

DOCKET NO. 208-SE-0517

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, STUDENT (“Student”), b/n/f PARENT and PARENT (“Petitioner”) brings this action against the Spring Branch Independent School District (“Respondent,” or “the School District”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

There are two primary issues in this case. First, whether the School District denied Student a free appropriate public education (FAPE) during the 2016 Extended School Year, the 2016-17 school year, and the 2017 Extended School Year. The second issue is whether the Petitioner is entitled to reimbursement for the unilateral private placement of Student. The hearing officer concludes that:

1. The School District provided Student with a FAPE during the relevant time periods; and
2. Petitioner is not entitled to reimbursement for the unilateral private placement of Student.

A. Legal Representatives

Student has been represented throughout this litigation by advocate Patricia Freeze of National ARD/IEP Advocates. The School District has been represented throughout this litigation by its legal counsel Amy Tucker of Rogers Morris & Grover.

B. Resolution Session and Mediation

The parties participated in a resolution session on May 19, 2017, but did not reach an agreement. The parties did not participate in mediation.

C. Continuances

Three continuances were granted in this case. The first was at Petitioner's request to accommodate a scheduling conflict for Petitioner's advocate and to allow time to collect documents requested by the School District. The second was at Respondent's request based on Petitioner's failure to produce discovery that was necessary for Respondent to prepare for hearing. The third was requested by Respondent to allow time for the parties to recover and the School District to reopen following Hurricane Harvey. The parties ultimately selected a new set of dates for the hearing and an extension of the decision due date by agreement.

II. DUE PROCESS HEARING

The due process hearing was conducted on October 17-19, 2017. Petitioner continued to be represented by advocate Patricia Freeze, who was assisted at the due process hearing by advocate Louis Geigerman. In addition, Student's parents, *** and ***, also attended the hearing. Respondent continued to be represented by its legal counsel Amy Tucker. In addition, ***, Director of Special Education for the School District, attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing the parties requested the record remain open in order to allow submission of written closing arguments on the seminal issues in this case. Those pleadings were submitted by both parties in a timely manner. The decision of the hearing officer is due on December 6, 2017.

III. ISSUES

A. Petitioner's Issues

Petitioner submitted the following hearing issues:

1. Whether the School District failed to provide Student with a FAPE within the meaning of the IDEA during the 2016 extended school year (ESY); the 2016-2017 school year, and the 2017 ESY by:
 - a. developing an inappropriate Individualized Educational Program (IEP) as evidenced by either Student's regression academically and behaviorally or Student's failure to make progress.
 - b. failing to provide Student with occupational therapy (OT) that Student needed in order to receive a FAPE; and
 - c. failing to develop an individualized ESY in terms of frequency and duration during the 2016 and 2017 ESY.
2. Whether Petitioner is entitled to reimbursement for the *** program Petitioner created for Student during the 2016 ESY, the 2016-2017 school year, and the 2017 ESY.

B. Respondent's Legal Position and Additional Issues

The School District denies Petitioner's allegations and contends that it worked with Petitioner to develop and implement an appropriate IEP that provided Student with meaningful educational benefit. The School District further asserts that Student received FAPE in the least restrictive environment appropriate to meet Student's individualized needs.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

In addition to making findings that Student was denied FAPE and that Student's private placement was justified and appropriate, Petitioner requests the following items of requested relief:

1. The School District reimburse Petitioner for all expenses related to Student's private placement during the 2016 ESY, the 2016-2017 school year, and the 2017 ESY;
2. The School District provide and fund full time, full-day ESY placement and related services for the summer 2017;
3. The School District fund private placement at *** and related services for a one-year period after the summer of 2017; or, in the alternative,
4. The School District provide Student with compensatory educational services due to the denial of FAPE.

V. FINDINGS OF FACT

1. Student is ***-year-old child eligible for special education services from the School District as a student with autism and a speech impairment.¹
2. Student was initially diagnosed with autism spectrum disorder associated with cognitive delays and language impairment in 2012.² Student has developmental delays in ***.³ Student has extremely low skills in all areas of ***, clinically significant deficits in ***, clinically significant deficits in ***, and clinically significant deficits in *** behaviors. Student also demonstrates ***.⁴
3. Student was initially evaluated for eligibility for special education services in January of 2014 while a student in the *** Independent School District (*** ISD). *** ISD determined that Student was eligible for special education services under the categories of autism and speech impairment.⁵ Student later moved into the geographical boundaries

¹ Joint Exhibit (J.Ex.) 1, p. 1.

² J.Ex. 23, p. 1 and J.Ex. 25, p.1.

³ J.Ex. 23, p. 4.

⁴ J.Ex. 21, p. 7.

⁵ J.Ex. 22.

for the School District and began receiving special education services from the School District in August of 2015.⁶

4. Student attended school in the School District during the 2015-16 school year and for *** in the fall of the 2016-17 school year. Student was then withdrawn from school by Student's parents on ***, 2016.⁷ Student did not attend school in the School District for the remainder of the 2016-17 school year and did not attend at all in the 2017-18 school year.⁸
5. Student has deficits in the areas of cognition, communication, social skills and behavior. Student's deficits interfere with Student's ability to comprehend grade level material, attend and follow instructions in a group setting and participate in cooperative learning groups, and ***. Student requires intensive, systematic training, positive behavioral supports, visual supports and discrete trial teaching in order to be successful in a school environment.⁹
6. Student is able to listen to a story read to Student and answer a comprehension question with a visual support and a verbal cue. Student is able to independently match up to five picture cards with word cards. With verbal prompting, Student is able to respond to a single greeting from an adult, to request a preferred item when it is visually accessible to Student. and to respond to closed questions.¹⁰
7. Student is able to identify vocabulary through pointing, ***, to raise the volume of Student's voice to an appropriate level and to utilize low level assistive technology in order to make requests and greetings. Student needs to improve Student's ***.¹¹ To improve Student's *** skills, Student needs to ***.¹²
8. Student is able to write Student's first name, draw lines of different lengths and copy models of different shapes, such as circles and squares. Student needs to learn to ***.¹³
9. Student is able to count a set of ten, or less, objects; to sort objects by attributes, such as color; to identify positional words using manipulatives; to complete puzzles; to match objects to pictures; and to expressively identify numbers one to ten. Student needs to learn ***.¹⁴

⁶ J.Ex. 10.

⁷ J.Ex. 12, p. 5.

⁸ J.Ex. 1 and J.Ex. 2.

⁹ J.Ex. 1, p. 2.

¹⁰ J.Ex. 1, p. 2.

¹¹ J.Ex. 1, p. 2.

¹² J.Ex. 1, p. 2 and J.Ex. 12, p. 9.

¹³ J.Ex. 1, p. 2.

¹⁴ J.Ex. 1, p. 2-3.

10. Student responds to the adult directive of stop, shows interest in other ***. Student needs to ***.¹⁵
11. Student is able to follow familiar one step directives with no more than a verbal or visual cue and is able to remain seated in a designated area. Student needs to learn ***.¹⁶
12. Student requires an educational setting that allows for intensive interventions that address Student's significant behaviors that interfere with Student's safety and that allows for the development of prerequisite skills necessary for academic success. Student requires direct, targeted interventions to decrease inappropriate behaviors and to develop prerequisite skills. Interventions for Student need to be provided by staff trained to address Student's significant communication and behavioral needs as a student with autism and need to be delivered in a highly structured setting with an increased staff to student ratio.¹⁷ Student needs a classroom environment utilizing visual supports for behavior management and academic tasks.¹⁸ Student requires more intensive, specialized instruction than can be delivered solely in a general education setting.¹⁹
13. Student received Student's instruction at the School District in the *** classroom. The *** program is located in a *** classroom on *** campus in the School District. The *** Program is designed for students ***. In the *** Program, *** discrete trial training is used with the students for skill acquisition. All of the staff in the program are specifically trained in autism spectrum disorders.²⁰
14. Student's *** classroom had *** students, a teacher, and *** assistants. Each student in the classroom had ***.²¹ While in the *** program, Student made progress in reading, writing, social skills, ***.²²
15. For the 2016-17 school year, the School District placed Student in the *** program and proposed *** minute speech therapy sessions per week. The School District also proposed *** sessions of in-home training per month for Student and *** sessions per month of parent training.²³

¹⁵ J.Ex. 1, p. 3.

¹⁶ J.Ex. 1, p. 3.

¹⁷ J.Ex. 1, p. 29 and J.Ex. 21, p. 8.

¹⁸ J.Ex. 21, p. 8.

¹⁹ J.Ex. 2, p. 26 and J.Ex. 12, p. 32.

²⁰ Transcript (TR) Vol. 3, p. 660-664

²¹ J.Ex. 18, p. 1 and TR Vol. 3, p. 689.

²² J.Ex. 6, p. 1; J.Ex. 7, p. 21-25 and J.Ex. 12, p. 23.

²³ J.Ex. 2, p. 30-31 and 34.

16. For the 2017-18 school year, the School District proposed placing the Student in the *** program, a specialized *** program for children on the autism spectrum, *** minute session of occupational therapy per week and *** minute sessions of speech therapy per week. The School District also offered *** minute sessions of in-home training per month for Student and *** minute sessions of parent training per month at the school and home for Student's parents during the 2017-18 school year.²⁴
17. Student requires ESY services to avoid behavioral regression during times of extended breaks from school and to facilitate the emergence of critical skills in communication and ***.²⁵ For the summer of 2016, the School District offered an ESY program of *** hours and *** minutes of classroom instruction per day, *** days a week for *** weeks, *** minute sessions of speech therapy, *** hour sessions of in-home training for Student and *** minute sessions of parent training.²⁶ Student's 2016 ESY program was developed through a series of Admission, Review and Dismissal (ARD) committee meetings with Student's parents and was modified to address parental concerns.²⁷ For the summer of 2017, the School District proposed an ESY program of *** hours and *** minutes of classroom instruction per day, *** days a week for *** weeks, *** minute sessions of OT per week for *** weeks, *** minute sessions of speech therapy per week for *** weeks and *** minute sessions of *** training over the summer.²⁸ Student did not attend the School District's ESY program in either 2016 or 2017.
18. Student's parents were dissatisfied with the proposed 2016 ESY program and ***.²⁹
19. Student exhibits higher performance on academic and functional skills in highly structured environments.³⁰ Student has difficulty generalizing skills readily across environments. To aid in generalization, Student requires specific and explicit instruction. Student requires in-home and parent training to assist in generalization and to fully benefit from the instruction delivered at school.³¹
20. During the 2015-16 school year, the School District provided training to Student's parents in their home to work on utilizing positive behavior supports, using visual schedules and supports, enhancing expressive language, ***, and utilizing contingent reinforcements.³²

²⁴ J.Ex. 1, p. 33.

²⁵ J.Ex. 1, p. 32, 48, & 54.

²⁶ J.Ex. 6, p. 11, and 14.

²⁷ J.Ex. 7; J.Ex. 6; and J.Ex. 4.

²⁸ J.Ex. 1, p. 37, 55.

²⁹ TR Vol. 2, p. 550, 586 and 591.

³⁰ TR Vol. 3, p. 674-675.

³¹ J.Ex. 18, p.4 and J.Ex. 21, p. 8.

³² J.Ex. 1, p. 51; J.Ex. 18, p. 4 and TR Vol. 2, p. 534-536.

21. Student requires OT services at school to benefit from Student's educational program. Student needs additional opportunities for sensory stimulation in the classroom and the implementation of a sensory diet.³³ The School District first offered OT to Student on February ***, 2017.³⁴

VI. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a 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)*. Under IDEA a school district has a duty to provide a FAPE to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. The evidence showed Student was a child with a disability residing within the jurisdiction of the School District and thus the School District had the duty to serve Student under IDEA.

The seminal issue in this case is whether Student's parents are entitled to reimbursement for the costs of a unilateral private placement consisting of *** therapy services beginning in the summer of 2016 through the current school year. The central question is whether the School District provided or proposed an appropriate educational program for Student and, if not, whether the *** program is appropriate for Student.

1. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.³⁵ *Schaffer v. Weast, 546 U.S. 49, 62 (2005); Teague Ind. Sch. Dist. v. Todd L.,*

³³ J.Ex. 13, p. 3-4; J.Ex. 14, p. 6-7 and TR Volume (Vol.) 1, p. 234.

³⁴ J.Ex. 1, p. 33.

³⁵ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding.

999 F. 2d 127, 131 (5th Cir. 1993). Therefore the burden of proof is on Student to prove the IEP at issue were not reasonably calculated to enable Student to make educational progress given Student's unique, individual circumstances.

2. FAPE Overview

A FAPE is special education, related services, and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child'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)*. While the IDEA guarantees only a "basic floor of opportunity," the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 188-189*.

The evidence demonstrated the School District provided services to Student in a highly structured, specialized program for children with autism. Within this specialized program, the School District provided Student with a program tailored to address Student's unique academic and functional deficits and provided services in Student's home to assist Student, and Student's family with generalizing learning outside of the classroom.

B. IEP

In meeting the obligation to provide a FAPE a School District must have in effect an IEP for each child with a disability 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. A child's 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, and, 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)*.

To meet its substantive obligation under the IDEA, a school district must offer an IEP that is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. The adequacy of a given IEP turns on the unique circumstances of the student for whom it was created. *Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017)*. While the IEP need not be the best possible one nor must it be designed to maximize a student's potential the school district must nevertheless provide the student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP, 582 F. 3d 576, 583 (5th Cir. 2009) cert. denied, 559 U.S. 1007(2010)*.

The basic inquiry in this case is whether the IEP implemented by the School District was reasonably calculated to provide the requisite educational benefit given Student's unique circumstances. *Rowley, 458 U.S. at 206-20; Andrew F. v. Douglas Cnty. Dist. RE-1, 137 S. Ct. 988 (2017)*. In this case, Student has an autism spectrum disorder that significantly impacts Student's educational skills and function. Student requires a program of highly specialized services delivered by individuals trained to educate students with autism. The School District developed and implemented an IEP that addressed Student's expressive and receptive communication deficits, Student's functional skill deficits, Student's adaptive behavior needs and Student's foundational academic needs in *** and ***. Moreover, Student's IEP addressed Student's need for a highly structured learning environment that utilized best practices for students with autism and provided in-home and parent training to facilitate generalization across environments of the skills acquired at school. In sum, the IEP developed by the School District for Student was reasonably calculated to provide educational benefit to Student given Student's unique circumstances.

C. Reimbursement for Private Placement

A parent is entitled to reimbursement for the unilateral private placement of a child with a disability if the public school's program does not provide the student with a FAPE and the

private school's program is appropriate. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass*, 471 U.S. 359, 370 (1973). In this case the first issue is whether the School District's program was appropriate. If not, the second issue is whether Student's unilateral *** private placement is appropriate. *Burlington*, 471 U.S. at 370. The private placement need not meet all State requirements for reimbursement purposes so long as the private placement meets Student's individualized needs and is therefore appropriate. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13, 15 (1993). If both prongs of the *Burlington* test are met the hearing officer may also consider whether reimbursement should nevertheless be reduced or denied. 34 C.F.R. § 300.148 (d).

1. FAPE

To determine whether the School District's program was appropriate for Student, the hearing officer must determine whether the School District offered and provided a FAPE to Student. In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA FAPE requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- 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 for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

a. The program is individualized on the basis of the student's assessment and performance

In this case, Student was served in a specialized program for students with autism. Student's particular program was developed utilizing the evaluation first completed by *** ISD and modified as Student's needs and skills evolved. Student's program addressed Student's particular communication, academic, functional and adaptive behavior needs. Through the provision of in-home and parent training, Student's program also addressed Student's difficulties with generalization.

The evidence did show that Student required occupational therapy in the form of a sensory diet as part of Student's program and that the School District did not make this service available until February of 2017. However, the *** classroom in which Student received Student's services did have elements that addressed some of Student's sensory needs. In addition, Petitioner failed to prove that the failure to provide the occupational therapy services caused educational harm to Student. Taken as a whole, the School District developed a program for Student that was individualized on the basis of Student's assessment and performance. *Klein Independent School District v. Per Hovem*, 690 F. 3d 390, 391 (5th Cir. 2012).

b. Program is administered in the least restrictive environment

Student requires a specialized program delivered by staff trained to work with students with autism. The Student also requires a program with a low student to staff ratio. The School District delivered Student's program in 2015-16 and 2016-17 in *** campus. Student was educated in a *** program for students with autism with *** other students and *** School District staff. This program gave Student opportunities to interact with other students in the *** program and exposure to nondisabled peers on *** campus. This was the setting most appropriate for meeting Student's individual needs and delivering the highly specialized program Student requires.

Petitioner proposed a program of *** services for Student. This program significantly reduces Student's interaction with, and exposure to, other students with, and without, disabilities. As such, this program is more restrictive than the program delivered by the School District.

c. The services are provided in a coordinated, collaborative manner by the key stakeholders

The School District worked closely with Student's parents to develop Student's IEP and program. The School District addressed parents' concerns related to generalization for the Student by providing in-home and parent training. To address parental concerns over Student's ESY services, the School District convened additional ARD committee meetings and added services to Student's summer program. Moreover, School District staff continued to attempt to work collaboratively with Student's parents even after Student's parents ***.

d. Positive academic and non-academic benefits are demonstrated

While receiving services from the School District, Student made progress. Student showed improvements in communication skills, reading, writing, social skills, adaptive behavior and task refusal. Petitioner made much of Student's inability to consistently demonstrate Student's progress in the home setting. Petitioner claimed this led to the conclusion that Student was not benefitting from Student's program. However, the evidence showed that Student, at this point in Student's development, requires a highly structured, particularized environment in order to be most successful in performing academic and functional tasks. The *** classroom is such a structured and particularized environment and *** is not. To assist with transferring, or generalizing, Student's progress to the home environment, the School District offered and provided in-home and parental training. During Student's in-home sessions, Student displayed the same academic and functional skills that were present at school.

2. Appropriateness of Private Program

The second prong of the reimbursement analysis asks whether the educational program provided by the private school was appropriate. *Burlington*, 471 U.S. at 370. The private school program need not necessarily meet every specific requirement of the IDEA but only that it be “otherwise proper” under IDEA. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13, 15 (1993). See also, *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009). Having concluded that the School District provided FAPE to Student, it is not necessary to analyze the appropriateness of Student’s *** private placement.

D. Extended School Year Services

In Texas the need for ESY is based on documentation that shows, in one or more critical areas addressed in the student’s IEP, that the student exhibits or may reasonably be expected to exhibit severe or substantial regression that cannot be recouped or that the student has been or will be unable to maintain one or more acquired critical skills in the absence of ESY services. *19 Tex. Admin. Code § 89.1065 (emphasis added)*.

Student’s ARD committee determined that Student required ESY services to prevent a regression in behavioral skills. To address Student’s ESY need, the School District offered a combination of classroom services, speech therapy services and in-home and parent training. This program is sufficient to maintain Student’s adaptive behavior skills and avoid a significant regression in these skills. Petitioner did not meet its burden of proof to show that Student either experienced significant regression in other academic or functional areas or that the offered ESY program was inadequate to meet the demonstrated need. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

VII. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993).
2. Petitioner did not meet Petitioner’s burden of proving Respondent failed to provide Student with FAPE during the 2016 ESY, the 2016-17 school year and the 2017 ESY. *Schaffer v. Weast*, *supra*; *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, *supra*; 34 C.F.R. §§ 300.1, 300.17.

3. Petitioner did not meet Petitioner's burden of proving entitlement to reimbursement for the unilateral private placement. *Schaffer v. Weast, supra; Burlington, Supra; Endrew F. v. Douglas Cty. Sch. Dist. RE-1, supra; Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., supra; 34 C.F.R. §§ 300.1, 300.17.*

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**. All other requests for relief not specifically stated in these Orders is hereby **DENIED**.

SIGNED December 6, 2017.



Steve Elliot
Special Education Hearing Officer
For the State of Texas

IX. 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. 20. U.S.C. § 1415 (i)(2); 19 Tex. Admin. Code Sec. 89.1185 (n).