No. 19-

IN THE

Supreme Court of the United States

MICHAEL BRUNO, AS PARENTS/GUARDIANS/NEXT FRIEND OF R.B., A MINOR; R.B., INDIVIDUALLY, A MINOR; BRITTANY BRUNO, AS PARENTS/ GUARDIANS/NEXT FRIEND OF R.B., A MINOR,

Petitioner,

v.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition follows appeals from an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), in which the parents alleged a denial of a free appropriate public education (FAPE) because, *inter alia,* the school district failed to provide "comparable services" under the Act after a student transferred from out of state. In this case, the district reduced the student's programming from a full-day to a half-day program. The question presented is whether such a reduction is consistent with the mandate that the school district provide "similar" or "equivalent" services, as set forth in guidance from the U.S. Education Department.

LIST OF PARTIES

The parties to the appeal are Michael Bruno, as Parents/Guardians/Next Friend of R.B., a minor; R.B., Individually, a minor; Brittany Bruno, as Parents/Guardians/Next Friend of R.B., a minor and the Northside Independent School District.

RELATED CASES

Raylen B., B/N/F Brittany and Michael B., v. Northside Independent School District, No. 099-SE-0117, Special Education Due Process Hearing for the Texas Education Agency. Judgment entered on October 4, 2017.

Michael Bruno et. al v. Northside Independent School District, No. 5:17-cv-01129, U.S. District Court for the Western District of Texas. Judgment entered on December 12, 2018.

Michael Bruno et. al v. Northside Independent School District, No. 19-50012, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on December 17, 2019.

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JURISDICTION

The judgment to be reviewed was entered in the United States Court of Appeals for the Fifth Circuit on December 17, 2019. Jurisdiction in the United States District Court for the Western District of Texas was predicated upon 20 U.S.C. § 1415(i)(3), and jurisdiction in the court of appeals was predicated upon 28 U.S.C. § 1291. Jurisdiction for this petition is predicated upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

34 C.F.R. § 300.323(f):

> IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the

child's IEP from the previous public agency), until the new public agency -

(1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

20 U.S.C. § 1414(d)(2)(C):

Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

STATEMENT OF THE CASE

R.B. was born in 2011, and, at the time of the underlying administrative hearing, was attending school in the Northside Independent School District (NISD). ROA.462. He is diagnosed with an autism spectrum disorder (ASD) and experiences accompanying language and behavioral difficulties. ROA.1536. At all times pertinent to this appeal, he qualified for special education services under the IDEA.

R.B.'s father serves in the military. ROA.5868. In January 2016, R.B.'s family moved to Texas due to a military transfer from their prior residence in Florida. *Id.* In Florida, R.B. had attended a full-day "mixed" (i.e., inclusion) classroom. ROA.5870, 2049. His Florida individualized education program (IEP) recommended a separate class with "less than or equal to 40% with non-

ESE" students.[1] ROA.2049. In that class, R.B. would receive daily small- group instruction in social interaction, and in independent functioning, along with language therapy one hour per week, occupational therapy (OT) thirty minutes per week, along with 28 monthly minutes of OT consultation and daily adult assistance with personal care tasks. *Id.* The IEP goals focused on peer interactions, putting toys away, pretend play, motor imitation, following directions, and requesting. ROA.2043–2046. However, by changing R.B.'s setting to a more restrictive environment which included only disabled peers, R.B. was denied the opportunity to observe and imitate appropriate peer interaction skills modeled by non-disabled peers. ROA.2043–2044.

At the end of R.B.'s time in Florida, he was making very good progress with toileting. ROA.2671. He was "independently pulling down his own pants, sitting up on the potty, going to the bathroom, [and] washing his hands[.]" *Id.* He wore underwear most of the time at the time he moved to Texas. *Id.*

After receiving R.B.'s educational transfer paperwork from R.B.'s parents, Raquel Davila, the special education PPCD teacher at Langley Elementary, telephoned Holland Elementary in Florida to inquire as to the nature of R.B.'s placement and services in the ESE classroom. ROA.3237, 3248–3252.[2] Ms. Davila failed to ask questions regarding the length of R.B.'s instructional day in Florida and as to the structure of the ESE program. ROA.3302–3303.

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1. ESE apparently stands for "exceptional student classroom[.]" ROA.3250.

2. PPCD apparently means "Preschool Program For Children with Disabilities". See ROA.2583–2584.

On January 13, 2016, NISD's Admission, Review and Dismissal (ARD) committee convened to develop "comparable services" for R.B. in light of his transfer from out of state. ROA.1164–1169.[3] R.B.'s parent had informed the ARD committee that R.B. attended school with typically-functioning peers in a full-day program in Florida. ROA.3253–3254. Nevertheless, the ARD placed R.B. in a self-contained half-day PPCD program, for three hours daily, with OT and speech. ROA.1166–1167. NISD staff would testify that a full-day PPCD program was available. ROA.2389, 3255–3256.

Subsequently, NISD conducted a re-evaluation review of R.B. ROA.1170. On February 22, 2016, the ARD committee convened to develop a permanent program for R.B. ROA.1189. The committee found that Autism was R.B.'s primary disability, with a secondary disability of Speech Impairment. ROA.1190. It recommended a behavior intervention plan (BIP) to address struggles with waiting his turn, hitting, spitting, and throwing class furniture. ROA.1192, 1197. While the committee acknowledged that R.B. has communication needs, it declined to recommend assistive technology to address those needs. ROA.1193, 1197. From January 13 through February 22, R.B. received four fewer hours daily than the Florida IEP mandated, thus losing 84 hours of instructional time.

The ARD placed R.B. permanently in a "collaborative" PPCD class, three hours daily, for the remainder of the 2015/16 school year and for the 2016/17 school year. ROA.1202. He would attend Langley Elementary School.

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3. The ARD committee is the Texas nomenclature for the IEP Team.

ROA.1189 et seq. The annual goals in the IEP address attempting to communicate by verbalizing or exchanging pictures or objects, keeping hands and feet to himself, and communicating wants and needs via words with use of a visual, with no spitting. ROA.1194–1196.

From February 16, 2016, until May 16, 2016, thirty-minute Weekly Interval Data collected by NISD revealed an overall and continuing decline in R.B.'s behaviors. ROA.1325–1344; 2132–2136. When a behavior occurred, "Y" was circled and adjacent tally marks indicated the number of occurrences during the thirty-minute interval. ROA.1325–1344. Staff would record when R.B. exhibited a negative behavior but failed to record the number of times the behavior occurred within the thirty-minute interval. *Id.* The true number of negative occurrences was not fully represented in the data collection. ROA.1325–1344; 2132–2136. In addition, the thirty-minute Weekly Interval Data sheets are missing several days of data for instances of spitting, throwing, and hitting behaviors. ROA.1325–1341.

R.B.'s behaviors of spitting, hitting, throwing furniture, and screaming did not decrease at Langley Elementary. ROA.2137–2153. R.B. was no longer using the digital pronate position and was not making object, measurable progress in handwriting or fine motor skills. ROA.1175–1177.

As early as February 8, 2016, R.B. began having toileting accidents. ROA.2066–2067. Data collection sheets from Langley Elementary revealed that R.B. exhibited increased need for prompting during toileting activities which coincided with increased occurrences of toileting accidents. *Id.* Ms. Davila testified that she remembered

when R.B. soiled his pants and recalled asking his parents to send diapers to school. ROA.2076 (came to school with poop in his pull-ups); 3283 ("a couple of times that he pooped in his pants"). R.B.'s parent had to begin sending diapers to school as R.B. soiled his pants on numerous occasions. ROA.3327, 2856– 2857. Although NISD's data collection revealed regression, NISD insisted that R.B. showed no regression. ROA.1189–1225.

On January 11, 2017, R.B.'s parents filed a request for a special education due process hearing with the Texas Education Agency (TEA). ROA.459. The request alleged a denial of a free appropriate public education (FAPE), commencing in January 2016 when R.B. transferred to NISD, and continuing through the 2016/17 school year. ROA.462. Specifically, the parent alleged, *inter alia,* that NISD failed to timely and fully implement comparable services based on the Florida IEP, failed to provide FAPE in the least restrictive environment, that R.B. stagnated or regressed in his programs both at Langley and Boldt, that the IEPs were not reasonably calculated to provide educational benefit, that NISD engaged in procedural violations of the Individuals with Disabilities Education Act (IDEA), that NISD failed to provide staff trained in peer-reviewed, research-based methodologies such as ABA. ROA.462–464. The parents requested various relief, including reimbursement for costs incurred relating to ABA, OT and speech services obtained by the parent, an order directing NISD to hire or contract with various staff and provide ABA and assistive technology, and compensatory services. ROA.464–465.

On January 26, 2017, the parents filed an amended request for a special education due process hearing.

ROA.507. The amended request sought the following relief:

1. The NISD denied RB. with a Free Appropriate Public Education during the spring semester of the 2015-2016 school year, from January 2016 through completion of the 2015-2016 school year and including summer 2016 (for lack of Extended School Year services).

2. The NISD denied and is continuing to deny R.B. with a Free Appropriate Public Education during the 2016-2017 school year, including summer 2017.

3. The NISD's Langley FIE [and] IEP did not contain present levels of performance that informed the goals and the goals lacked objective baselines and specificity of measurement in order to determine progress. As a result, it denied R.B. a free appropriate public education in violation of20 U.S.C. 1414(d).

4. The NISD's Boldt October 2016 ARDC/IEP does not contain measurable goals, with objective baselines, and specificity of measurement in order to determine progress. This violates 20 U.S.C. 1414(d).

5. The NISD's October 2016 ARDC/IEP continues to deny R.B. a Free Appropriate Public Education for the 2016-2017 school year, including summer 2017.

6. The NISD reimburse the Petitioner Parents for any and all costs (i.e. transportation) related to ABA services, speech and language services, and occupational therapy services that they have had to personally pay due to the NISD's failure to provide R.B. a Free Appropriate Public Education, including materials and transportation.

7. The NISD hire or contract with a licensed BCBA, RBT, OT, and licensed Speech and language to work with NISD staff to provide direction and guidance to R.B.'s ARDC and all school staff to prepare an IEP for him that is designed to meet his unique educational needs, and that his IEP will provide: a) peer-reviewed researched programs (i.e. ABA) provided by qualified personnel such as an RBT; b) a means by which the programs can be provided in a regular education environment with differentiated instruction and supplementary aids and supports to help R.B. successfully learn academically alongside his non-disabled peers; c) services to ensure that R.B. is fully socially included with his non-disabled peers; d) services to ensure that R.B. is able to utilize assistive technology devices and programs.

8. The NISD pay for R.B. to receive compensatory education services from a qualified private source of the Petitioner Parents' choice in an amount equal to the deprivation of education he has experienced.

9. The NISD revise its district-wide special education plan to ensure the provision of ABA based services to children with autism. If the Hearing Officer believes he lacks jurisdiction over this request, Petitioner Parents request an order so stating.

10. The NISD revise its district-wide practices for Extended School Year services to ensure objective measurement of children's progress so as to determine the need for ESY services. If the Hearing Officer believes he lacks jurisdiction over this request, Petitioner Parents request an order so stating.

ROA.521–522. A due process hearing was held over three days from August 7th to 9th, 2017. RE.17. On October 4, 2017, in a written decision, the Special Education Hearing Officer ("SEHO") concluded that NISD had provided R.B. with the requisite comparable services upon his transfer to NISD from a Florida public school, and that NISD had provided R.B. with a FAPE. ROA.411–450.

On November 3, 2017, plaintiff parent initiated an action in the U.S. District Court for the Western District of Texas, requesting judicial review. Docket No. 1, see R.E. 4. On December 12, 2018, the district court issued a memorandum and order, upholding the SEHO's decision. App. 4a. On January 7, 2019, plaintiff-appellant filed a notice of appeal with the district court. R.E. 50. On December 17, 2019, the court of appeals issued a summary order, affirming the order of the district court. App. 1a.

REASONS TO GRANT PETITION

Petitioner requests certiorari only for the question of whether IDEA's mandate that a school district provide "comparable services" allows the district to reduce the daily services by 50%, and by placing the child in a more restrictive setting with non-disabled peers, when a child transfers to that school district from out of state. Guidance from the U.S. Education Department defines "comparable" as "similar" or "equivalent".

The court of appeals found that "[u]nder his Individualized Education Program ('IEP') at his previous school, R.B. attended a full-day, 'mixed' classroom, which is a special-education classroom containing both special-needs and non-disabled students, and received speech and occupational therapy each week" but that "[u]pon enrolling at NISD, the district provided him a temporary service plan[,] . . . plac[ing] R.B. in a half-day program in a self-contained classroom—a classroom with only special-needs students." App. 2a. Nevertheless, the court of appeals upheld a finding that this action did not violate the IDEA.

This issue is of great importance to military families, who often are transferred to different states during the school year. The Court should grant certiorari and find that a half-day program, in a self-contained setting, is not "similar" or "equivalent" to a full-day program in a mixed setting, and remand for further proceedings to determine appropriate relief.

On February 5, 2020, the Committee on Armed Services: Subcommittee on Military Personnel held a hearing entitled "Exceptional Family Member Program—

Are the Military Services Really Taking Care of Family Members?" 166 Cong. Rec. D121-01, 166 Cong. Rec. D121-01, D123. An article in the *Military Times* reported on the hearing, stating that "there are more than 103,000 service members with more than 139,000 family members in the EFMP programs."[4] The article goes on to report:

> Problems with inconsistency and lack of advocacy have plagued military special needs families for decades. Advocates testified about families issues ranging from difficulty in getting their health care providers and support system in place after a permanent change of station move; being transferred to locations without adequate medical and educational resources to meet their needs, and perceptions surrounding EFMP, and the [sic] whether it could negatively affect a service member's career. While EFMP is effective at some installations, it varies widely. The DoD Military Family Readiness Council has discussed the issue for years, and recommended improvements and standardization in the EFMP.

Of course, many of the family members in the EFMP programs are eligible for services under the IDEA. 32 C.F.R. § 75.5(b) ("Family members of active duty Service members (regardless of location) and civilian employees appointed to an overseas location eligible for enrollment in a DoD EA school on a space-required basis will be

4. https://www.militarytimes.com/pay-benefits/2020/02/06/lawmakers-vow-to-fix-dod-special-needs-program-for-military-families/

identified as having special educational needs if they have, or are found eligible for, either an IFSP or an IEP under 32 CFR part 57.") Military families with IDEA-eligible children are facing challenges not only within the EFMP program, but in obtaining services from school districts under the IDEA. In this case, a military family transferred from Florida to Texas saw a child's daily services cut in half despite a clear mandate that the Texas school district provide "similar" or "equivalent" services to children with special needs transferring from out of state. While case law on this issue is scant, the Court should grant certiorari clarifying the meaning of "similar" or "equivalent," as this issue affects thousands of children of military personnel.

I. THE IDEA

The Individuals with Disabilities Education Act (IDEA) requires that school districts in states receiving federal funds implement procedures and policies that assure that each disabled student receives a "free appropriate public education," or "FAPE." See 20 U.S.C. §§ 1400(d)(1)(A), 1412(a), 1415(a); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). In order to ensure that each student receives a FAPE, parents and school districts collaborate to develop an individualized education program ("IEP") that is "reasonably calculated to enable the child to receive educational benefits." 20 U.S.C. § 1400(d)(1)(A); *R.H. v. Plano Indep. School Dist.*, 607 F.3d 1003, 1008 (5th Cir. 2010); *J.H. ex rel. A.H. v. Fort Bend Indep. Sch. Dist.*, 482 F. App'x 915, 917–18 (5th Cir. 2012). The purpose of the IDEA is "(a) [t]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special

education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (b) [t]o ensure that the rights of children with disabilities and their parents are protected; (c) [t]o assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and (d) [t]o assess and ensure the effectiveness of efforts to educate children with disabilities." 34 C.F.R. § 300.1.

The "review of the adequacy of an IEP is limited to two basic questions: (1) Did the school district comply with the procedural requirements of the IDEA?; and (2) Is the IEP reasonably calculated to enable the student to receive educational benefits?" *Board of Educ. v. Rowley,* 458 U.S. 176, 206–207 (1982). Under *Rowley,* the IDEA "generates no additional requirement that the services so provided be sufficient to maximize each child's potential[,]" providing, at the federal level, for a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 198, 201.

To meet its substantive obligation under the IDEA, a school must offer an individual education program (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S. Ct. 988, 1000 (2017). A school district must "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.*, 137 S. Ct. at 1002. This program must be provided in the "least restrictive environment," namely:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE SERVICES WERE REDUCED BY A HALF DAY AND NISD PLACED THE STUDENT IN A MORE RESTRICTIVE SETTING, BUT LEGALLY ERRED IN FINDING THAT NISD PROVIDED COMPARABLE SERVICES

"If a child with a disability who had an IEP that was in effect in a previous public agency in another state transfers to a public agency in a new state, and enrolls in a new school within the same school year, the new public agency, in consultation with the parents, must provide the child with FAPE (*including services comparable to those described in the child's IEP from the previous public agency*), until the new public agency: 1) conducts an evaluation if determined to be necessary by the new public agency; and 2) develops, adopts, and implements a new IEP if appropriate." 34 C.F.R. § 300.323(f) (emphasis added); 20 U.S.C. § 1414(d)(2)(C)(i)(II); see *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations,*

and Reevaluations, 111 LRP 63322 (OSERS 09/01/11); *Letter to Sims,* 103 LRP 22737 (OSEP 10/09/02).

In addition to the IDEA, the Interstate Compact on Educational Opportunity for Military Children (MIC3), in which Texas is a member, exists to strengthen transitions and close educational gaps as military families and their children move to a new school district in another state. As such, NISD was required to initially provide comparable services to Student based on current Individualized Education Program (IEP). Tex. Educ. Code § 162.002. While "comparable" services do not need to be identical, they must be reasonably comparable. The U.S. Education Department has interpreted comparable to mean "similar" or "equivalent." 71 Fed. Reg. 46,681 (2006).

Under both the IDEA and the MIC3, if the new district disagrees with the evaluation or the IEP from the prior district, it must comply with the IDEA regulations concerning evaluations and IEP meetings, including all pertinent timelines. *Id.*; 34 C.F.R. § 300.323(f). Upon determining that R.B. required evaluations after his enrollment at Langley, NISD had thirty days to complete a Full Individual and Initial Evaluation (FIIE). Tex. Admin. Code § 89.1050(G)(2). NISD was thus required to provide comparable services until it conducted the FIIE, which it wholly failed to do. See *Falcon Sch. Dist. 49,* 116 LRP 16253 (SEA CO 02/19/16).

Nevertheless, the district court, as affirmed by the court of appeals, erroneously concluded that the services provided—the half-day PPCD placement—constituted "comparable services" under IDEA. RE.22–26. R.B. enrolled in NISD in January 2016; on the same day,

without a cogent or responsive reason or any evaluation, NISD unilaterally changed Student's least restrictive environment (LRE) from a full day of instruction in an inclusion setting with access to non-disabled peers to a half-day self-contained classroom with zero access to non-disabled peers. ROA.2049; 2029–2050. Without formally evaluating Student, NISD additionally removed or reduced many of Student's related services including: 1) reducing direct speech services from 2160 minutes per academic year to a mere 1190 minutes per academic year; and 2) replacing 1080 minutes of direct OT services with a mere 80 minutes of "integrated" OT. ROA.2851, 2854, 2845. 1170–1188; 1226–1274. This change of placement and reduction in services cannot be said to be comparable in any sense of the term, denying R.B. a FAPE.

R.B.'s parent had informed the ARD committee that R.B. attended school with typically- functioning peers in a full-day program in Florida. ROA.3253–3254. PPCD teacher Davila failed to inquire to the Florida district regarding the length of R.B.'s instructional day in Florida and as to the structure of the ESE program. ROA.3302–3303. NISD staff would testify that a full-day PPCD program was available. ROA.2389, 3255–3256.

In concluding that the half-day self-contained program was "comparable," the district court stated that "R.B.'s Florida IEP did not specify the number of hours of instruction that R.B. was receiving." RE.23. It then further reasoned: "That R.B.'s mother informed NISD that R.B. attended a full-day program in Florida is still not dispositive—while it is true that NISD could have inquired with the Florida school regarding the number of hours of instruction R.B. received, comparable services are not

identical services or the same services." RE.25. In the end, the district court, as affirmed by the court of appeals, concluded, erroneously, that half the amount of services are "equivalent" or "similar", and that placement in a restrictive self-contained class is similarly "equivalent" to an inclusion program. RE.26.

Additionally, the placement of R.B. in a self-contained setting, rather than the mixed setting mandated by the Florida IEP, increases the restrictiveness of the setting. See 20 U.S.C. § 1412(a)(5)(A) (defining least restrictive environment). A more restrictive setting should not be deemed "similar" or "equivalent" to a less restrictive setting. See generally *Honig v. Doe,* 484 U.S. 305, 321 (1988) (importance of LRE requirement).

Finally, the district court confused the FAPE requirement ("IDEA does not require a school district to provide the best available or optimal educational setting") with the comparable services requirement (similar or equivalent services to previous IEP). RE.26. Here, the district court assumed without evidence that Florida was somehow providing an "optimal" setting, by providing R.B. with a full day of services. Nothing in the record supports this conclusion.

III. THE COURTS SHOULD HAVE DIRECTED APPROPRIATE RELIEF

Compensatory educational services are designed to make up for the services a child has lost. *Miener v. Missouri,* 800 F.2d 749, 753 (8th Cir. 1986); *C.C. v. Beaumont Indep. Sch. Dist.,* 65 IDELR 109 (E.D. Tex. 2015) (upholding majority of compensatory education

award); Caldwell Indep. Sch. Dist., 111 LRP 56462 (TEA 2011) (awarding in excess of one year of compensatory education and noting its equitable nature), upheld by *Caldwell Independent School District v. L.P.*, 994 F.Supp.2d 811, aff'd., 62 IDELR 192 (5th Cir. 2013). As discussed above, NISD denied R.B. a FAPE from January 2016 through late February 2016, so the district court, and the court of appeals, should have awarded compensatory education. The Court should remand for a determination of appropriate relief.

CONCLUSION

Based on the foregoing, petitioners respectfully request that the Court grant certiorari to the United States Court of Appeals for the Fifth Circuit and entertain the merits of this case.

Dated: Auburn, New York
March 16, 2020

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 17, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50012

MICHAEL BRUNO, AS PARENTS/GUARDIANS/ NEXT FRIEND OF R.B., A MINOR; R.B., INDIVIDUALLY, A MINOR; BRITTANY BRUNO, AS PARENTS/GUARDIANS/NEXT FRIEND OF R.B., A MINOR,

Plaintiffs-Appellants

v.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee

December 17, 2019, Filed

Appeal from the United States District Court for the Western District of Texas. USDC No. 5:17-CV-1129.

Before STEWART, CLEMENT, and HO, Circuit Judges.

PER CURIAM:[**]

R.B., a preschool student with autism and a speech impairment, transferred from a Florida public school

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

to Northside Independent School District ("NISD") in January 2016. Under his Individualized Education Program ("IEP") at his previous school, R.B. attended a full-day, "mixed" classroom, which is a special-education classroom containing both special-needs and non-disabled students, and received speech and occupational therapy each week. He also received additional services from a private Board Certified Behavior Analyst and occupational therapist.

Upon enrolling at NISD, the district provided him a temporary service plan designed to furnish R.B. with special-needs services comparable to his Florida IEP as required by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA"). NISD placed R.B. in a half-day program in a self-contained classroom—a classroom with only special-needs students. His speech-language therapy services and occupational therapy services remained the same as described in his Florida IEP.

After this initial transfer period, NISD completed a Full Individual and Initial Evaluation and developed a new IEP for R.B. In completing the evaluation and developing the new IEP, NISD consulted with R.B.'s parents and teachers, reviewed R.B.'s tests and evaluations from his Florida school district, and relied on evaluations from a speech pathologist, occupational therapist, and licensed specialist in school psychology. NISD determined that R.B. should be provided with less speech and occupational therapy than he had received in Florida and that his classroom should be changed from a self-contained classroom to a mixed classroom.

Appendix A

On January 11, 2017, Michael and Brittany Bruno, R.B.'s parents, filed a request for a special education due process hearing with the Texas Education Agency. They alleged that NISD committed a substantive violation of the IDEA by denying R.B. a free appropriate public education ("FAPE") and committed numerous procedural errors under the IDEA. After a three-day evidentiary hearing, which included testimony from fifteen witnesses and more than 800 pages of exhibits, the special education officer concluded that NISD provided R.B. with a FAPE and did not commit procedural violations of the IDEA. The Brunos appealed the hearing officer's decision to the district court. The district court granted judgment on the administrative record to NISD, and the Brunos appealed to this court.

We have reviewed the briefs, the applicable law, and relevant parts of the record, and we have heard oral argument. The district court committed no reversible error. The judgment is affirmed, essentially on the basis carefully explained by the district court in its 41-page December 12, 2018 Order.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED DECEMBER 12, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NO. 5:17-CV-1129-DAE

MICHAEL BRUNO AND BRITTANY BRUNO, AS PARENTS/GUARDIANS/NEXT FRIEND OF R.B., AND R.B., INDIVIDUALLY, A MINOR,

Plaintiff,

vs.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Defendant.

December 12, 2018, Decided;
December 12, 2018, Filed

ORDER: (1) GRANTING NISD'S MOTION FOR JUDGMENT ON ADMINISTRATIVE RECORD; AND (2) DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE RECORD

The matters before the Court are: (1) Defendant Northside Independent School District's ("NISD") Motion

for Judgment on the Administrative Record (Dkt. # 25); and (2) Plaintiffs Michael and Brittany Bruno, as Parents/Guardians/Next Friend of R.B., and R. B.'s Motion for Judgment on the Record (Dkt. # 26.) Pursuant to Local Rule CV-7(h), the Court finds these matters suitable for disposition without a hearing. After careful consideration of the motions and the administrative record in this case, the Court finds that NISD's motion should be **GRANTED**, and Plaintiffs' motion should be **DENIED**.

FACTUAL BACKGROUND

Plaintiff R.B. is a student with autism and a speech impairment. (Dkt. # 1 at 2.) At the time of the parties' briefing on the instant matters, R.B. was a six-year old child attending Boldt Elementary at NISD. (Dkt. # 25-1 at 3.) At all relevant times, R.B. lived with his parents in San Antonio, Texas, and NISD was the resident school district for R.B., which was responsible for providing him a free appropriate public education ("FAPE")[1] under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*

A. 2015-2016 School Year

Plaintiffs are a military family who were transferred from Florida to Texas in January 2016. (Dkt. # 1 at 2; Dkt. # 6-15 at 45.) Prior to the transfer, R.B. was four years old and attended Holland Elementary, a public school in

1. The Court repeats some of the full phrases and corresponding acronyms throughout this opinion for the reader's ease.

Florida, where he was provided a full-day of school in the Exceptional Student classroom ("ESE"), a self-contained classroom for students eligible for special education services. (Dkt. # 6-9 at 13; Dkt. # 6-15 at 47; Dkt. # 6-16a at 64.) R.B. received private Applied Behavior Analysis ("ABA")[2] training from a privately hired Board Certified Behavior Analyst ("BCBA"), who was permitted to visit the school campus and make recommendations for R.B.'s teacher with regard to behavioral strategies to use with R.B. (Dkt. # 6-14 at 98, 321.) The BCBA was not paid by the Florida school district, nor asked to provide teacher training. (*Id.*) R.B. also received occupational therapy ("OT"). (*Id.* at 277-78.) R.B.'s OT included the use of a weighted vest and a weighted lap pad, as well as assistive technology like the use of an iPad for communication. (*Id.*) R.B.'s occupational therapist in Florida was not paid by the school district and she was never employed as an occupational therapist in a public-school setting. (*Id.* at 291.)

Upon their transfer to San Antonio, Plaintiffs enrolled R.B. at Langley Elementary in NISD. (Dkt. # 25-1 at 5.) On January 13, 2016, a Temporary Placement meeting was held with R.B.'s mother, the Preschool Program for Children with Disabilities ("PPCD") teacher, and the vice-principal at Langley Elementary. (Dkt. # 6-7 at 6; Dkt. # 6-15 at 94; Dkt. 6-16 at 67.) A Reevaluation Review also took place on the same day, wherein school district staff reviewed a Florida evaluation report dated July 7, 2014, and consulted with R.B.'s mother. (Dkt. # 6-7 at

2. "ABA uses scientifically evidence-based treatments to change socially significant behaviors." (Dkt. # 6-14 at 97.)

12.) The Reevaluation Review concluded that additional evaluation was needed with regard to R.B.'s language and communication, OT, and his emotional/behavior/intellectual and educational performance. (*Id.*) The Reevaluation Review's purpose, according to NISD, was to confirm a set of services for R.B. on a 30-day temporary basis until an Admission, Review, and Dismissal ("ARD") meeting[3] could be held. (*Id.*; Dkt. # 6-15 at 96-97.)

During the 30-day period, the PPCD teacher proposed that R.B. be placed in a half-day, self-contained PPCD in the afternoon at Langley Elementary. (Dkt. # 6-15 at 96.) The PPCD teacher understood that this was comparable to R.B.'s classroom in Florida. (Dkt. # 6-16 at 68, 71.) The PPCD teacher explained that NISD did have a full-day, or full continuum program, but only if there was a need for it. (*Id.* at 68.) R.B.'s mother, however, questioned his placement in the half-day class, but ultimately agreed to the placement as it was her understanding a full-day program was not available. (*Id.* at 71-72.) R.B.'s mother frequently conferred with the PPCD teacher during the 30-day period. (*Id.* at 75.)

On January 22, 2016, another Reevaluation Review meeting was held. At this meeting, R.B.'s mother attended along with the PPCD teacher, a licensed specialist in school psychology ("LSSP"), a speech/language pathologist intern, the Vice-Principal, a general education teacher, and the occupational therapist. (Dkt. # 6-4 at 12.)

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3. An ARD meeting is a meeting of parents and educators to discuss and develop an individualized educational program ("IEP") for a special needs student. (Dkt. # 1 at 3.)

At the conclusion of that meeting, the team agreed that an updated evaluation should be completed by February 23, 2016. (*Id.*)

On February 22, 2016, NISD completed a Full Individual Evaluation ("FIE"), confirming that R.B. continued to meet the eligibility requirements for special education and related services as a student with autism and a speech impairment. (Dkt. # 6-15 at 102.) The same day, a permanent placement ARD meeting was held. (*Id.*; Dkt. # 6-16 at 76-77.) At the meeting, R.B.'s FIE was reviewed, confirming his need for continued speech/language therapy. (Dkt. # 6-15 at 102.) Regarding R.B.'s academic and functional skills, R.B.'s functional behavior assessment ("FBA")[4] was reviewed; it was determined that R.B. demonstrated age appropriate skills in reading, writing, math, science, and social studies. (*Id.*)

To address R.B.'s behavioral, social and emotional needs, the PPCD teacher proposed a Behavior Intervention Plan ("BIP"). (Dkt. # 6-7 at 54, 100; Dkt. # 6-16 at 81, 82.) It was noted that R.B. had disruptive classroom behaviors, including spitting and physical aggression. (Dkt. # 6-7 at 54, 100; Dkt. # 6-16 at 81, 82.) The BIP included a set of targeted behaviors, classroom strategies, use of a positive reward system, a set of consequences to improve behavior, and social skills training. (Dkt. # 6-7 at 54, 100.)

The February 22, 2016 ARD developed an individualized educational program ("IEP") for R.B.

4. An FBA is a component of the FIE. (Dkt. # 6-4 at 13.)

that covered the time period from February 22, 2016, through February 21, 2017. (Dkt. # 6-7 at 67.) The IEP was based on R.B.'s FIE, present levels of achievement and functional performance ("PLAAFPs"), and outside reports. (*Id.*; Dkt. # 6-15 at 204.) Subsequently, the PPCD teacher recommended that R.B. attend a half-day morning, inclusive PPCD/Early Childhood Collaborative classroom ("ECC")[5] at Langley Elementary; the ARD agreed to this change. (*Id.*) The IEP concerned R.B.'s placement and course schedule for the remainder of the 2015-2016 school year, through February of the 2016-2017 school year. (*Id.*) The IEP also included integrative OT services to R.B. even though NISD's OT evaluation did not recommend this service. (*Id.*) According to the PPCD teacher, R.B.'s mother was in agreement with the IEP. (Dkt. # 6-16 at 88.)

In April 2016, a meeting with R.B.'s mother, the PPCD teacher, the Vice-Principal, and the counselor took place to discuss parental concerns over R.B.'s use of inappropriate language. (Dkt. # 6-15 at 106,109; Dkt. # 6-16 at 94-95.) In May 2016, the Special Education Area Coordinator ("the Coordinator") with supervisory responsibility over Langley Elementary met with R.B.'s mother to continue to discuss parental concerns. (Dkt. # 6-14 at 40.) Parental concerns included R.B.'s use of a toilet, schedule, communication with the school, and how

5. The PPCD/ECC classroom is structured by combining a pre-K classroom with a PPCD classroom. For instance, half of the students with special needs spend time in a pre-K classroom, and half of the pre-K students spend time in the PPCD classroom. (Dkt. # 6-14 at 65, 74.)

R.B.'s behavior was being addressed at school. (*Id.* at 42-43.) In meeting with the Coordinator, R.B.'s mother inquired into the possibility of allowing R.B.'s private BCBA therapist to visit the campus as was allowed at his Florida school. (*Id.* at 44, 53; Dkt. # 6-15 at 51) Because there were difficulties getting the BCBA background check and credential properly submitted, the BCBA never visited the school as requested. (Dkt. # 6-14 at 45; Dkt. # 6-15 at 118; Dkt. # 6-16 at 102.) R.B.'s mother did not inquire into the possibility after that initial request. (Dkt. # 6-15 at 51.)

Subsequent to the meeting with the Coordinator, NISD agreed to R.B.'s mother's request for an independent educational evaluation ("IEE").[6] (Dkt. # 6-14 at 184-85.) An independent LSSP/psychologist (the "IEE examiner") reviewed NISD's IEP and agreed with the conclusions that R.B. met eligibility criteria as a student with autism and a speech impairment. (*Id.*) While R.B.'s math skills fell within the average range, his reading skills were above expectations for his age and grade level. (*Id.* at 195.) The IEE examiner found that R.B. was one of the higher performing readers in the PPCD/ECC class. (*Id.*) The IEE examiner recommended intensive ABA therapy, social skills training, speech therapy and behavior-based language skills training, counseling services, OT,[7]

6. Although the parties refer in the administrative record to the IEE as having been completed in 2016, the record reflects that the report was not completed until June 2017. (*See* Dkt. # 6-9 at 100-12.)

7. In March 2016, R.B. began receiving private OT services, which addressed different goals than the school-based OT services

warnings about changes in routine or transitions, planning and organizing tasks, and limiting attention to negative behaviors, among others. (*Id.*)

Also in response to R.B.'s mother's concerns, an NISD support specialist[8] conducted an observation and behavioral consultation, observing R.B. in the classroom at Langley Elementary from May 18-20, 2016. (Dkt. # 6-14 at 58-59, 192; Dkt. # 6-16 at 19.) The support specialist observed R.B. appropriately engaged in the educational activities of the classroom, including using words and a visual to express his need to use the restroom, was easily redirected with the use of visual or verbal prompts when needed, and used appropriate coping strategies when overstimulated. (Dkt. # 6-14 at 58-59.) The support specialist thereafter recommended that the PPCD teacher continue with the strategies currently in place. (Dkt. # 6-16 at 22.) R.B.'s mother was allowed to observe R.B. in the company of the support specialist, facilitated by the Coordinator. (Dkt. # 6-14 at 56-57; Dkt. # 6-15 at 70; Dkt. # 6-16 at 102.) R.B.'s mother reported to the Coordinator that R.B. was doing better by the end of the school year. (Dkt. # 6-14 at 58.) The PPCD teacher also observed that R.B. had made significant improvements. (Dkt. # 6-16 at 91-92.)

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that R.B. received. Private, or clinical-based, OT services focus on a client's independence performing daily tasks, whereas school OT services focus on a student's IEP goals. (Dkt. # 6-14 at 295-96; Dkt. # 6-15 at 19.)

8. A support specialist is assigned to a set of campuses and available to make campus visits to assist with instructional and behavioral strategies, suggestions, and classroom management. (Dkt. # 6-4 at 18.)

B. 2016-2017 School Year

R.B. began the 2016-2017 school year at Langley Elementary. (Dkt. # 6-14 at 76.) After the school year began, R.B.'s mother continued to have concerns about R.B.'s placement. (*Id.* at 66.) Specifically, she was concerned about R.B.'s progress in toileting skills, as well as his safety after she observed bruises and marks on R.B.'s body. (*Id.* at 66-68.) R.B.'s mother thereafter made a report to Children's Protective Services ("CPS") who investigated her complaints. (Dkt. # 6-16 at 108-09.) At the conclusion of its investigation, CPS did not make any findings against the PPCD teacher or NISD. (*Id.*) Thereafter, R.B.'s mother conferred with the NISD Coordinator, who referred her to NISD's central administration. (*Id.* at 68.)

R.B.'s mother met with NISD's Director of Elementary Administration (the "Director"). (Dkt. # 6-4 at 21.) At R.B.'s mother's refusal to send R.B. to Langley Elementary, the Director suggested that R.B. transfer to Boldt Elementary to resolve her concerns. (*Id.*) R.B. began attending Boldt Elementary in September 2016 in a PPCD/ECC program like he attended at Langley Elementary. (Dkt. #6-14 at 220.) R.B. attended a half-day morning class staffed by a special education teacher and an early childhood teacher and two instructional assistants ("IA"). (*Id.*) At Boldt Elementary, R.B.'s prior IEP from February 2016 was implemented and R.B. received school-based OT services as well as speech therapy sessions. (*Id.* at 225.)

On October 25, 2016, another ARD meeting was convened at which another IEP was developed. (Dkt. #

6-14 at 107; Dkt. # 6-15 at 37.) At the ARD meeting, R.B.'s mother brought two private BCBAs, a private OT, and a private speech pathologist, who all gave input into the development of the PLAAFPs and the IEP. (Dkt. # 6-14 at 107; Dkt. # 6-15 at 37.) R.B.'s PPCD teacher also gave input into the PLAAFPs and the IEP. (Dkt. # 6-14 at 115.)

PROCEDURAL BACKGROUND

On January 11, 2017, Plaintiffs filed a request for a due process hearing with the Texas Education Agency ("TEA"), alleging that NISD failed to provide R.B. with a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3). (*Id.*) Specifically, Plaintiffs alleged that NISD failed to provide R.B. with comparable services when he transferred into the school district from a public school district in Florida, and thereafter failed to provide R.B. with FAPE. (*Id.*) A full evidentiary due process hearing was held over three days from August 7-9, 2017. (*See* Dkt. # 6-4.) On October 4, 2017, in a written decision, the Special Education Hearing Officer ("SEHO") concluded that NISD had provided R.B. with the requisite comparable services upon his transfer to NISD from a Florida public school, and that NISD had provided R.B. with a FAPE. (*Id.* at 39.)

On November 3, 2017, Plaintiffs filed the instant lawsuit in this Court, appealing the SEHO's decision. (Dkt. # 1.) On August 13, 2018, NISD filed a motion for judgment on the administrative record. (Dkt. # 25.) On August 27, 2018, Plaintiffs filed a response in opposition (Dkt. # 27); NISD filed a reply on September 4, 2018

(Dkt. # 30). On August 13, 2018, Plaintiffs filed their own motion for judgment on the record. (Dkt. # 26.) On August 27, 2018, NISD filed a response in opposition (Dkt. # 28); Plaintiffs filed a reply on September 4, 2018 (Dkt. # 29).

LEGAL STANDARD

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-482. The IDEA's purpose is "to ensure that all children with disabilities have available to them a free appropriate public education 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)(1)(A).

States receiving federal assistance under the IDEA must: (1) provide a "free appropriate public education" ("FAPE") to each disabled child within its boundaries, and (2) ensure that such education is in the "least restrictive environment" ("LRE") possible. *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997); 20 U.S.C. § 1412(a)(1), (5). The FAPE provided must be developed to each disabled child's needs through an "individual education program" ("IEP"). *Michael F.*, 118 F.3d at 247; *see* 20 U.S.C. § 1414(d). In Texas, the committee responsible for preparing an IEP is known as an Admissions, Review, and Dismissal ("ARD") committee. *Michael F.*, 118 F.3d at 247.

"When a parent challenges the appropriateness of an IEP, a reviewing Court's inquiry is two-fold." *Hous.*

Indep. Sch. Dist. v. V.P., 582 F.3d 576, 583 (5th Cir. 2009). "The court must first ask whether the state has complied with the procedural requirements of the IDEA, and then determine whether the IEP developed through such procedures was 'reasonably calculated to enable the child to receive educational benefits.'" *Id.* at 583-84 (citation omitted). "If the court finds that the state has not provided an appropriate educational placement, the court may require the school district to reimburse the child's parents for the costs of sending the child to an appropriate private school or institution." *Id.* at 584 (citations omitted). "Reimbursement may be ordered only if it is shown 'that (1) an IEP calling for placement in a public school was inappropriate under the IDEA, and (2) the private school placement . . . was proper under the Act.'" *Id.* (citation omitted).

The role of the judiciary under the IDEA is limited, leaving the choice of educational policies and methods in the hands of state and local school officials. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003) (citing *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996)). "Under the IDEA, a federal district court's review of a state hearing officer's decision is 'virtually de novo.'" *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003). "The district court must receive the state administrative record and must receive additional evidence at the request of either party." *Id.* The court must reach an independent decision based on a preponderance of the evidence. *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *Michael F.*, 118 F.3d at 252. However, this requirement

"is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Instead, "due weight" is to be given to the hearing officer's decision. *Id.* Thus,

> courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to the state and local educational agencies in cooperation with the parents or guardians of the child.

Id. at 207.

The party seeking relief under the IDEA bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). Specifically, "a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the IDEA." *Michael F.*, 118 F.3d at 252.

ANALYSIS

NISD argues in its motion that it provided comparable services to R.B., as required under IDEA, upon his

transfer from a Florida public school district, and that it provided R.B. with a free appropriate public education pursuant to IDEA. (Dkt. # 25 at 9, 13.) NISD contends also that it did not violate Plaintiffs' procedural rights under the IDEA. (*Id.* at 19.)

Plaintiffs, on the other hand, argue that: (1) NISD's procedural violations denied R.B. a free appropriate public education (Dkt. # 26 at 8); (2) the SEHO erroneously found the IEE's recommendations were implemented (*id.* at 10); (3) NISD failed to provide comparable services under the IDEA, which denied R.B. a free appropriate public education (*id.* at 13); (4) NISD failed to conduct a full individual and initial evaluation, denying R.B. a free appropriate public education (*id.* at 15); (5) R.B.'s IEP was not reasonably calculated based on his needs (*id.* at 16); and (6) any academic and non-academic progress made was de minimus, unsupported by the record, or attributed to private services (*id.* at 21).

A. Comparable Services

The IDEA sets forth a school district's obligations to a student with an existing IEP who transfers from another state within the same academic year. *See* 20 U.S.C. § 1414(d)(2)(C)(i)(II). "If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year," the new school district must provide the student with "services comparable to those described in the child's IEP from the previous public agency" until

the school district conducts an evaluation, if the district determines such an evaluation is necessary, and develops a new IEP, if appropriate. 34 C.F.R. § 300.323(f); *see also* 19 Tex. Admin. Code § 89.1050 (j)(2). The Comments to the Department of Education's 2006 regulations state that the prior evaluation of a child who transfers to a school in another state is considered an initial evaluation made pursuant to 34 C.F.R. §§ 300.304 through 306. 71 Fed. Reg. 46,682 (2006); *see* 34 C.F.R. § 300.301 (defining an initial evaluation).

If the new school district determines that an evaluation is necessary, the evaluation is considered a full individual and initial evaluation and must be completed within the timelines established by § 89.1011(c) and (e) of 19 Tex. Admin. Code § 89.1050. The timeline for completing the requirements is 30 calendar days from the date of the completion of the evaluation report. *Id.* at § 89.1050(j)(2).

1. NISD Half-day Program and Speech/ Occupational Therapy

Plaintiffs argue that NISD failed to provide R.B. with the requisite comparable services upon R.B.'s transfer to NISD from a Florida public school district. (Dkt. # 26 at 14.) Among others, Plaintiffs complain that NISD provided R.B. with only a half-day of school rather than the full day of instruction he received in Florida. (*Id.*) Plaintiffs also complain that R.B. did not receive comparable services in speech and occupational therapy at NISD. (*Id.*)

Upon review, the Court finds that R.B.'s Florida IEP did not specify the number of hours of instruction that

R.B. was receiving. (Dkt. # 6-11 at 148-57.) Instead, it states only that R.B. attended school "every school day" in a "self-contained classroom." (*Id.* at 156.) The Florida IEP also noted that R.B. received language therapy for 60 minutes weekly, and received OT for 30 minutes weekly. (*Id.*) It also noted that R.B. was placed in a separate class, which was "less than or equal to 40%" with non-disabled children. (*Id.*)

Upon R.B.'s transfer to Langley Elementary in NISD, during his 30-day evaluation period,[9] NISD's IEP provided that R.B. would be provided "services comparable to the services provided in his previous Florida IEP." (Dkt. # 6-7 at 9.) Among others, it notes that R.B. "will participate in a self-contained PPCD program 3 hours daily," and that the classroom would be staffed with a certified special education teacher and special education instructional assistant. (*Id.* at 8.) Additionally, R.B. would be provided the same amount of OT (30 minutes per week) and speech therapy (60 minutes a week) as he did in Florida. (*Id.* at 9.) Regarding ABA therapy, R.B.'s Florida IEP does not state whether ABA therapy was a part of the IEP; instead, the testimony of his Florida ABA provider at the administrative hearing indicated that she was a private

9. To determine whether NISD complied with § 300.323(f)'s requirement that it provide comparable services to R.B's Florida IEP, the Court looks only to the temporary 30-day placement following his transfer. (*See* Dkt. # 6-7 at 6-11.) Any complaints regarding R.B.'s February 22, 2016 IEP, made subsequent to the 30-day temporary placement, is not proper to challenge under § 300.323(f), which addresses only the 30-day period subsequent to the transfer. Thus, any argument by Plaintiffs that NISD was required to provide comparable services beyond the 30-day period is without merit.

provider who was allowed on campus to make visits to observe R.B. (Dkt. # 6-14 at 321, 330-31.) Thus, contrary to Plaintiffs' contention, the Florida public school did not provide him ABA therapy outside of allowing R.B.'s private ABA therapist to come into the school for therapy.

Additionally, while it is true that R.B. did not receive the same number of hours of instruction as he did in Florida, this fact does not render the services he received at NISD non-comparable. As discussed, R.B.'s Florida IEP never mentioned the number of hours of instruction he received daily. That R.B.'s mother informed NISD that R.B. attended a full-day program in Florida is still not dispositive—while it is true that NISD could have inquired with the Florida school regarding the number of hours of instruction R.B. received, comparable services are not identical services or the same services. *See Sterling A. ex rel. Andrews v. Washoe Cty. Sch. Dist.*, 2008 U.S. Dist. LEXIS 94222, 2008 WL 4865570, at *5 ("When a child transfers to a new public agency from another state, 'comparable services means services that are "similar" or "equivalent" to those that were described in the child's IEP from the previous public agency, as determined by the child's newly-designated IEP Team in the new public agency.'" (citing 71 Fed. Reg. 46540, 46681 (Aug. 14, 2006))). "Comparable" services within the meaning of 20 U.S.C. § 1414(d)(2)(C)(i)(II) means that, in the interim IEP, NISD needed to provide services to R.B. that were "similar" or "equivalent" to those provided for in the Florida IEP. NISD was not obligated to adopt the Florida IEP in its exact form; all that the IDEA requires is that the interim IEP be similar or equivalent to the Florida IEP.

Based on the parties' arguments and evidence, as well as the administrative record in this case, the Court finds that a preponderance of the evidence supports the SEHO's conclusion that R.B. was provided comparable services to his Florida IEP during the 30-day temporary placement period upon his transfer to NISD. The Court notes that the IDEA does not require a school district to provide the best available or optimal educational setting. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (citations and internal quotations omitted). Instead, it requires the school district to provide a "floor of opportunity" to give educational benefits to the handicapped child. *Id.* Here, the evidence indicates that while the exact number of instructional hours differed, the substance and goals of the services was the same. Thus, considering the: (1) substantial similarity in the substance and goals of NISD's services during the 30-day temporary placement period, and (2) the deference due to local and state officials' educational policy determinations, the Court finds that R.B. was provided services comparable to those provided to him in the Florida IEP.

2. Full Individual and Initial Evaluation

Plaintiffs also argue that NISD failed to conduct a full individual and initial evaluation during the 30-day temporary placement period following R.B.'s enrollment at Langley Elementary. (Dkt. # 26 at 15.) Plaintiffs contend that because NISD determined that R.B. required additional evaluation upon his transfer to the District, NISD was required to complete a transfer evaluation that was sufficiently comprehensive to identify all the student's

special education and related service needs as if it were an initial evaluation of the child. (*Id.*) Plaintiffs assert that NISD's Reevaluation Review of Existing Evaluation Data ("REED") relied mostly on his Florida IEP but did not consider or conduct its own formal assessments. (*Id.*) Regarding this, Plaintiffs complain that the SEHO failed to make any findings on this issue. (*Id.*)

Pursuant to 34 C.F.R. § 300.304(b), in conducting an evaluation of R.B. upon his transfer, NISD was required to:

> (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
>
> (i) Whether the child is a child with a disability under § 300.8; and
>
> (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
>
> (2) Not use any single measure or assessment as the sole criterion for determining whether

> a child is a child with a disability and for determining an appropriate educational program for the child; and
>
> (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 300.304(b).

Upon the Court's own review, the Court finds that NISD complied with § 300.304(b)'s requirements controlling the conduct of an evaluation. The record demonstrates that NISD's REED of R.B. upon his transfer to Langley Elementary used a variety of tools and techniques to evaluate and assess R.B.'s disabilities. (*See* Dkt. # 6-7 at 12-30.) NISD's thorough 19-page reevaluation report details its review of R.B.'s Florida IEP and discusses the new assessments and parental input taken upon his transfer to the District. (*Id.*) NISD's REED met the statute's requirements and Plaintiffs have not met their burden of demonstrating that NISD failed to fully evaluate and assess R.B. upon his transfer.

B. Appropriateness of the IEP

Plaintiffs challenge the appropriateness of NISD's IEP. They argue that NISD committed procedural violations which amount to a denial of a free and appropriate public education. Plaintiffs also contend that the SEHO erroneously concluded that NISD provided

R.B. with an IEP that was reasonably calculated to enable him to progress. (Dkt. # 26 at 16.)

To determine whether the IEP was appropriate, the Court looks to whether (1) the state complied with the procedural requirements of IDEA, and (2) the IEP was reasonably calculated to enable the child to receive educational benefits. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012). Here, Plaintiffs challenge both prongs of the analysis.

1. Procedural Issues

Plaintiffs argue that NISD committed several procedural violations which amounted to a denial of a free and appropriate public education. (Dkt. # 26 at 7.) Plaintiffs contend that NISD ignored parental concerns during the IEP meetings, which resulted in the denial of a FAPE. (*Id.*) Additionally, Plaintiffs complain that the SEHO erroneously found that the Independent Educational Evaluation ("IEE") recommendations were implemented by NISD. (*Id.* at 10.)

"In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(iii).

"Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity." *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

a. Parental Concerns

According to Plaintiffs, the SEHO erroneously concluded that parental concerns were considered and addressed by NISD. (Dkt. # 26 at 8.) Plaintiffs argue that NISD in fact failed to consider or address several parental concerns, contributing to a denial of a FAPE for R.B. (*Id.*) Plaintiffs assert that at the January 13, 2016, and the February 22, 2016 ARD meetings at Langley Elementary, R.B.'s mother expressed concerns about the unilateral reduction in hours of R.B.'s school day. (*Id.*) Plaintiffs maintain that NISD refused to consider R.B.'s previous IEP and conduct an evaluation, and that NISD summarily concluded that the Florida IEP did not meet Texas standards. (*Id.*) Plaintiffs also contend that NISD unilaterally moved many of R.B.'s services and supports over his parents' objections without any explanation. (*Id.*)

Plaintiffs further argue that at the Langley February 22, 2016 meeting, and the September 20, 2016 meeting after his transfer to Boldt Elementary, R.B.'s parents expressed concerns that R.B.'s sensory needs were not being addressed. For instance, Plaintiffs complain that NISD told them to buy their own weighted vest when R.B.'s parents inquired into the use of one. (Dkt. # 26 at 9.) Additionally, Plaintiffs complain NISD refused to provide correct sensory devices to R.B. or address his

sensory needs. (*Id.*)

Plaintiffs also contend that at the January 13, 2016, and the February 22, 2016 ARD meetings at Langley Elementary, R.B.'s mother requested that R.B.'s Applied Behavior Analysis ("ABA") services in his Florida IEP continue at NISD, or alternatively, that their private BCBA be allowed to observe and collaborate with NISD regarding ABA services. (Dkt. # 26 at 9.) According to Plaintiffs, NISD refused these services. (*Id.*) Plaintiffs argue that NISD also ignored parental requests for use of assistive technology ("AT") and did not conduct an AT evaluation. (*Id.*)

Plaintiffs further complain that the SEHO erroneously concluded that the denial of extended school year ("ESY") services was based on assessment. (Dkt. # 26 at 9.) Plaintiffs contend that NISD failed to evaluate R.B.'s need for ESY services, without any negotiations with his parents, and denying R.B. an educational benefit needed to prevent the regression of critical skills over the summer break, thus denying R.B. a FAPE. (*Id.* at 10.)

Upon review, the Court finds that the record supports the SEHO's decision that NISD appropriately considered R.B.'s parents' input when formulating R.B.'s IEP. There is no dispute that R.B.'s mother attended every ARD meeting, and R.B.'s outside private providers attended the October 2016 ARD meeting. Outside of the ARD meetings, the record supports that parental concerns were considered and addressed by NISD. For instance, a daily communication log went back and forth from Langley

Elementary to R.B.'s home, and once R.B. transferred to Boldt Elementary, the PPCD teacher utilized a smart phone application to communicate. Additionally, upon parental request, a visual schedule and daily behavioral chart were provided. Furthermore, a parental request to transfer campus locations was approved by NISD.

Regarding the number of school hours that R.B. attended upon his transfer to Langley, the Court has addressed this issue above. Plaintiffs have not met their burden of demonstrating that a reduction in the number of school hours resulted in the denial of a FAPE for R.B. As for ABA services, while R.B.'s parents expressed their desire to have such services upon R.B.'s transfer to NISD, the record is clear that R.B.'s ABA provided in Florida was privately hired and permitted to visit the school campus and make recommendations for R.B.'s teacher. (Dkt. # 6-14 at 98, 321.) The ABA provider did not provide R.B. therapy through the Florida IEP or the school. (*Id.*) Thus, there is no basis for Plaintiffs' assertion that NISD ignored their requests for such services when formulating the IEP or otherwise. Additionally, the record demonstrates that R.B.'s private BCBA was never denied access by NISD to R.B.'s school.

Regarding R.B.'s parents requests for AT, more sensory programs or services, or ESY, there is no evidence in the record supporting such need upon R.B.'s transfer to NISD. The record demonstrates that, upon evaluation, R.B. did not require or need such services beyond what it was providing to R.B. Plaintiffs have also not met their burden of demonstrating that a failure to provide any of

these services resulted in R.B.'s regression or inability to recoup skills.

The right to provide meaningful input is not the right to dictate the outcome. *White*, 343 F.3d 373 (citing *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656 (8th Cir. 1999) (determining that if parents are given the opportunity to participate in the formulation process, the IDEA requirement of meaningful parental input is satisfied even if the parents disagree with the decision); *Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("[P]arents, no matter how well-motivated, do not have a right under [the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."), *cert. denied*, 488 U.S. 925, 109 S. Ct. 308, 102 L. Ed. 2d 327 (1988). Absent any evidence of bad faith exclusion of the parents or refusal to listen to or consider the R.B.'s parents' input, NISD met IDEA requirements with respect to parental input. Thus, on this record, NISD complied with this procedural component.

b. IEE Recommendations

Plaintiffs also complain that the SEHO erroneously found that the Independent Educational Evaluation ("IEE") recommendations were implemented. (Dkt. # 26 at 10.) The IEE, referred to by Plaintiffs, was completed by Dr. Lindsay Heath on June 12, 2017, yielding sixteen recommendations, eleven of which were school-based, with the remaining recommendations related to R.B.'s home and extracurricular activities. (Dkt. # 6-9 at 100-12.) Plaintiffs

argue that the Langley IEP failed to consider eight of the eleven school-based recommendations and only partially implemented the three remaining recommendations. (Dkt. # 26 at 10.) Plaintiffs also argue that the Boldt IEP failed to consider four of the eleven recommendations and only partially considered the remaining recommendations. (*Id.*)

Upon consideration, the Court finds no merit to Plaintiffs' contention regarding Dr. Heath's IEE. The IEE occurred after R.B.'s ARD meetings and IEP at both Langley Elementary and Boldt Elementary. Dr. Heath's report was issued on June 12, 2017, and R.B.'s ARD meetings were held on February 22, 2016, and October 25, 2016, or at least a full seven months prior to Dr. Heath's report. Thus, it is impossible for NISD to have complied with a report that was not yet issued.

Finding that a procedural violation is not supported by the record,[10] the Court will turn to the second prong of the analysis—whether R.B.'s IEP was reasonably calculated to enable him to receive educational benefits.

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10. In Plaintiffs' response to NISD's motion, Plaintiffs raise an argument that NISD's prior written notices ("PWN") failed to explain the denial of R.B.'s parents' requests. (Dkt. # 27 at 24.) Plaintiffs contend that during the January 2016 and February 2016 ARD meetings, R.B.'s mother informed NISD of R.B.'s ABA and AT needs, but the requests were refused without a cogent explanation. (*Id.*) The Court, however, does not find any evidentiary support in the record for this assertion. Even if true, Plaintiffs have not met their burden of demonstrating that this action resulted in the denial of a FAPE to R.B.

2. Whether the IEP Was Reasonably Calculated

A court looks to four factors to determine whether the IEP was reasonably calculated:

> (1) Is the program individualized on the basis of the student's assessment and performance; (2) is the program administered in the least restrictive environment; (3) are the services provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) are positive academic and non-academic benefits demonstrated?

R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1012 (5th Cir. 2010); *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 2018 WL 6187765 (5th Cir. 2018). "[T]hese factors are 'indicators' of an IEP's appropriateness" and are only "intended to guide a district court in the fact-intensive inquiry of evaluating whether an IEP provided an educational benefit." *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 294 (5th Cir. 2009). "[A] party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the IDEA." *Id.* at 252 (footnote omitted).

a. Program Individualization

The IEP must be designed to meet the particular needs of the student based on the student's assessment and performance and include "sufficient support services

to allow [him] to benefit from the instruction." *Adam J. ex rel. Robert J.*, 328 F.3d at 810. The IDEA requires that:

> [i]n developing each child's IEP, the IEP Team . . . shall consider (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child.

20 U.S.C. § 1414(d)(3). In addition, the IDEA requires the IEP to include a "statement of the child's present levels of academic achievement and functional performance, including how . . . the child's disability affects the child's involvement and progress in the general education curriculum. . . ." *Id.* at § 1414(d)(1)(A)(i)(I)(aa); 34 C.F.R. 300.320(a)(1).

NISD asserts that R.B.'s IEP was individualized based on his performance and assessments. (Dkt. # 25 at 14.) It argues that the evidence at the administrative hearing demonstrated that NISD conducted appropriate evaluations of R.B. and developed an IEP based on those evaluations and his performance. (*Id.*) Plaintiffs, however, argue that NISD failed to identify and evaluate R.B.'s individual needs, thus failing to ensure his IEP goals were appropriate to progress in light of R.B.'s disabilities. (Dkt. # 26 at 16.) Because of this failure, Plaintiffs contend that R.B. was denied a meaningful educational benefit. (*Id.*)

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i. R.B.'s IEP

In developing R.B.'s IEP, the record demonstrates that the ARD committee considered NISD's evaluations, R.B.'s present levels of academic achievement and functional performance (PLAAFPs), as well as relevant outside reports. (*See* Dkt. # 6-7 at 31-67.) Among others, NISD considered R.B.'s full individual evaluation ("FIE") dated February 22, 2016 (*id.* at 12-30), as well as data from R.B.'s "COR Advantage" developmental profile and subsequent reports, which described observed instances of R.B.'s academic, social, and emotional development, among others (Dkt. # 6-12). The ARD committee also utilized R.B.'s behavior data from the classroom, observations, and progress reports. (Dkt. # 6-8 at 43-62.)

Additionally, at the ARD meeting to formulate the IEP, R.B.'s teacher described his abilities in the classroom. (Dkt. # 6-15 at 105; Dkt. # 6-16 at 76, 78.) Some of R.B.'s strengths and needs were described in the PLAAFP, and goals were developed by the ARD committee, which included R.B.'s mother, based on those needs. (Dkt. # 6-7 at 32-34; Dkt. # 6-16 at 76.) The ARD committee created one speech therapy goal and two behavior goals based on the information it had for R.B. (Dkt. # 6-7 at 36-38.) The ARD committee also identified the related services that R.B. required to allow him to benefit from the educational instruction, including speech and language services, visual supports, verbal prompts, sensory breaks, as well as personal care services. (*Id.* at 39.) The IEP described the accommodations and program modifications to assist R.B.'s learning. (*Id.*) Thus, on this record, the

preponderance of the evidence supports the SEHO's conclusion that the IEP was individualized to R.B.'s needs.

ii. R.B.'s FBA and BIP

Plaintiffs further complain that NISD's FBAs and BIPs: (1) were not reasonably calculated from objective data; (2) failed to address R.B.'s elopement behaviors; and (3) failed to address R.B.'s physical aggression behaviors. (Dkt. # 26 at 16-20.) Plaintiffs also argue that NISD failed to address R.B.'s pica and tantrum behaviors. (*Id.* at 21.) Because NISD based R.B.'s IEP on perfunctory FBAs and BIPs, Plaintiffs contend that R.B.'s behavior goals were not reasonably calculated, and his IEP therefore fails to sufficiently address R.B.'s behavior needs. (Dkt. # 27 at 13.)

The purpose of the FBA is to explore a child's misbehavior and discover what, if anything, can be done to address it and prevent it from occurring again. *See generally* 64 Fed. Reg. 12,618 (March 12, 1999). It is an "educational evaluation" under the IDEA. *Harris v. D.C.*, 561 F. Supp.2d 63, 67 (D.D.C. 2008). "FBAs rely on the premise that all behaviors serve a purpose." *Cobb Cnty. Sch. Dist. v. D.B. ex re. G.S.B.*, 2015 U.S. Dist. LEXIS 129855, 2015 WL 5691136, at *1 (N.D. Ga. Sept. 28, 2015). "FBAs attempt to identify the underlying reasons and environmental variables that contribute to problem behaviors." *Id.* "Information gathered through the FBA helps evaluators design a Behavior Intervention Plan ("BIP") with strategies to reduce or eliminate conditions that encourage problem behaviors and to create conditions that encourage positive behaviors." *Id.* Additionally,

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> *IDEA provides no explicit requirements for FBAs*. Rather, industry standards provide the framework for such an evaluation. FBAs may be conducted by educators or behavioral analysts. First, the evaluator relies on teacher and parent interviews, direct observation, and school records to identify targeted behaviors and form a hypothesis about the purpose of the problem behaviors. Next, the evaluator collects "ABC"-Antecedent, Behavior, Consequence-data. "Antecedents" are events or environmental conditions that precede (and presumably trigger) problem behaviors. "Behavior" refers to behavior topographies, which describe how the behavior looks. "Consequence" data records the immediate aftermath of the behaviors. The evaluator looks for patterns in the ABC data to create a hypothesis about the function of the problem behaviors. Because FBAs have no explicit requirements, analysts may exercise substantial discretion in tailoring their data collection to the particular student.

Cobb Cnty., 2015 U.S. Dist. LEXIS 129855, 2015 WL 5691136, at *1 (emphasis added).

Despite Plaintiffs' arguments to the contrary, the administrative record in this case demonstrates that NISD relied on appropriate evaluations and observations of R.B.'s behavior. In formulating the FBA and BIP, NISD appropriately considered R.B.'s behaviors, including tantrums and spitting, as well as physical aggression.

R.B.'s February 2016 IEP explicitly addressed these behaviors and included them in the formulation of R.B.'s FBA and BIP. (Dkt. # 6-7 at 37-38, 54-61.) R.B.'s PPCD teacher at Langley Elementary observed and reported R.B.'s physical aggression and spitting behaviors and used verbal redirection and positive reinforcements to attempt to correct these behaviors. (Dkt. # 6-7 at 54-59; Dkt. 6-16 at 80.) The PPCD testified at the hearing in front of the SEHO that the ARD committee chose to focus on R.B.'s physical aggression and spitting because they were most disruptive to his learning and progress when they occurred. (Dkt. # 6-16 at 83.) The PPCD kept consistent data on R.B.'s behaviors and progress, which formed the baseline data for his behavior goals. (*Id.* at 81; Dkt. # 6-12 at 6-37.)

R.B.'s October 2016 IEP and BIP also addressed his behavioral needs. (Dkt. # 6-12 at 49.) For instance, the ARD committee developed progressive goals for R.B. including those for staying in an assigned area for each grading period. (*Id.* at 55; Dkt. # 6-15 at 211.) The ARD committee targeted R.B.'s elopement—leaving or darting out of the classroom or assigned areas—specifically in his BIP because of R.B.'s mother's concerns. (Dkt. # 6-15 at 214-15.) Notably, this behavior was addressed in the BIP, although the PPCD teacher had not observed such behavior by R.B. in her classroom. (*Id.* at 215-16.) R.B.'s BIP also included positive behavior re-enforcement, including the ability to earn activities and privileges for good behavior. (Dkt. # 6-12 at 70.) R.B.'s progress reports from Boldt Elementary reflect that he met or exceeded his goals for staying in his assigned area. (*Id.* at 122-24.)

R.B.'s progress on his behavior is documented. At the time of the October 2016 ARD committee meeting, R.B.'s spitting and physical aggression behaviors had improved. For instance, his behavior chart data from Langley Elementary showed that he went from a high of spitting 44 times in a week in March 2016, to the last five weeks of that school year as only spitting 7, 8, 2, 4, and 0 episodes of spitting, respectively. (Dkt. # 6-12 at 11-27.) His behaviors of hitting and throwing show similar progress. (*Id.*) Although Plaintiffs complain that certain information from the behavior tally charts are missing, the Court does not find evidence supporting this assertion in the record. Upon the Court's review, the Court finds that the charts contain tally marks for each behavior tracked. (*See id.; see also* Dkt. # 6-11 at 217.)

Regarding Plaintiffs' complaints about R.B.'s pica behavior, Plaintiffs have not met their burden of demonstrating that such behavior specifically impeded his learning and therefore was required to be addressed in an IEP or BIP. Plaintiffs have not identified any evidence in the record that this behavior was disruptive to R.B.'s learning and progress while in the classroom. Despite this, there is evidence in the record that R.B.'s teachers addressed this behavior when necessary, by redirecting R.B. or providing him a "chewy," or a safe object to chew on, which would successfully allow R.B. to continue learning. (Dkt. # 6-15 at 145-148.) Likewise, R.B.'s tantrum behaviors were rare and there were no ongoing tantrum issues. Instead, his primary behavioral concerns were addressed in the BIP, such as hitting, spitting, and throwing. (*Id.* at 228-230.) Accordingly, on this record,

the preponderance of the evidence supports that R.B.'s FBA and BIP were reasonably calculated and based on sufficient evaluations and observations to adequately address R.B.'s disruptive behaviors.

b. Least Restrictive Environment

The IDEA contains a "mainstreaming" component, which requires that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." 20 U.S.C. § 1412(5)(A) (2016). This mandate requires that a disabled child be placed in the least restrictive environment ("LRE") that will provide him with a meaningful educational benefit. "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995).

NISD contends that it fulfilled its obligation to provided services to R.B. in the LRE to the maximum extent possible. (Dkt. # 25 at 17.) The Court agrees. Following his initial 30-day evaluation upon his transfer from Florida to NISD, R.B. was placed in a collaborative classroom at both Langley Elementary and Boldt Elementary. At the hearing before the SEHO, Plaintiffs conceded that this was the LRE for R.B. at NISD. (Dkt. # 6-4 at 149.) Regarding his temporary placement in an ESE self-contained classroom during his initial 30-day

evaluation, there is evidence in the record that supports that this placement was based off the PPCD teacher's conversation with the Florida schools and that this was comparable to the services R.B. received while a student in Florida. Accordingly, on the record before the Court, Plaintiffs have failed to meet their burden of establishing that R.B.'s IEP was not implemented in the LRE.

c. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

Coordination and collaboration among the key "stakeholders" are necessary components of a FAPE. *See R.H.*, 607 F.3d at 1012; *Michael F.*, 118 F.3d at 253. The IDEA contemplates a collaborative process between the district and the parents. *See R.H.*, 607 F.3d at 1008. Here, as addressed above, NISD appropriately considered R.B.'s parents input in formulating his IEP. Again, as stated, R.B.'s mother attended every ARD meeting and NISD regularly met or corresponded with her regarding any of her concerns. On several occasions, R.B.'s mother acknowledged and praised R.B.'s teachers or other NISD personnel for their efforts. At her request, R.B. was transferred from Langley Elementary to Boldt Elementary. NISD also allowed R.B.'s private providers to attend the ARD meetings and provide input.

On this record, the Court finds that Plaintiffs have failed to meet their burden of demonstrating that R.B.'s services were not provided in a collaborative and coordinated manner between them and other key stakeholders. Reviewing the evidence as a whole, the

preponderance of the evidence supports the SEHO's conclusion that there was sufficient coordination and collaboration among the key stakeholders involved in R.B.'s education, even if it was not to R.B.'s parents' satisfaction.

d. Academic and Non-academic Environment

"The IDEA guarantees an appropriate education, not a perfect education, and the benefit conferred upon the student 'must be meaningful' and 'likely to produce progress.'" *Adam J. ex rel. Robert J.*, 328 F.3d at 808-09 (quoting *Michael F.*, 118 F.3d at 248). The Supreme Court recently explained that an educational program "must be appropriately ambitious in light of [the student's] circumstances." *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988, 1000, 197 L. Ed. 2d 335 (2017). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright line rule, however, should not be mistaken 'for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id.*

"Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew*, 137 S.Ct. at 999 (citing *Rowley*, 458 U.S. at 208-209). The ultimate goal is to provide the whole educational experience, adapted in a way to confer benefits on the child. *Hovem*, 690 F.3d at 397. Courts should not lightly disregard educators' decisions on the appropriate educational methods to

achieve a FAPE. *Rowley*, 458 U.S. at 204. Further, it is not necessary for R.B. to improve in every area to show that his IEP conferred a benefit. *See Bobby R.*, 200 F.3d at 350 (stating "it is not necessary for Caius to improve in every area to obtain an educational benefit from his IEP."). As the party challenging the IEP, the onus is on Plaintiffs to show that it was not appropriately ambitious, because the presumption of the IDEA favors the proposal of the school district. *Salley*, 57 F.3d at 467.

Here, Plaintiffs complain that there was no educational benefit to R.B. at NISD because there is no credible evidence that R.B. made meaningful educational progress while there. (Dkt. # 27 at 18.) Plaintiffs insist that R.B.'s "IEP was not reasonably calculated due to the inadequacy, or complete absence, of formal evaluations to form the bases of [his] IEP." (*Id.*) Plaintiffs contend, instead, that the evidence shows that R.B. regressed and any progress was de minimus.

The SEHO found that R.B. demonstrated progress in achieving his goals, and that such progress is consistent with some educational benefit to the program. *See, e.g., Bobby R.*, 200 F.3d at 349 (finding an educational benefit was shown by increased test scores, even if the student could not keep up with the rest of the class). Although Plaintiffs disagree with this finding, the legal focus in this matter is necessarily narrow. Plaintiffs must demonstrate that R.B.'s IEPs were not reasonably calculated to enable him to make progress in light of his circumstances. *Endrew E.*, 137 S. Ct. at 999.

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R.B.'s teachers and other key stakeholders at NISD developed an IEP, which they believed would confer an educational benefit to him. R.B.'s parents did not object to either the February 2016 IEP, nor the October 2016 IEP, at the time of the ARD meetings. R.B.'s teachers and others believed those goals were appropriate. Indeed, the evidence in the administrative record supports that R.B. demonstrated progress in key areas addressed by the IEP. For instance, R.B. improved in his spitting and physical aggression behaviors. (Dkt. # 6-12 at 11-27.) R.B. also demonstrated an increase in the use of language to express his wants and needs. (Dkt. # 6-16 at 92.) It is also well-documented in the record that R.B. was one of the higher performing students academically in his class. Additionally, at the end of the 2016-2017 school year, R.B. had shown improvement in fine motor skills, literacy, language, reading, blending sounds, math, counting, toileting, and classroom behavior. (Dkt. # 6-4 at 26; Dkt. # 6-15 at 255.) R.B. had also made other behavioral progress. (Dkt. # 6-4 at 26; Dkt. # 6-15 at 255.) Accordingly, on the record before the Court, the Court finds that NISD prepared an IEP designed to, and that did, in fact, provide an educational benefit that was more than de minimus to R.B., considering his disabilities, and the IDEA creates a presumption in favor of that plan. Plaintiffs have not overcome that presumption.

Although Plaintiffs insist that the IEPs were inappropriate and deficient, as discussed previously, they have not produced enough evidence to show that the goals were based on irrelevant or inadequate data or observations. Testing whether a school district's

educational program was adequate, for FAPE purposes, should not be a retrospective evaluation of the educational outcomes achieved. *See Fuhrmann on Behalf of Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). It is significant that R.B.'s evaluation and achievement tests taken both at Langley Elementary and Boldt Elementary showed signs of improvement. While R.B.'s program at NISD may not have been as optimal as Plaintiffs might have liked, the Court is unconvinced that this program was defective under the IDEA. On the administrative record before the Court, the Court finds that a preponderance of the evidence supports that the SEHO's conclusion that the IEP was sufficient to offer R.B. a FAPE.

CONCLUSION

Based on the foregoing, the Court **GRANTS** NISD's Motion for Judgment on the Administrative Record (Dkt. # 25) and **DENIES** Plaintiffs' Motion for Judgment on the Record (Dkt. # 26). Plaintiffs' claims are **DISMISSED WITH PREJUDICE**. The Clerk's Office is **INSTRUCTED** to **ENTER JUDGMENT** and **CLOSE THE CASE**.

IT IS SO ORDERED.

DATED: San Antonio, Texas, December 12, 2018.

/s/ David Alan Ezra
David Alan Ezra
Senior United States
District Judge