identical to the interventions listed for the three different target behaviors from March 2016. While the District had renamed the three target behavior, it had not changed any of the interventions⁵⁴
31. After the completion of the FBA in December 2018, the District updated the BIP for Student during the December ***, 2018 ARD Committee meeting.⁵⁵ The BIP did not contain information about how it was developed or updated.
32. While the FBA conducted by the District identified five specific behaviors, the BIP targeted three of Student’s behaviors: ***. *** was not an identified behavior from the FBA. The BIP employed nearly identical behavior strategies, as indicated by checked boxes, for all three behaviors.⁵⁶

⁴⁹ TR at 348.

⁵⁰ JE 13 at 18.

⁵¹ TR at 446.

⁵² JE 13 at 18-19.

⁵³ *Id.*

⁵⁴ JE 8 at 26-28.

⁵⁵ JE 32 at 2.

⁵⁶ JE 5 at 24-5.

33. Each behavior identified in the BIP is, just as in March 2018 and March 2016, followed by four categories for interventions: classroom environment, classroom strategies, ***, and *** training. Within each of those categories, there are between three and seven check marks next to a general statement. For example, there are seven classroom strategies, each with a checked box, identified for Student's ***. ***.⁵⁷
34. Those seven identical classroom strategies are offered for Student's second targeted behavior—***. Six out of the seven classroom strategies are offered for Student's third targeted behavior—***. The only one not identified for that behavior is "****." However, the other six classroom strategies are identical. The BIP offers no explanation for why one particular classroom strategy might be ineffective for Student's third targeted behavior.⁵⁸
35. The interventions are essentially identical to those identified in March 2016 and again in March 2018. From *** grade through the *** grade, the District has made few revisions to the BIP. No antecedents of Student's behaviors are identified.⁵⁹
36. In the other three categories—classroom environment, ***, and social skills training—the same holds true. There are checked boxes followed by statements that are nearly identical across the three behaviors. They are also nearly identical to those from March 2018, despite the fact that an FBA had since been conducted and the BIP identified three different behaviors from the March 2018 BIP.⁶⁰

Behavior Management and Student's LRE

37. Student attended the *** classroom by ***self full-time for all of Student's classes during most of the 2018-19 and 2019-20 school years.⁶¹ The IEP did not change to reflect that new reality. Instead, the IEP reflects only Student's "ideal" general education curriculum, not where Student has been educated primarily in reality.⁶² While the District has attempted to reintegrate Student into general education classes, Student has rarely made it longer than a day or two in general education classes before returning to the *** classroom, where Student is the only full-time student.⁶³
38. For example, on November ***, 2019, the District placed Student in general education classes for the day in an effort to reintegrate Student. Before noon on that day, Student had

⁵⁷ *Id.* at 24.

⁵⁸ *Id.* at 24-5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ TR at 445.

⁶² TR at 450.

⁶³ TR at 538-40.

already ***.⁶⁴ The District placed Student back into the *** classroom by ***self after that day, where Student has remained since that time.⁶⁵

39. The District also attempted to use outside consultants to offer behavior suggestions. An outside group called “****” observed Student in the *** classroom during the 2019-20 school year and offered some suggestions on behavior management.⁶⁶ The District made no changes to any part of Student’s IEP, including Student’s BIP, as a result of the report *** produced.
40. Student is the only student in *** who is a full-time student in the *** classroom the majority of the time, though occasionally other special education students come in and out of the room to be reoriented before returning to a general education classroom.⁶⁷ There are *** with Student in the *** classroom providing Student’s instruction.⁶⁸
41. The District also does not allow Student to participate in extracurricular activities such as athletics or music, even though Student’s IEP indicates Student will participate in such activities.⁶⁹ Student *** in the *** classroom, with no other students present. When Student ***,⁷⁰ Student is unable to make new friends in this setting.⁷¹

ARD Committee Meetings in the 2018-19 and 2019-20 School Years

42. Student’s parent requested an ARD Committee meeting to discuss Student’s placement and concerns Student’s parent had about the placement. The meeting took place on March ***, 2019. Both Student and Student’s parent were present for the meeting.⁷² A District representative, special education teacher, and a general education teacher were present as well. Someone who could interpret evaluations was not present for the meeting and was not excused by the parent.⁷³
43. The ARD Committee members explained to Student’s parent and to Student that Student needed to earn Student’s way out of the *** classroom by demonstrating positive behavior and being respectful to Student’s peers and Student’s teachers.⁷⁴ As of the due process

⁶⁴ TR at 539.

⁶⁵ TR at 540.

⁶⁶ JE 36.

⁶⁷ TR at 170.

⁶⁸ TR at 365-66, 382,

⁶⁹ TR at 278, 290.

⁷⁰ TR at 520.

⁷¹ TR at 278.

⁷² JE 4 at 1.

⁷³ *Id.*, at 3.

⁷⁴ *Id.*, at 2.

hearing, that had not happened. In the 2018-19 school year, Student failed *** of Student's seven classes for the year.⁷⁵

44. While Student was passing Student's classes in the *** classroom during the 2019-20 school year, Student's grades are not reflective of the work Student is doing. Student's general education teachers send Student's work into the *** classroom. Student's general education teachers are not in the *** classroom with Student, though Student does have academic support in the classroom. The general education and paraprofessionals assigned to the *** classroom provide Student's academic support. Student refuses to do the vast majority of assignments the teachers send, but the teachers grade Student generously on the assignments Student does complete. Student's teachers then give Student passing grades in an effort to "boost [Student's] confidence," despite the fact that Student often refuses to complete any assignments for a week or longer.⁷⁶
45. Student is not making academic progress, because Student's behavior impedes Student's ability to make academic progress.⁷⁷ The District maintains and shares with Student's parent progress reports. These reports track Student's progress toward Student's IEP goals approximately six times per school year. They show that Student is not making progress toward achieving Student's academic or behavioral goals.⁷⁸
46. On March ***, 2019, Student allegedly ***.⁷⁹ The District held a Manifestation Determination Review (MDR) on March ***, 2019. Student's parent was present for the meeting. A District representative, special education teacher, general education teacher, and someone who could interpret evaluations were present as well.⁸⁰
47. The District determined that the behavior in question was not a manifestation of Student's disability and was not a result of the District's failure to implement Student's IEP. The District reviewed Student's BIP without making any changes to it.⁸¹
48. The District did not remove Student from *** following the MDR, instead opting to leave Student primarily alone in the *** classroom. The District did not make any changes to Student's schedule of services to reflect Student's *de facto* status as a full-time student in Student's own classroom.⁸²

⁷⁵ Respondent's Exhibit 1, page 1.

⁷⁶ TR at 416.

⁷⁷ TR at 204, 206, 472.

⁷⁸ JE 28.

⁷⁹ JE 3 at 5.

⁸⁰ *Id.*, at 3.

⁸¹ JE 3.

⁸² *Id.*

49. The District did not modify Student's BIP even though the District was aware that the behavior interventions were ineffective in managing Student's behavior. The District also did not change aspects of Student's BIP that were no longer applicable. For instance, one of the classroom strategies in the BIP is to "***praise behaviorally appropriate students."⁸³ Student was the only student in the *** classroom. Therefore, there were no other "behaviorally appropriate" students to whom to give praise. Yet the District did not modify the BIP, or any other part of the IEP, to reflect the new reality.⁸⁴
50. On September ***, 2019, the District conducted another MDR. This time, Student had ***while at school. Student's parent was present for the meeting. A District representative, special education teacher, general education teacher, and someone who could interpret evaluations were present as well.⁸⁵ The MDR found Student's behavior was a manifestation of Student's disability of Emotional Disturbance. Therefore, the MDR resulted in no further discipline. The District reviewed Student's BIP without making any changes.⁸⁶
51. The ARD Committee met for Student's annual ARD Committee meeting on October ***, 2019. Student's parent attended the meeting. The District had a special education teacher, a general education teacher, and an administrator present for the meeting. No one was present for the District who was capable of interpreting evaluations. The District did not make any changes to Student's BIP during the meeting. The District also did not order any new evaluations of Student.⁸⁷
52. During the meeting, the District proposed placing Student in a self-contained*** classroom on a different campus in the District. Student would not be alone in that classroom as Student now was at ***. Rather, there would be other students assigned to the self-contained classroom. *** did not have such a classroom.⁸⁸
53. Student needs a structured, self-contained classroom in which Student can work on Student's behavior issues at this time. The District's recommended placement would provide Student the environment Student needs to be successful and return to general education classes.⁸⁹ Student's parent disagreed with that recommended placement. The ARD Committee meeting ended in disagreement. Before the District could reconvene the ARD Committee, Petitioner filed the Complaint.

⁸³ JE 5, at 24-5.

⁸⁴ *See Id.*

⁸⁵ JE 2 at 3.

⁸⁶ JE 2.

⁸⁷ JE 3.

⁸⁸ TR at 238-39, 390,

⁸⁹ JE 16 at 14; TR at 203, 333, 422.

54. The ARD Committee has not met for a meeting since Petitioner filed the Complaint. Student has remained as the only student in the *** classroom at ***.

VII. DISCUSSION

A. Duty to Provide a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). A Texas school district has a duty to provide FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 29.003(a).

A school district is responsible for providing the student with specially designed personalized instruction with sufficient support services to meet the student's unique needs in order to receive meaningful educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁹⁰ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). In this case the District was obligated to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. The burden of proof in this case is on Petitioner to show the District did not do so. *Id.*

C. FAPE

⁹⁰ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009).

In order for a student to receive a FAPE, a school district must provide the student an educational program reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 1001 (2017). The student's progress must be something more than mere *de minimis* progress. *Id.*, at 1000. Every child should have the opportunity to meet appropriately challenging objectives. *Id.*, at 992.

D. The Four-Factor Test

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Even after the Supreme Court's 2017 decision in *Andrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018). Those factors are:

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

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

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

1. Individualized on the Basis of Assessment and Performance

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

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the District “was reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 999.

The District’s obligation when developing Student’s IEP and BIP—which is a part of the IEP—is to consider Student’s strengths, Student’s parent’s concerns for enhancing Student’s education, results of the most recent evaluation data, and Student’s academic, developmental, and functional needs. 34 C.F.R. 300.320(a)(1)(i). For Student, whose behavior impedes Student’s learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student’s IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

In this case, the District did not sufficiently individualize Student’s program on the basis of its own assessments and Student’s performance. An FBA is essential to addressing a student’s behavioral difficulties and, as such, plays a vital role in developing the student’s IEP. *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167, 190 (2nd Cir. 2012); *Harris v. District of Columbia*, 561 F.Supp.2d 63, 68 (D.D.C. 2008). The District’s FBA listed two potential functions of Student’s

behavior, but did not tie those functions to specific behaviors Student displays. It also stated that the interventions the District has tried have been ineffective, but did not offer any interventions that may be effective.

The BIP the District had in place then listed generic behavior intervention strategies that were virtually identical for all three behaviors it aimed to address. A BIP should be specific and should match specific interventions to specific behaviors in order to be adequate under the IDEA. *C.F. ex rel. R.F. v. New York City Dept. of Educ.*, 746 F.3d 68, 80 (2nd Cir. 2014). In this case, the generic interventions were not matched to specific behaviors. Instead, the interventions were virtually identical for each individual behavior. The BIP barely changed since March 2016 and the District has not revised it once since December 2018. However, the District's behavior interventions are not working. The District's 2018 FBA stated the interventions were not working. Based on Student's performance, the District needed to update Student's BIP.

In addition to listing generic behavior strategies that were nearly identical for the three identified behaviors and showed virtually no change between 2016-2020, the BIP did not explain how the BIP was developed. Student's behavior never improved during the 2017-18, 2018-19, or 2019-20 school years. Because Student's behavior interfered with Student's ability to learn, Student made no academic progress either.

The District was aware Student's behavior was preventing Student's progress and that its behavior interventions were not working. Yet the District did not update the BIP at any point over those school years in an effort to address some of Student's behavioral challenges or to reflect some of the new realities of Student's isolated placement. It did not conduct any additional evaluations after the 2018 FIE. As a result, Student's behavior and academic performance showed no improvement. The IEP, which included the ineffective BIP which remained virtually unchanged from March 2016 through June 2020, was not reasonably calculated to enable Student to make progress. *Andrew F.*, 137 S.Ct. at 1001.

2. LRE

The IDEA requires that students with disabilities be educated in general education settings with students who do not have disabilities to the maximum extent appropriate. The IDEA has a strong preference in favor of educating students with disabilities in general education settings with their nondisabled peers. However, if a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place them in special education classes. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.114(a)(1-2)(i-ii). This requirement of the IDEA is referred to as a school district's obligation to educate a student in the LRE. *Id.*

To determine whether a school district is educating a student with a disability in the LRE, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State Bd. Of Ed., 874 F. 2d 1036, 1048 (5th Cir. 1989).

To determine whether a student with a disability can be educated in general education settings, a hearing officer must examine the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id.* The hearing officer's determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- the educational benefit a student is receiving while placed in the general education setting; and
- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting. *Id.* at 1048-50.

In this case, Student cannot be educated in a mainstream class. No witnesses or evaluations presented in this case have stated Student can be educated safely and effectively in a mainstream

classroom. The District demonstrated it had tried to accommodate Student in mainstream classes, but that Student's behavior in mainstream classes was disruptive. Student's *** impeded both Student's learning and that of Student's peers.

However, as to prong two of the *Daniel R.R.* test, the District did not mainstream Student to the maximum extent appropriate. The District placed Student by ***self in the *** classroom for most of Student's time at ***, even though the District did not modify Student's IEP to acknowledge this change. Student does not have access to extracurricular activities, any classes outside of the *** classroom, or any interaction with peers without disabilities during the day. Student is even *** in the *** classroom.

After Student spent the majority of the 2018-19 school year in the *** classroom alone, the District did propose a change in placement to another campus with a classroom in which Student would not be alone in October 2019. The District was unable to implement that proposal due to the "stay put" provision of the IDEA. The District did not take steps, however, to integrate Student either prior to their recommendation or after. They kept Student alone in a self-contained room without access to peers without disabilities, extracurricular activities, or other opportunities outside of the self-contained classroom.

3. Whether Services Were Provided in a Collaborative Manner

Third, the District did provide services in a collaborative manner. The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

In this case, the District worked with Student's parent on Student's educational program. Student's parent attended every ARD Committee meeting for Student and, until October 2019, agreed with the services provided at the end of each ARD Committee meeting. The District set up additional ARD Committee meetings upon Student's parent's request, such as the ARD Committee meeting in March 2019 to discuss Student's placement.

The District sent Student's parent timely progress reports detailing Student's lack of educational progress. The District also kept in close contact with Student's mother. The District has attempted to set up an ARD Committee meeting to accept Student's eligibility for special education in the additional eligibility category of OHI, but Student's parent has refused to attend an ARD Committee meeting. Petitioner did not meet their burden of showing any lack of collaboration.

4. Academic and Non-Academic Benefit

Fourth, Student received neither academic nor non-academic benefit from Student's program. Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P.*, 703 F.3d at 813-14.

Academically, Student has not made progress toward Student's IEP goals and has not passed any standardized STAAR tests. Student's IEP goals are measurable and appropriate, but Student cannot make progress toward them. Student did not pass ***out of seven classes in the 2018-19 school year. While Student's grades indicate Student passed Student's classes in the 2019-20 school year, Student's grades were artificially inflated and are not an accurate reflection of the work Student is performing. Student has not received academic benefit due to the manner in which Student's behavior impedes Student's ability to learn. Student is intelligent and capable, but Student's behavior has prevented Student from realizing academic progress.

Non-academically, the District has also not provided Student benefit. Student spends the

entire school day by ***self in the *** classroom. Student has no opportunity to interact with peers without disabilities during the day and, consequently, has no access to making friends. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit). While Student enjoys ***, Student has no opportunity to participate in either, because the District has denied Student access to extracurricular activities. Thus, the District is not conferring academic or non-academic benefit on Student.

5. Conclusion

The District is fulfilling its obligation to collaborate with all necessary stakeholders. However, the District is not fulfilling its obligations to individualize Student's IEP based on assessment and performance, educate Student in Student's LRE, and to confer academic and non-academic benefits to Student. The areas in which the District is not meeting its obligations outweigh the one area in which it is. Taking the four *Michael F.* factors together, the District has failed to confer a FAPE to Student.

E. Procedural Issues

Petitioner raised two procedural issues in this case. When allegations of procedural violations are raised, a hearing officer may find a school district denied a student a FAPE if the procedural errors impeded the student's right to a FAPE, significantly impeded a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefit to the student. 34 C.F.R. §300.513(a)(2). It is not enough simply to find a procedural violation. The hearing officer must conduct an inquiry into the impact of the violation of the provision of a FAPE, the right of parents to participate in the decision making process, or the deprivation of educational benefit to the student. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 68 (3rd Cir. 2010). Specifically, Petitioner accused the District of the following procedural violations:

1. The District Conducted an ARD Committee Meeting Without Required Personnel

First, Petitioner stated not all personnel who were required to be present attended the 2019 annual ARD Committee meeting in October 2019. An ARD Committee meeting requires the following personnel: 1. The parents of the child; 2. A regular education teacher; 3. A special education teacher; 4. A representative of the public agency; and 5. An individual who can interpret evaluation results. 34 C.F.R. § 300.321(a), 19 Tex. Admin. Code 89.1050(c).

The District held ARD Committee meetings in which an individual who can interpret evaluation results was not present in both March 2019 and October 2019. Student's parent did not excuse that person from attending those ARD Committee meetings. Therefore, the District violated the IDEA by holding two ARD Committee meetings without a properly constituted ARD Committee.

The District committed a procedural violation of the IDEA. The next inquiry is to determine whether the absence of someone who can interpret evaluation results at two ARD Committee meetings in 2019 had any impact on the provision of a FAPE, the right of parents to participate in the decision making process, or the deprivation of educational benefit to the student. *C.H.*, 606 F.3d at 68. Petitioner did not present sufficient evidence of that. Someone who can interpret evaluation results attended ARD Committee or MDR meetings for Student in December 2018, March 2019, and September 2019. During those meetings, she proposed no new evaluations or revisions to the IEP, FBA, or BIP.

The District should have revised Student's IEP to reflect Student's *de facto* placement in the *** classroom. The District also should have made adjustments to Student's BIP, because the interventions that had been in place since 2016 were ineffective. The Hearing Officer dealt with both of those issues sufficiently in the FAPE analysis. Petitioner did not present evidence that the absence of someone who could interpret evaluations from these two meetings in particular caused that to happen. Her absence also did not impact Student's parent's ability to participate fully in the ARD Committee meetings and in planning Student's education plan. Therefore, the Hearing Officer does not find a procedural violation in this instance.

2. The District Failed to Provide Timely Progress Reports to Petitioner

Next, Petitioner alleges the District did not provide timely progress reports to Student's parent. The evidence presented did not support this issue. The District produced progress reports and provided those to Student's parent. Even if Petitioner had presented such evidence, Petitioner did not present evidence their absence had any impact on the provision of a FAPE, the right of parents to participate in the decision making process, or the deprivation of educational benefit to the student. *C.H.*, 606 F.3d at 68. Therefore, Petitioner did not meet their burden on this issue.

F. The District Did Not Implement Student's IEP

Petitioner's final issue is that the District did not implement Student's IEP. Specifically, Petitioner claimed the District did not provide counseling services with a qualified counselor.

To prevail on a claim of failure to implement the IEP, the party challenging implementation of the IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school district failed to implement substantial or significant provisions of the IEP. This approach affords school districts some flexibility in implementing IEPs while also holding them accountable for material failures and for providing each student with a disability a FAPE. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). Failure to implement a material portion of an IEP violates the IDEA, but failure to perfectly execute an IEP does not amount to denial of FAPE. *See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478, 484 (4th Cir. 2011).

In this case, the District did provide counseling services with a qualified counselor. However, the District did not implement the portions of the IEP dealing with Student's placement in general education classes and participation in extracurricular activities. Student spent nearly all of Student's time isolated in the *** classroom.

The District argues it did not have to adjust the IEP, because students in the *** program

can be placed into the *** classroom at any time without adjusting the IEP.⁹¹ However, Student's *de facto* placement in the *** classroom made other portions of Student's IEP obsolete, like portions of Student's BIP dealing with ***. Further, although the IEP stated Student would participate in extracurricular activities, Student did not have the opportunity to do so. The District failed to implement the IEP as developed by the ARD Committee during the December 2018 annual ARD Committee meeting.

VIII. CONCLUSIONS OF LAW

1. The District did not provide Student a FAPE during the relevant time period and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988.
2. The District did not provide Student educational services in Student's LRE. *Daniel R.R.*, 874 F.2d at 1048.
3. Petitioner did not demonstrate that the District committed any procedural violations of the IDEA. *C.H.*, 606 F.3d at 68.
4. The District did not appropriately implement Student's IEP. *Bobby R.*, 200 F.3d at 349.

IX. RELIEF AND ORDERS

In this case, the District has failed to confer a FAPE in the LRE to Student. The IDEA's central mechanism for the remedying of perceived harms is for parents to seek changes to a student's program. *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2nd Cir. 2002). Hearing officers have "broad discretion" in fashioning relief under the IDEA. Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *Sch. Cmte. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369 (1985).

⁹¹ TR at 450.

Petitioner has sought six specific items of relief. However, none of those items are appropriate for Student. First, Petitioner requested compensatory tutoring services. However, Student is not able to focus on Student's work now where Student is the only student in the classroom and receives one-on-one instruction. Student often goes more than a week without completing an assignment and is easily frustrated. Giving Student extra tutoring services, when Student has already shown no improvement with the one-on-one academic instruction Student now receives in the *** classroom, is not appropriate relief.

Petitioner's request to place Student into general education classes would also not be appropriate at this time. The District has attempted to place Student into general education classes, but it has not worked. Student is bright and capable, but Student's behavior has prevented Student from making any progress. Putting Student directly into a general education setting with Student's current BIP, as requested by Petitioner, would not place Student in a position to receive a FAPE.

The District is already providing counseling services with a qualified counselor, so Petitioner's third request for counseling as a related service is not appropriate. Petitioner presented no evidence of Petitioner's out-of-pocket expenses, so the Hearing Officer cannot order reimbursement for those. Petitioner also did not present evidence that the progress reports are untimely. Petitioner also did not establish that the IEP goals are inappropriate, particularly once the District can control Student's behavior.

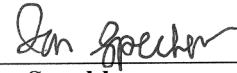
The evidence shows that the key to providing Student a FAPE in Student's LRE in the future is managing Student's behavioral issues. Given the "broad discretion" of the Hearing Officer in fashioning relief, the Hearing Officer makes the following orders:

1. The District shall immediately place Student in the placement the District recommended during the October 2019 annual ARD Committee meeting. Student shall have access to general education classes and extracurricular activities to the maximum extent appropriate while in this placement.
2. The ARD Committee shall accept Student's secondary eligibility for special education and related services as a Student with OHI either in an ARD Committee meeting or by an IEP amendment by no later than September ***, 2020.

3. The District must deliver to Petitioner by no later than 5:00 p.m. Central Time on August ***, 2020, a set of reasonable criteria for selection of an IEE provider who can conduct an FBA.
4. Petitioner shall select a provider who fits the reasonable criteria set by the District to conduct an independent FBA by no later than 5:00 p.m. Central Time on September ***, 2020. The provider shall use the FBA to develop a BIP. The provider may also conduct any additional evaluations which, in the evaluator's opinion, are necessary to better understand and/or improve Student's behavioral issues.
5. If Petitioner does not provide the name of an IEE provider to the District by 5:00 p.m. Central Time on September ***, 2020, the District shall select an IEE provider who meets the District's criteria by September ***, 2020.
6. The District shall also conduct its own Occupational Therapy evaluation to determine if Student has any sensory processing issues that may affect Student's behavior. The District will share those results with the IEE provider.
7. The District will hold an ARD Committee meeting with a properly constituted ARD Committee to review the Occupational Therapy evaluation, review and implement the results of the FBA, and adopt the BIP within 15 school days of completion of the IEE.
8. The ARD Committee meeting shall occur at a time when both Student's parent and the independent FBA provider are able to participate.
9. After that ARD Committee meeting, the ARD Committee shall meet at least every 30 school days during the 2020-21 school year to discuss whether Student can be satisfactorily educated in the general education setting with the use of supplemental aids and services, and, if not, whether the District has mainstreamed Student to the maximum extent appropriate. The parties may agree to meet more frequently or less frequently by mutual agreement.
10. Student shall continue to receive support from the *** program once Student is reintegrated into the general education environment until both Petitioner and Respondent agree such support is no longer necessary.

All other relief not specifically stated herein is **DENIED**.

SIGNED August 10, 2020.



Ian Spechler
Special Education Hearing Officer
For the State of Texas

X. NOTICE TO THE PARTIES

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