

DOCKET NO. 395-SE-0819

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner, Student, b/n/f Parent (collectively, Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. §1400, et. seq.* Petitioner’s primary assertion in the Complaint is that the Tyler Independent School District denied the Student a free, appropriate public education (FAPE) in accordance with *20 U.S.C. §1412 (a)(1)(A)*, and Petitioner made a request for a residential placement at public or the District’s expense as further set out below. The Hearing Officer finds that the District did provide Student a FAPE in Student’s LRE, and appropriately implemented the educational plan it prepared for the Student.

II. Procedural History

Petitioner, Student, b/n/f Parent (collectively, Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the IDEA. The Complaint was received by the Texas Education Agency (TEA or Agency) on the 19th day of August, 2019,

and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on the 19th day of August, 2019. The Respondent to the Complaint is the Tyler Independent School District (hereinafter District or Tyler ISD). The Initial Scheduling Order was issued on August 20, 2019 and set the usual timelines and deadlines. The first Pre-hearing Conference (PHC) was held on Oct 1, 2019, and the second held on December 3, 2019.

A. Representatives

Petitioner was represented by Devin Fletcher and Meera Krishnan of the Cuddy Law Firm, and the Respondent District was represented Gigi Driscoll of Walsh, Gallegos, Trevino, Russo & Kyle.

B. Resolution and Mediation

The parties agreed to waive the resolution session and participate in mediation in an attempt to settle the matter. The mediation was held on October 18, 2019, and the parties were unable to reach a resolution. The parties informed the hearing officer of the outcome of mediation during a prehearing conference on December 3, 2019.

C. Continuances

There were several continuances granted in this matter. The First Prehearing Conference was continued to September 17, 2019, and then due to a technical matter, was rescheduled for October 1, 2019. At that time, based upon the agreed request of the parties, the Due Process Hearing (DPH) was also continued by agreement, and set for January 27-30, 2020. Thereafter, a second PHC was scheduled for November 5, 2019, and was rescheduled by agreement, and set for the 3rd of December, 2019. The final continuance, based upon the agreed oral motion of the parties, was granted on February 3, 2020, and set March 2, 2020 as the deadline for the parties to file closing briefs, and extended the decision due date until March 16, 2020.

D. Preliminary Motions

Petitioner, on January 15, 2020, filed an unopposed Motion to Permit Telephonic Testimony requesting that the testimony of two witnesses, Ms. *** and Mr. ***, be provided by telephone. As noted, no objection was filed, and the Order Permitting Telephonic Testimony was issued on January 16, 2020.

Upon the beginning of the hearing, Petitioner invoked ‘the rule’, excluding witnesses from the hearing. Thereafter, Petitioner requested that the District’s expert witness also be excluded through the entirety of the hearing, except during the testimony of Petitioner’s expert witness. The District contended that, in accordance with *Tex. R. Civ. P. 614 (c)*, that the witness is “essential to the party’s (the District) claim or defense”. It was ruled that the expert, Dr. ***, be permitted to remain during the hearing.

E. Due Process Hearing

The due process hearing was conducted on January 27-30, 2020 at the administrative offices of Tyler ISD, at 1319 Earl Campbell Parkway, Tyler, Texas. The Petitioner continued to be represented by Meera Krishnan of the Cuddy Law Firm. In addition, the Student’s parents, *** and *** attended the hearing. The Tyler ISD continued to be represented by its legal counsel, Gigi Driscoll, and Nona Matthews served as co-counsel for the District. Further, Dr. ***, Executive Director of Academic Support for Tyler ISD attended the hearing as the school district’s representative, and Dr. ***, Respondent’s Expert Witness attended the hearing as well.

III. Issues

A. Petitioner’s Issues

Petitioner alleges that the District denied Student a free, appropriate public education (FAPE) as is required by the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. §1400, et. seq.*, along with related statutes and regulations. Petitioner’s allegations of failure to provide FAPE consists of the following sub-issues:

- That the District failed to provide an individualized program for the student, and failed to develop an appropriate Individualized Education Plan (IEP) that was reasonably calculated for the Student to make appropriate academic and non-academic progress;
- That the District failed to develop appropriate goals and objectives for the Student in Student's IEP;
- That the Behavior Implementation Plan (BIP) was not appropriate and that Student's behaviors contributed to the Student's inability to make meaningful academic progress; and,
- That the District failed to provide appropriate, individualized supports and services in a number of areas, including behavioral supports, *** instruction, ABA therapy, direct speech therapy, and direct occupational therapy (OT), and that these are necessary for the Student to make academic and non academic progress.

These allegations relate and apply to the 2018-2019 and 2019-2020 school years.

B. Petitioner's Requested Relief

The Petitioner's primary requested relief is that of residential placement for the Student. More specifically, the initial request was for placement at *** at public expense. At the time of the hearing, the request had been modified to residential placement at District expense at ***, as well as any other relief that the hearing officer may deem appropriate.

C. Respondent's Issues and Legal Position

The District contends that Student's placement and IEP, as well as related supports and services, were appropriate and met all of the Student's academic and non-academic needs. Further, District contends that the Student did make academic and non-academic

progress during the time in question, and that residential placement is not necessary or appropriate in this instance.

D. Statute of Limitations

The parties were clear that at issue in this due process proceeding were the school years 2018-2019 and 2019-2020. While some of the testimony and exhibits relate to the Student's attendance, conduct, education and services prior to that time, they are presented only in the context of background and provided as a framework for the consideration of the issues in this case.

IV. Findings of Fact

Background

1. Student is a *** student who currently attends *** within the Tyler Independent School District. ***, and they reside within the boundaries of the Tyler Independent School District.¹
2. Student qualifies for special education with the eligibility criteria of autism and speech impairment.²
3. Student first enrolled in the Tyler ISD in August 2016, ***.³ Student's father had been in contact with the District in advance of Student's enrollment.⁴
4. Student had been identified as eligible for special education services as a student with autism and speech impairment by ***.⁵ The same eligibility continues while enrolled and attending the Tyler Independent School District.⁶

¹ Transcript (T) 590:15-20; 600:8-10.

² Joint Exhibit (J) 1:1; J10:1.

³ T. 449: 5-8.

⁴ T. 443:5-8; 444:15-25; Petitioner's Exhibit (P)24:2-5.

⁵ T. 475:13-19; P1.

⁶ J:1-15; J.10:1.

5. ***.⁷ ***.⁸
6. When Student first enrolled in Tyler ISD, Student was initially placed in ***, and subsequently was moved on September ***, 2016 to the *** at the same school due to 'behavior concerns'.⁹
7. The District completed an evaluation, specifically a Full and Individual Evaluation (FIE) in September 2016.¹⁰ The results demonstrated that Student's cognitive abilities were below average, that language skills were limited in both the expressive and receptive domains; that language memory and core language were well below average; and that Student's reading skills were below average.¹¹
8. Tyler ISD also conducted a Functional Behavioral Analysis (FBA) and the report was issued on September ***, 2016. It provided that behaviors exhibited by the Student included ***.¹²
9. On October***, 2017, the Student's annual Admission, Review, and Dismissal (ARD) committee meeting was held, and Student continued to be eligible for special education with autism and speech impairment. ¹³ At the time of this ARD, the Student's placement was changed to *** in the District, based upon Student's needs.¹⁴ Goals included academics in reading, language arts, math, social studies, and science.¹⁵ Related services including speech and occupational therapy, and were to be continued on a consultative basis, and ESY was to be provided as well.¹⁶
10. Additionally, at the time of the October ***, 2017 ARDC, the BIP was continued with revisions, and the targeted behaviors of *** continued, with the recommended use of Applied Behavior Analysis (ABA) strategies.¹⁷
11. The *** class was designed for students with Autism and is individualized for each student, and includes the incorporation of the use of Applied Behavior Analysis (ABA).¹⁸ Further the classroom has adaptive and is for sensory needs, and utilizes

⁷ T. 564:20-24; T.565:5-14.

⁸ T. 567:21-25; 583:21-23.

⁹ J1:4.

¹⁰ J1:1-26.

¹¹ T. 475-480; J1: 8-13;18-19.

¹² J1:22-25.

¹³ J2:2.

¹⁴ T.450:1-25; 451:1-22; J2:27, 29.

¹⁵ J2:9.

¹⁶ J2:9, 25-26, 30.

¹⁷ T. 864:21-867:6; J2:38-42.

¹⁸ T. 279:19-25; 280:1-15; 330:1-6; 873:19-25.

visuals that are key in terms of having a structured environment which in turn is effective in working with students with autism.¹⁹

12. Most often the strategies used to address Student's behavior consisted of Applied Behavior Analysis strategies.²⁰
13. On November ***, 2017, another ARD was held in response to the Student's parent requesting residential placement for the Student.²¹ The members of the ARD committee determined that residential placement was not needed at this time as the Student was making both academic and non-academic progress.²²
14. Mr. ***, who was Student's teacher *** the 2017-1018 school year, testified about the frequency of *** during that year. and noted some decrease throughout the year as well as extinguishment of some of the behaviors.²³ He is also Student's teacher in ***, and testified that the initial behaviors that impeded many academic efforts have now lessened a great deal.²⁴
15. At the March ***, 2018 ARD committee meeting, the parent declined in-home training that was offered by the District.²⁵ At that same meeting, Student's parent requested a possible transition to a general education setting for the Student, and, as a result, Student was placed in *** class.²⁶
16. Student had a past history of other behaviors ***, but for the most part these had been extinguished by the time of the end of the 2017-2018 school year.²⁷
17. The District offered services of in-home parent training on several occasions.²⁸ An early attempt to provide such services was during 20as during the fall of 2017. Ms. *** testified that she made attempts to contact Student's parent with an eventual training meeting set for November *** 2017.²⁹ At the time of the training that occurred at the Student's home in Tyler, the parent was present for only a small portion of the training, even though the importance of parental participation was

¹⁹ T. 424:15-25;425:1-25; 426:1-25; 427:1-6; 858:6-15.

²⁰ T. 124-125; 278:14-21.

²¹ J3:1.

²² J3:2-5.

²³ T. 276:5-10; 333:6-25; 334:1-25; 335:16-20; 337:13-15.

²⁴ T.291:4-11; 308:4-8.

²⁵ J.4:1-2.

²⁶ T.500:16-502:3; J.4:2.

²⁷ T. 337:13-18; 862:19-25.

²⁸ T.888:5-12; J4:16-17.

²⁹ T. 652:12-14.

noted in the Agreement to Provide In-Home Parent Training.³⁰ She further noted the importance of displaying Student's work and using visuals generally when working with the Student.³¹

18. A May 2018 ARD was held, and a determination was made that the Student should not be placed in any general education settings for at least the first six weeks of the school year, as *** itself could cause some increased *** in the Student.³²
19. Student attended ESY during the summer of 2018. Mr. ***, who was with student during the first part of ESY, testified that some of the challenging behaviors that Student had previously exhibited, ***, appeared to be nearly extinguished at the time of ESY, although some *** was present during that time.³³

The 2018-2019 School Year

20. Student began the school year at ***, and Student's placement was the *** class.³⁴ Initially there were issues surrounding the Student ***, and after some time, Mr. *** and Student's father were able to ***, and thereafter Student soon was able to go about the remainder of the day.³⁵
21. While concern was expressed about ***, after some problematic first couple days of school, Student was able to adjust to the routine, did well, and showed no problematic behaviors.³⁶
22. At the beginning of the 2018-2019 school year, the October ***, 2017 IEP, along with the revisions, was operative.³⁷
23. On August ***, 2018, Student's parent notified the District by email that he was withdrawing Student from Tyler ISD.³⁸

³⁰ T.654:1-21; J4:15-17.

³¹ T.655:17-25; 656:17-23.

³² 504:6-25; 505:1-14; J4:2.

³³ T.127:6-25; 128:1-4.

³⁴ J.4:2.

³⁵ T.135:15-25; 136:3-8;

³⁶ T.140:17-25; 141:1-8.

³⁷ J.2.

³⁸ P24:26.

24. Student's parent unilaterally placed Student in a residential placement, namely *** beginning August ***, 2018.³⁹ The *** then conducted an ARD for the Student on October ***, 2018.⁴⁰
25. While student enrolled in***, Student's mother participated in a majority of the parent trainings that were offered, although more focused on changing Student rather than on learning strategies. Student's father did not participate.⁴¹ Additionally, parents did not participate in in-home parent training that was urged by the ***.⁴²
26. Restraints were used at *** on occasions, and the discharge report showed that the student was making progress, although had not mastered the behavioral goals.⁴³
27. Although Student failed to meet the behavioral objectives for discharge from ***, parents expressed concern about Student's possible *** as Student was away from home for an extended period of time. At parents' request, Student was discharged on November ***, 2018.⁴⁴
28. Student reenrolled in the Tyler ISD on November ***, 2018.⁴⁵ Student was placed in *** and Student's teacher remained Mr. ***. Upon the return and the transition, Student exhibited an initial increase in ***.⁴⁶
29. Upon Student's re-enrollment, a transfer ARD was held on the *** of November, 2018, and the committee determined that no additional evaluations were needed at that time.⁴⁷ A new BIP from *** was considered. District also held a staffing was and
30. An incident occurred in early December 2018, ***. The District held an ARD Manifestation Determination Review (MDR), and the committee determined that the conduct was a manifestation of Student's disability.⁴⁸ Student's father noted that ***, and that Student was ***.⁴⁹

³⁹ Respondent's Exhibit (R)11:2.

⁴⁰ J:7:1-42.

⁴¹ R10:3; R11:9

⁴² R11:9-10.

⁴³ R11:10

⁴⁴ R10:3.

⁴⁵ R12:1.

⁴⁶ T.142:17-25;143-150.

⁴⁷ J8:T. 456:13-19;

⁴⁸ T. 83:15-25; 431-432; J9:1-2, 7-10.

⁴⁹ T.431:18-25;432:1-19; 457:17-20.

31. *** was then added to Student's BIP, and Student had exhibited ***.⁵⁰ No other *** during the remaining school year.⁵¹
32. There were occasions during the 2018-2019 school year that District staff employed the use of Restraints with Student.⁵² The duration of the restraint on these occasions lasted minutes, and no further restraints have been used during the current school year.⁵³
33. While enrolled in the Tyler, several revisions ARDs were held as modifications to the Student's IEP were often necessitated,⁵⁴ and the Annual ARD was held January ***, 2019. At that time, Student demonstrated progress in reading and *** had decreased. Student also showed improvements with expression and writing, and made progress in Math as well. Student also began to initiate communication.⁵⁵
34. Student's handwriting had also improved although at times Student ***. The differences in Student's handwriting were attributed much more to Student's mood at the time Student was writing, rather than Student's ability.⁵⁶
35. The District conducted a FIE for the Student in February 2019. It was to obtain additional information for educational and instructional planning, and demonstrated that Student has made progress and that the District should continue in providing the education, supports and services as it has.⁵⁷
36. An increase in *** was seen, particularly in April, 2019, and another ARD was held on May 2019; at that time a discussion was held exploring reasons for the increase in ***. Student's father mentioned that Student ***⁵⁸ and the increase could have been the result of ***. It appears that ***.⁵⁹ Although ***.⁶⁰

⁵⁰ T.809 811 R10:4.

⁵¹ T.94:14-25;435:2-6.

⁵² T. P.15,16,17, 18, 19.

⁵³ P19,20.

⁵⁴ J4-J6.

⁵⁵ J:10.

⁵⁶ T.200:18-25; 201:1-25.

⁵⁷ J11.

⁵⁸ T.595:4-2

⁵⁹ T. ex. Ard.

⁶⁰;596:1-10.

37. In April 2019, the District submitted a request for funding for the parents for assistance with *** for the Student. This request was made for the parent, and at the parent's request.⁶¹
38. Student also attended ESY during the summer of 2019 to maintain behavior goals, with the District providing transportation. No *** was seen and Student generally complied with directives.⁶²

The 2019-2020 School Year

39. The Student's teacher for this School Year is Mr. ***, ***. Mr. *** testified that Student's behaviors had decreased which allowed more time for instruction, which he noted allowed for progress, in *** for example.⁶³
40. Student's current placement provides a variety of settings for classes, although the majority of the day is spent in *** where Student is instructed by Mr. ***, and that these subjects are modified from the general education curriculum.⁶⁴
41. When Student is outside of *** for Student's classes such as ***, Student is ***, who most of the time is Mr. ***.⁶⁵
42. The IEP in place at the beginning of the school year was the January 2019. Student also ***.⁶⁶ Student has had no adverse behaviors since November ***, 2019.⁶⁷
43. While at an earlier time, Student exhibited behaviors that were interfering with Student's ability to learn and also contributing to Student's slow academic progress was Student's low language abilities, and Student was unable to ***.⁶⁸ Student now has made progress on this goal.⁶⁹
44. Testimony of the *** teacher, Mr. ***, who was Student's teacher in ***, this year as well as the previous school year, testified that the Student is more interactive, and went from no interaction with others to interacting in some of the

⁶¹ T. 411:5-24; 412:18-25; 413:1-12; P22.

⁶² J14:R:15.

⁶³ T. 369:21-25; 370:1-19.

⁶⁴ T.360-36; 428:2-20.

⁶⁵ T.357:13 -359:16.

⁶⁶ T.357:11.

⁶⁷ T.350.

⁶⁸ T.204-206; 306-310.

⁶⁹ T.310.

- games most of the time.⁷⁰ The other students in the class are students with a variety of disabilities.⁷¹ Additional District staff observed Student engaging with other students in the gym and appearing to enjoy the activity.⁷²
45. Mr. *** also noted that he has observed no incidents of ***,⁷³ and that Student remains hesitant to engage on Student's own but is able to get the routine of the class activity.⁷⁴
46. Student's teacher in ***, which is a general education class, Ms. ***, testified that Student has started participating in the class, ***. While Student often continues to ***, more recently started to integrate with the class.⁷⁵
47. Student currently, and for about the last six months, receives ABA services every weekend, f*** in the *** home. The services are provided by a registered behavior technician who is supervised by a BCBA.⁷⁶
48. After learning about the private ABA services that Student was receiving, the District requested permission from Student's father to talk with the BCBA, which was not provided to the District.⁷⁷
49. Student's parents have *** for assistance with Student on several occasions.⁷⁸ Parent also testified to the use of restraint with the Student.⁷⁹
50. Ms. ***, a positive behavior specialist in the District provides ABA consult services in ***, and has observed student in a variety of settings, and noted that the Student does not escape demands, although some can be delayed.⁸⁰
51. Student was received speech on a consult basis, and in October 2019, Ms. ***, a licensed speech pathologist began also providing direct services to the Student, and that Student has made progress.⁸¹

⁷⁰ T. 669:3-15; 670:12-15.

⁷¹ T.667:7-15.

⁷² T.699:13-25; 700:1-12.

⁷³ T.671:20-672:1-16.

⁷⁴ T. 676:12-677:1-25.

⁷⁵ T. 781:20-25;782:15-17; 783:9-25.

⁷⁶ T. 235:3-25; 236:1-7.

⁷⁷ J16.

⁷⁸ T.601:1-25; 602:1-25; 603:1-8; p.

⁷⁹ T.574:23-25; 575:1-11.

⁸⁰ T. 688:7-23; T.690:6-25; 694:7-23.

⁸¹ T. 740:10-21; 742:

52. A private evaluation was completed in August, 2019 by Dr. *** of *** at the request of Student's parents. The evaluation showed that the Student has a deficit in terms of ***, and the report suggested an additional diagnosis of ***.⁸² The District continues to request consent from Student's parent for cognitive assessment.⁸³
53. Testimony also indicated that the Student's cognitive abilities will impede the rate of advancement or progress in academics, as Student has challenges with memory and information processing.⁸⁴
54. Student demonstrated improved behavior when Ms. ***, the District BCBA last year, visited Student's class and Student was able to greet her, as well as wait for the time to engage in a conversation about lunch and wait for lunch. She noted the progress Student had made in Student's behavior.⁸⁵
55. Considering Student's delays in language, reading and diagnosed ***, the Student has made academic progress.⁸⁶
56. Several District teachers and providers who work with the Student provided credible testimony that residential placement is not necessary for the Student to make academic and non-academic progress.⁸⁷
57. The District's expert, after considering the evidence, stated that Student has made progress and that residential placement is not necessary or needed. ⁸⁸
58. Finally, the District also offered services to the parents in terms of in-home parent training so that the home environment could be more similar to that in the school, with the goal of reducing incidents in the home. The District continued to offer Student's parents in-home parent training, noting that it is possible for weekend and late evenings. ⁸⁹ The importance of this was stressed, as the importance of using the same strategies in home and in school.⁹⁰

Consideration of *** for Private Placement

⁸² R.18.

⁸³ R.14.

⁸⁴ T.481:5-12.

⁸⁵ T. 899:1-25.

⁸⁶ T:541.

⁸⁷ T.376:1-19; 541:23-542:18; 900:18-902:6.

⁸⁸ T.827: 832.

⁸⁹ T.888:5-12;

⁹⁰ 876:9-877:17.

59. The parents had selected a residential facility *** for the Student, and is currently requesting that the District place the student in this residential placement at public expense.⁹¹
60. Ms. ***, Admission Director for *** testified that the Student has been admitted to the program for residential placement, although currently no beds are available.⁹²
61. The facility includes an on-site accredited school, and the academic program provides school attendance from 9:00 a.m. until 3:00 p.m. each weekday, although the specific curriculum or course offering was unclear.⁹³
62. Ms. *** also testified that the living units are essentially self-contained, and that students do not interact with one another.⁹⁴
63. The evidence failed to prove that Student's IEP and BIP were not reasonable calculated to provide Student with a meaningful benefit. Further, Student's IEP and BIP were individualized based upon Student's assessment and unique needs.

V. Discussion

There are two major issues in this matter: one is whether the District provided the Student with a free, appropriate public education (FAPE) for the period of time beginning August 19, 2018 through this current school year; and the second is whether the Student should be placed in a residential setting at public expense in order to make educational and non-educational progress.

A. Burden of Proof

⁹¹ P:26.

⁹² T.626:20-25; 627:1-5

⁹³ T. 642:13-25.

⁹⁴ T.644:4-17.

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁹⁵ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F. 3d 127, 131 (5th Cir. 1993). No distinction has been established between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). Therefore the burden of proof is on the student to prove that the IEP at issue was not reasonably calculated to enable the student to make an educational progress given the students unique, individual circumstances. The IDEA creates a presumption in favor of the education plan proposed by the District and places the burden of proof on the Student challenging the plan. *R.H. v. Plano Indep. Sch. Dist.*, 607 F3d 1003, 1010-11 (5th Cir. 2010).

B. Duty to Provide FAPE

The primary purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education as well as related services, and that these services are designed to meet their unique needs, and prepare them for further education, employment or independent living. 20 U.S.C §1400(d). Under the IDEA, school districts have a duty to provide FAPE to all children with disabilities between the ages of three and twenty-one, who reside in the jurisdictional boundaries of the district. U.S.C. 34 C.F.R. §300.101(a).

More specifically, a free, appropriate public education includes special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child so that that the student receives an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 USC §1401(9); *Bd. Of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188 – 189, 200 – 201, 203 – 204. (1982).

In order to meet its substantive obligation under the IDEA, the school district must offer an individualized education plan (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 unique circumstances of the student for whom it was created, and the student's progress must be something more than mere *de minimis* progress. *Andrew F. v Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988, 1000-1001 (2017).

The Fifth Circuit has developed the elements for determining FAPE in the case of *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997). These four factors must be assessed in order to determine whether the IEP in issue, and as implemented, was reasonably calculated to provide students with necessary educational benefit under the IDEA. The factors are:

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

There is no requirement that these four factors or indicators need be considered in any particular order or any particular weight given each. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293-294 (5th Cir. 2009). Further, the court reaffirmed these factors as remaining appropriate and consistent with *Andrew F.* See *E.R. v. Spring Branch Indep. Sch. Dist.* 909 F.3d 754 (5th Cir. 2018).

C. Private Placement

A student's parent is entitled to reimbursement for a unilateral private placement in those instances where it is established that the school district's program does not provide the student with a free, appropriate public education. Where tuition reimbursement is sought after a parent's unilateral placement, case law provides that at least three factors are to be considered, in what is often called the three prongs of the Burlington-Carter test. See *Sch. Comm. of Burlington v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985); *Florence*

Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). These factors include whether the district provided the student a FAPE; if the school district failed to provide FAPE, then whether the private placement chosen by the parent is appropriate; and a consideration of the equities in requiring a district to pay for a unilateral placement for the student. *Id.*

D. Least Restrictive Environment (LRE)

While the issue concerning the provision of FAPE include a consideration of the LRE, the IDEA also requires that students with disabilities be educated in general education settings with students without disabilities to the full extent as is appropriate under the circumstances. There is a strong preference in favor of students with disabilities being educated in a general education setting with peers who do not have disabilities. *Rowley at 189.*

Under the IDEA, the school district must ensure, to the maximum extent appropriate, that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412 (a)(5); 34 C.F.R. §300.114 (a)(2)(i)(ii).

Additionally, the Fifth Circuit requires LRE issues to be considered in light of *Daniel R.R. v. State Board of Education*, 874 F2d 1036 (5th Cir. 1989). Hearing officers must consider whether the student with a disability can be educated in general education settings with the use of supplemental aids and services; and, in instances where they cannot, whether the school district mainstreamed the student to the maximum extent possible. Additional considerations may include the nature and severity of the students disability; the student's academic achievement; non-academic benefits of regular classroom placement, and the impact of the student on the general education class. 20 U.S.C §1412 (a)(5); 34 C.F.R. §300.114 (a); *Daniel R.R.*

VI. Analysis

A. FAPE

i. Was the District's Program Appropriate and Individualized Based on the Student's Assessments and Performance

In examining whether the IEP itself, and the implementation of the IEP, were reasonably based upon the individual needs of the student, the evidence demonstrated that throughout the time period in question the District made revisions to the IEP on several occasions. The Student's ARDC met on several occasions and modifications were made to provide the instruction and services. In addition, when student was unilaterally removed from the district, upon Student's return or re-enrollment, a transfer ARD was promptly held. Additional revision ARDs were held, and in terms of the time in question, in terms of both what was designed and then implemented. When Student ***, a meeting was held to address the issue.

Further, the student has been placed in ***, an environment that provides the Student with an individualized setting as well as daily activities. It was noted that the teacher personalized the environment for each student in ***, and implemented the academic instruction in an individualized manner, in both content and teaching strategies. The general education curriculum, provided to Student's teacher by the general education teachers, was modified considering the unique needs of the Student. The services provided and those offered were also done in an individualized manner, and even those offered but declined were considered reflective of the individual Student and designed accordingly.

ii. Considerations of the Least Restrictive Environment (LRE)

It is important that the IEP is administered in the LRE, and while not limitless, it can be a continuum that would provide the Student with a balance of a self-contained environment and some exposure to a less restrictive environment, including general

education classes. It was clear that the Tyler ISD made efforts throughout the time in question to provide the Student with opportunities to be educated in a less restrictive environment than Student's placement of ***. The district made efforts to educate the Student in some instances with general education students, such as the ***, and in others with other students with disabilities with a general education teacher. Evidence showed that the student has made some progress in interacting with peers in Student's ***, as well as not just attending but also beginning to participate in a general education class, namely ***.

On the other hand, the proposed placement requested by Petitioner is one of additional restriction, where the classes contain only students with the same or similar disabilities. Even more restrictive are the living arrangements themselves. The Student would be self-contained within a particular unit, and have little interaction with other students in other units. The facility and school do not afford the student appropriate opportunities to be educated and interact with other students with other disabilities or with students with no disabilities, thereby depriving Student of the ability to develop nonacademic educational benefit in *** development and interaction with other students. As the LRE is one of the key components of an appropriate placement under the IDEA, compliance is mandatory, and this residential placement cannot be considered appropriate under these standards.

iii. Cooperation and Collaboration in the Provision of Services

Student's program for each school year in question was developed and provided in a coordinated and collaborative manner. As noted, the special education teacher often collaborated with the regular education teachers in order to modify the curriculum for the Student. The speech consult and direct provider and OT consult personnel also worked with Student's teacher, so that the teacher could incorporate such services on a daily basis. The behavioral specialist (and the BCBA the first year) also worked regularly with Student's teacher, so that strategies were incorporated into Student's day. The

District also included the parents in each of the ARDC meetings; while Student's mother does not live in Tyler and declined to participate in the ARDC meetings, Student's father has participated in most of the ARDC meetings. Also when the father was unable to be present in person, he often attended by telephone conference, although on occasion was limited in terms of time. Most of the time, during the school years in question, there was agreement with the IEP and its revisions.

Additionally, the District was often in touch with the parent, and even on those occasions where services were declined, continued to make some efforts to provide those related services, such as in-home parent training. The District also made attempts to coordinate with those individuals providing private ABA services to the Student.

iv. Academic and Nonacademic Benefit

Another issue for consideration in determining whether the IEP itself and the implementation of the IEP is where the Student made academic and non-academic progress. Looking first at the academic in terms of progress that the Student has made, it is clear that early on, Student's behaviors often obstructed the academic progress in somewhat limiting the ability of the student and to receive academic instruction. That however has changed, and the Student is demonstrating academic progress.

With regard to behavioral progress, it is clear from both the testimony and the documentary evidence that the Student has made progress in terms of a reduction in the number of incidents. Additionally, the type of *** appears to have been reduced as well. Evidence also established that academic instruction for the student continues, and that the Student has made progress. Student also demonstrated progress in terms of interaction with other students outside of ***.

Many other services were provided and these include it was demonstrated the evidence that the student made progress, in light of Student's unique needs. Student's academic progress has also impacted by the inability the low cognitive scores as well as the challenges in language, both receptive and expressive. The language issue presents

challenges to the instruction and the student's ability to comprehend the lessons. Further, there is some impact as evidenced by the diagnosis of ***.

B. Issue of Private Placement for the Student

Since the Petitioner failed to meet Student's burden to show that the District failed to provide Student FAPE, and in light of the finding that the District did provide Student FAPE, there is no need for further consideration of the proposed or requested private placement for Student.

VII. CONCLUSIONS OF LAW

1. That Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. § 1400, et. seq., 34 C.F.R. §300.301 and related statutes and regulations, and such is to be provided by the Tyler Independent School District.
2. Petitioner did not meet Petitioner's burden of proving that the District failed to provide the Student FAPE. 34 C.F. ;*Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Respondent District complied with the IDEA, and provided the Student with a FAPE, as the program was individualized, provided in the Least Restrictive Environment, collaborated with key stakeholders, and the Student made an made academic and non-academic progress. *Michael F.*, 118 F.3d 253.
4. The District provided sufficient related services to allow Student to receive a FAPE. *Irving Indep. Sch. Dist. v. Tatro*, 468.U.S. 883 (1984).

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that all relief sought by Petitioner is hereby DENIED. All Petitioner's claims are DISMISSED with Prejudice.

SIGNED: March 16, 2020

Kimberlee Kovach
Special Education Hearing Officer
for the State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer 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 district court of the United States. 20 U.S.C. §§1415(i)(2) and (3)(A); 19 Tex. Admin. Code § 89.1185(n).