United States Court of Appeals

for the

Fifth Circuit

Case No. 18-20274

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Appellant,

– v. –

O.W., by next friend Hannah W.,

Defendant-Appellee.

HANNAH W., as Parent/Guardians/Next Friends of O.W., an Individual with a Disability; DANIEL W., as Parents/Guardians/Next Friends of O.W., an Individual with a Disability; O.W.,

Plaintiffs-Appellees,

– v. –

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON IN CASE NO. 4:16-CV-2643 ALFRED H. BENNETT, U.S. DISTRICT JUDGE

BRIEF FOR APPELLEES

DORENE J. PHILPOT
DORENE J. PHILPOT LAW
7314 Offats Pointe
Galveston, Texas 77551
(281) 989-2010
dphilpotlawtexas@gmail.com

SONJA D. KERR, ESQ.
HOLLINGSWORTH & ZIVITZ, P.C.
9600 Great Hills Trail
Austin, Texas 78759
(512) 717-5204
skerr@hzlegal.com

Attorneys for Appellees

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.21.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Defendants-Appellees

O.W.
Hannah Wier
Daniel Wier

Counsel for Defendants-Appellees

Sonja D. Kerr
Catherine Michael
Hollingsworth & Zivitz, P.C.
9600 Great Hills Trail, Suite 150
Austin, Texas 78759
Telephone: (512) 637-1083

Dorene Philpot
Philpot Law Office, P.C.
7314 Offats Pointe
Galveston, Texas 77551
Telephone: (281) 989-2010

Counsel for Cuddy Law Firm
(Intervenor on Fees)

Brian O'Toole
O'Toole Atwell, PC
504 Lavaca, Suite 1010
Austin, Texas 78701
Telephone: (512) 476-4740

Plaintiff-Appellant

Spring Branch Independent
School District

Counsel for Plaintiff-Appellant

Amy C. Tucker
atucker@rmgllp.com
Jonathan G. Brush
jbrush@rmgllp.com
Rogers, Morris & Grover, LLP
5718 Westheimer Rd, #1200
Houston, Texas 77057
Telephone: (713) 960-6000

/s/ Sonja D. Kerr

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that the Court should hear oral argument but for reasons distinct from those set forth by Appellants. The Court should soundly affirm the IDEA's statutory requirement for Child Find, reminding the District that regular education services cannot impede a special education evaluation, especially where, as here, the parents requested a special education evaluation.

In a nutshell, a school district's affirmative duty is to comply with Child Find, separate, distinct and apart from any attempt to place responsibility upon the parents of a child with a disability, such as O.W. and his parents. When all is said and done, the thrust of the school district's argument in this case – as in others—is to attempt to point the finger of delay and blame on the state of Texas' rules, or on the parents, or others rather than to accept its failure to timely evaluate and identify O.W. as required. Here, the District wrongly delayed while O.W. constantly violated the Student Code of Conduct from the first day of school on August 24, 2014 until it placed him in the AB program on March 23, 2015.

As the District Court pointed out, after this substantial delay, O.W. did not receive a FAPE because the District failed to fully implement the IEP it promised O.W. from March 23, 2015 until May 2015, when he was no longer attending or attending only half-days. This does not meet the Fifth Circuit standard of an

"appropriately ambitious" IEP and services for O.W. Reimbursement to the parents for the 2015-2016 costs of Fusion and payment forward (for 2016-2017) is a proper remedy.

In light of these failures, and the importance of the failure to comply with Child Find in the state of Texas, the Court should allow oral argument to clarify the key aspects of the extensive record in this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

STATEMENT OF JURISDICTION[1]

Jurisdiction before the District Court was pursuant to 20 U.S.C. § 1415(i)(2)-(3) and this Court has jurisdiction consistent with 28 U.S.C. § 1291.

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The District Court committed no clear error when it correctly affirmed the well-reasoned decision of a Texas Special Education Hearing Officer (SEHO) that the District violated its Child Find duty by its unreasonable delay of a special education evaluation and special education services to O.W., a student suffering from an emotional disturbance.

II. The District Court committed no clear error when it correctly affirmed the SEHO's decision that the District failed to fully implement O.W.'s IEP by using time-out and restraints and calling the police on four occasions, all of which was contrary to the IEP's mandate of positive and calm interactions to assist O.W. to correct his behavior and by leaving O.W. without appropriate services for the last 20 days of his fifth grade year.

[1] O.W.'s brief is supported by the certified Record on Appeal from the district court (ROA). The ROA includes the completed certified record from the underlying special education hearing, including four volumes of pleadings, transcripts of the three day hearing, exhibits of the parties and the 108 page decision of the SEHO. ROA.159-3286. References to the ROA that are within the Record Excerpts contain the identical numbers from the ROA.

III. The District Court committed no clear error when it correctly affirmed the SEHO's decision that O.W.'s return to the District would be detrimental and thus, properly affirmed reimbursement to O.W.'s parents for the tuition costs of Fusion Academy for the nearly two years of denial of the free appropriate public education to which O.W. is entitled.

COUNTER-STATEMENT OF THE CASE

I. Preschool Speech Services and Unsuccessful Nottingham Kinder

The District served O.W. as a toddler for speech and language services from 2006 through 2009. ROA.1106-1107; ROA.2108. O.W. had to leave two different preschools because of his aggression, significant impulse control problems, and oppositional behaviors. ROA.1112; ROA.996; ROA.956; ROA.1050. O.W.'s parents did not know that his toddler services meant O.W. had been in special education. ROA.3036:15-25-ROA.3037:1.

In 2009, before O.W. began kindergarten at Nottingham, Dr. Guttentag identified him with very superior intelligence (IQ 137) and oppositional defiant disorder. ROA.2115; ROA.2111-2118; ROA.996. O.W.'s preschool teacher described O.W. as engaging in persistent misbehavior. ROA.2112. And, O.W. would typically "escalate" by physically attacking, including hitting, biting and hair-pulling. ROA.2112. Dr. Guttentag recommended that O.W. attend kindergarten, and be placed in the Gifted and Talented program. Still, she recognized he might have

difficulty handling the behavioral demands of public school kindergarten and suggested he have a positive support plan, and assistance such as an aide. ROA.2117.

O.W. attended kindergarten at Nottingham during the 2009-2010 school year. ROA.956; ROA.2026. O.W. was not successful in kindergarten, where he had behavioral problems, and was aggressive to other children. ROA.1642; ROA.2575:2-6; ROA.1051; ROA.2108. At that time, O.W.'s parents were unaware that they could ask to have O.W. evaluated for special education. ROA.2575; ROA.176-177; ROA.2576:20-25; ROA.2577:1-2; ROA.3036-3037.

II. O.W. Attends Private School for Four Years at Parent Expense.

After his unsuccessful year in kindergarten at Nottingham, O.W.'s parents paid for O.W. to attend first and second grade at Rainard, (2010-2011 and 2011-2012), a private school for gifted children located in the District. ROA.956; ROA.2026. O.W. had behavioral problems while at Rainard but the parents did not know they could ask for a public school special education evaluation from the District. ROA.2576:2-6. In November of 2010, while O.W. was at Rainard, Ms. W. wrote the District to inquire about a potential small school for gifted children that she had heard the District might create. She asked about handling special emotional and behavioral needs in addition to academics. The District wrote back about the gifted issue, but did not address special emotional and behavioral needs. ROA.1642-1643. Later, the District confirmed O.W. would be considered gifted. ROA.1647.

O.W. threatened suicide in the spring of his second grade year (2011-2012) at Rainard. ROA.2110; ROA.1009-1010. This led to his evaluation by Dr. Susan Rosin in May of 2012. ROA.996-1007. Dr. Rosin confirmed that O.W. was intellectually gifted (IQ 135). ROA.999. She explained his emotional difficulties as ADHD/Combined Type, Oppositional Defiant Disorder (ODD) and Mood Disorder. ROA.1006. Dr. Rosin reported that O.W. showed "chronic" symptoms of sadness, anxiety and anger, reported he was not getting along with the majority of his peers and sometimes entertained passive thoughts of suicide. ROA.1005.

Subsequently, O.W. attended third grade (2012-2013) and fourth grade (2013-2014) at The New School in the Heights. ROA.956. The New School was a therapeutic private school for children with social-emotional challenges. It was located within the Houston school district. ROA.2312:17-25. Children at The New School suffered from some type of disability. Dr. Powell-Williams worked at The New School. ROA.2316:18-21; ROA.2312:17-24. She provided O.W. counseling services (both individual and group) on a daily basis. ROA.2315:17-25; ROA.2316:1-11. Even though O.W. was in classes of just six to eight children at The New School, O.W. had behavioral problems and would become overwhelmed. ROA.2575:7-14; ROA.2324-2324. Solutions included having O.W. do 1:1 work with a teacher or have shorten days and then work back up to full days. ROA.2349-2351. During the time O.W. was at The New School, his parents did not know they

could ask the Houston school district to evaluate O.W. for special education services. ROA.2575:7-19. From the end of second grade and beginning of third grade forward and continuing to the time of the administrative hearing, O.W. was also under the care of Dr. Robbi Wright, Psychiatrist. ROA.2517.

O.W.'s final report card from The New School indicates that he only sometimes met behavioral requirements, did not work well without supervision, had difficulty accepting comments on his performance from others and trouble organizing his materials and assignments. ROA.2033. He did pass all fourth grade academic subjects. ROA.2033.

III. Parents Seek Help as O.W. Re-Enters Nottingham in Fifth Grade.

Before O.W. went to fifth grade in the District, his parents did not know they could ask the District to evaluate him even before he began school. ROA.2576:20-23. Still, the parents wanted help. So, when she registered O.W. for school, Ms. W. provided Nottingham staff with an August 7, 2014 letter from O.W.'s psychiatrist, Dr. Wright, in an effort to get an expedited section 504 meeting. ROA.1707. (The parents asked for 504 because their daughter had a 504 plan. ROA.3036:9-14; ROA.2575.) Dr. Wright's August 7, 2014 letter explained O.W. was diagnosed with ADHD, Combined Type and would benefit from 504 accommodations. ROA.1014. Ms. W. did not seek special education at that time as she did not know O.W. was eligible for special education. ROA.3036-3037.

Since O.W. was coming from a therapeutic school, before school began, Ms. W. called Ms. Briedenthal, O.W.'s fifth grade teacher. She also gave her a note at "Meet the Teacher" asking the teacher to call her. ROA.2611. Ms. W. also brought O.W. up to the campus, introduced him to assistant principal Sherri Folger, and tried to make him comfortable there. ROA.3043.

Assistant principal Sherri Folger saw Dr. Wright's letter within the first two weeks of school; "before school began or around the time." ROA.2232, ROA.2242; ROA.1014.[2] Ms. W. recalled giving Dr. Rosin's evaluation to Ms. Folger the "first month" of school, and providing her with Dr. Powell-Williams' contact information. ROA.3066:6-12; ROA.3067:2-17. Although Ms. Folger agreed that the District was "on notice" of O.W.'s disability because she had Dr. Wright's letter as school began, Ms. Folger never provided the parents with any special education consent evaluation form or information about special education until January 2015. ROA.2263-2264.[3]

IV. O.W. Returns to Regular Fifth Grade at Nottingham.

The District staff knew O.W. was having difficulty right away because he constantly violated the student code of conduct. ROA.2021-2023. O.W. engaged in

[2] Although Ms. Folger told Ms. W. that the letter had been lost and Ms. W. provided her another copy, Ms. Folger apparently either found the original or had another copy within the first two weeks of school. ROA.3038:20-25 to ROA.3039:1-11.

[3] Folger explained that even if a parent brings a private evaluation to the school district, it was not the policy of the district to give the parents a Notice of Procedural Safeguards explaining about special education. ROA.2246-2247.

physical aggression at least one or two times per week, even on the first day of school. ROA.2021-2023; ROA.1833. From then until March 2015, O.W. had 14 referrals for noncompliance, profanity and threats, leaving class without permission, touching teacher materials without permission, and physical aggression toward adults. ROA.1833. O.W. was suspended 11 days; 8 out of school and 3 in-school suspensions. ROA.2021-2023. This does not include days O.W. was simply sent home. The District concedes that in the fall of 2014 O.W. immediately began having behavioral problems, even on the first day. ROA.2023.

On the very first day of school, Principal Moore conferenced with Ms. W. because O.W. had drawn violent pictures including images of murder and death. ROA.2023; ROA.180, ¶¶28, 29, 30, RE at Tab 6. During the first few days, Ms. W. talked a lot to Principal Moore and Assistant Principal Folger; she told them O.W. had transferred from The New School, that it was a therapeutic school, that he had difficulty with transitions and depression and had been diagnosed with Oppositional Defiant Disorder, Mood Disorder, Anxiety and Depression. ROA.3038:6-15; ROA.3040:11-15.

Ms. W. promptly signed releases on August 26, and again on August 29, 2014, so the District could obtain information from The New School. ROA.2021; ROA.2029; ROA.2023; ROA.2264:15-16; ROA.3066. She arranged for O.W.'s longtime counselor Dr. Powell-Williams to be available to talk with school staff.

ROA.3066-3067; ROA.1707. Although the District staff never called her, Dr. Powell-Williams called and spoke with Principal Moore before October 1, 2014. ROA.3067; ROA.2019.

The parents were clearly seeking help. After school began in late August, Ms. W. was frequently up at Nottingham, sometimes up to five times per week, would sit at lunch with O.W., and offered to provide help. ROA.3043:14-25; ROA.1707.

By September 23, 2014 Ms. W. had also filled out a Family History Form for the District in which Ms. W. explained O.W. had disruptive and impulsive behavior, anxiety, depression and other problems. ROA.2024-2028. She provided a list of his medications as well. ROA.2026.

By October 2014, O.W.'s behaviors were occurring four out of five days, severely interrupting the teaching and learning of students on a daily basis. ROA.2019.

Before October 1, 2014, Dr. Powell-Williams was concerned O.W. was beginning to regress at Nottingham. She spoke with Principal Moore and asked if SBISD was going to do a special education evaluation of O.W. ROA.2359:25 – 2360:1; ROA.2351:21-25-ROA.2352:3-10; ROA.2356; ROA.2019.

By October 1, 2014, the District knew of O.W.'s problems, had Dr. Wright's letter, Dr. Rosin's evaluation from 2012, (identifying O.W. as gifted with various disabilities), and Dr. Powell-Williams' query with Principal Moore about a special

education evaluation. ROA.2019. In fact, the October 1, 2014 referral for school psychological assistance states that had the school followed its code of conduct, O.W. "would be suspended out of the classroom daily." ROA.2019. Although offered to them, staff did not actively seek assistance from Dr. Powell-Williams. ROA.2327:5-13; ROA.3067:9-17.

V. District Offers §504, Delays Special Education (10/01/14)

Although the parents had hoped their August 2014 letter from Dr. Wright would expedite a 504 plan for O.W., the District delayed holding any Section 504 until October 8, 2014. ROA.2001. By October 8, 2014, O.W. was already failing all content classes in his fifth grade classroom with Ms. Breidenthal and cursing out his teacher daily. ROA.2002; ROA.2001; ROA.1886; ROA.2019. O.W. participated in class only when he was awake, cursed the teacher out daily, sometimes stood on his chair and shouted, called other students names and left the classroom without permission. ROA.2002. Behavior interventions had been inconsistent. ROA.2002. Parents of other students had even called the school concerned about the impact to their children of O.W.'s behavior. ROA.2002.

Yet, at the October 8, 2014 meeting, the District refused Ms. W.'s oral request for a special education evaluation. ROA.2577:9-25; ROA.1970. So, O.W.'s parents paid the Monarch Diagnostic Clinic to evaluate him. Monarch completed its evaluation December 2, 2014, issuing a written report in February 2015. ROA.1049-

1080. Through the end of the first grading period, O.W. continued to fail math and reading, and barely passed three of his other four courses. ROA.1886.

VI. O.W.'s Continued Time in Regular Fifth Grade (Second Nine Weeks).

During the second nine weeks of his fifth grade year, O.W. was on a Section 504 plan but was failing classes including Language Arts, Mathematics, Reading and Social Studies at the end of the second nine weeks. ROA.1114; ROA.1886. Despite the Section 504 plan, O.W. continued to have disciplinary problems:

- On October 20, 2014, O.W. refused to line up and left the cafeteria. ROA.2021-2022.
- On November 4, 2014, O.W. received a one day in-school suspension for mocking and swearing at his teacher. ROA.2021.
- On November 6, 2014, O.W. slept most of the morning. ROA.1657.
- On November 8, 2014, O.W. slept in class all but 2 hours of the day, yet managed to get all of his work done. ROA.1658.
- On November 10, 2014, O.W. was very disruptive, refused to do any work, and teased a classmate until she cried. ROA.2021.
- O.W. had two incidents on November 24, 2014; he swore at a student, left the room, played with the teacher's computers, threw paper clips at other students and crawled under a cabinet. ROA.2021.

By this time, O.W. had a total of two out of school suspensions and various referrals to the principal's office. ROA.2021-2023.

In mid-November, 2014, Ms. W. signed a form declining all Gifted & Talented services for O.W. ROA.2031. She was concerned that O.W. couldn't handle transitions and a bus ride necessary to participate in same. ROA.2031.

By January 13, 2015, O.W. was suspended two days for hitting a coach and three days for hitting his teacher. ROA.2021. As of January 13, 2015, O.W. had five formal out-of-school suspensions totaling 8 days and three in-school suspensions covering 3 days for a total of 11 days. ROA.2021-2023. In addition, he left on other days when his parents were called to pick him up or Ms. W. checked him out of school. ROA.2261-2262.

O.W.'s anxiety was "very high" during the fall semester, he complained of stomach aches, was generally unwilling to go to school, was chewing on his shirt collar and sleeve, and would go several days without sleeping at night. ROA.1710. Dr. Powell-Williams met with O.W. biweekly or weekly while he was at Nottingham and was concerned that he was regressing, was more anxious, more withdrawn, and unwilling to comply. She thought he was losing some of the skills he had gained at The New School. ROA.2329:21-25; ROA.2330:1-25; ROA.2331:1-9.

The SEHO concluded that the preponderance of the evidence showed the District had wrongly delayed the special education evaluation. It had ignored the request for help from Dr. Wright (August 7, 2014), refused Ms. W.'s oral request for a special education evaluation on October 8, 2014, and ignored Dr. Powell-

William's suggestion to Principal Moore that O.W. have a special education evaluation, all while fully aware O.W. was failing classes and having significant behavioral problems. ROA.201, ¶¶103-108; RE at Tab 6.

VII. District Evaluates February/March 2015 (Third Six Weeks)

By January 15, 2015, O.W. had received multiple out-of-school suspensions and had recently assaulted teachers. ROA.1969. At a 504 meeting held on January 15th, Ms. W. requested that O.W.'s special education evaluation be expedited. ROA.2000. This request was ignored by the District. ROA.2000.

The District failed to identify O.W. as a student eligible for special education and with Emotional Disturbance until February 24, 2015. ROA.1775; ROA.1793. ROA.1815-1841. In its Full Individual Evaluation of February 24, 2015, the District noted that O.W.'s "current report card indicates failing grades" and that O.W. had 14 office referrals for noncompliance, profanity/threats, leaving class; touching teacher's materials and physical aggression. ROA.1799. Then, the FIE team recommended O.W. receive a highly structured, predictable environment with positive individual attention with opportunity for physical movement; direct instruction in the areas of self-regulation and behavioral control; a safe place to cool off; social skills instruction; and accommodations to assist with executive functioning. ROA.1840-1841. Notably, the District's own FIE found O.W. was "personable and enjoyable when working one-on-one." ROA.1833.

VIII. O.W. Attends TOTAL; Corrected Grades (Jan. 26, 2015-Mar. 13, 2015)

While waiting for his special education evaluation to be completed since it was not expedited, O.W. moved to the TOTAL program, the district's disciplinary program. ROA.1096. O.W.'s parents did not know TOTAL was a disciplinary program. ROA.2584:14-16; ROA.2191:25 – ROA.2192:1-4. O.W. attended the TOTAL program from January 26, 2015 through March 11, 2015, a total of 35 school days. ROA.1715. O.W. was given A's and B's while in the TOTAL program even though he was allowed to **not** complete assignments. ROA.2862. At various times, unbeknown to his parents, O.W. was in an isolation room in TOTAL. ROA.2560:1-4.

IX. O.W. Assigned to Ridgecrest/AB Program (3/23/15 to 5/29/15)

A month after O.W.'s FIE was done, and an IEP created, he was finally assigned to special education in the Adaptive Behavior Program at Ridgecrest Elementary School (Ridgecrest/AB) on March 23, 2015. ROA.1775-1808. The AB program was to provide O.W. with 30 hours of school each week. ROA.1146. The IEP, dated March 11, 2015 provided that O.W. would have six goals:

> Reading: Making inferences in reading
> Writing: Organizing writing.
> Mathematics: Obtain 70% accuracy on 3/5 assignments.
> Science: Explain concepts orally.
> Social Studies: Identify main concepts
> Behavior (Goal 6.1): Choose a replacement behavior.
> Behavior (Goal 6.2): Express emotions appropriately and refrain from threats/profanity.

Behavior (Goal 6.3): Remain in designated area.

ROA.1135-1136.

The March 2015 IEP provided that O.W. would have reduced assignments in math, encouragement for classroom participation and support for the general education teacher. It also provided that O.W.'s behavior would be managed and measured by: 1) clearly defined limits; 2) frequent reminders of tasks; 3) positive reinforcement; 4) frequent eye contact; 5) frequent breaks; 6) private discussions about behavior; 7) supervision during transition interventions; 8) follow behavior intervention plan; 9) LSSP to assist with Behavior Intervention Plan; and 10) provide O.W. access to a cooling-off area. ROA.1139.

Despite his gifted intellect, O.W. was not able to complete the fifth grade curriculum in the Ridgecrest/AB classroom. ROA.2939:20-25-2940:1-19. The reason was his behavior. ROA.2940. O.W. failed fifth grade math, despite reduced assignment. ROA.2062.

O.W. fared no better behaviorally. He did not meet any of his three behavior goals. ROA.1969. Staff reported in writing (and later confirmed in their testimony to the SEHO) that O.W.'s progress was not sufficient at that time for O.W. to reach his behavior goals by the next annual ARD committee meeting date of March 11, 2016. ROA.1894-1895; ROA.3197. By the end of the year, his report card showed overall unsatisfactory conduct. ROA.1887-1888; ROA.2062.

O.W. began attending the Ridgecrest/AB program on a part-time basis in early May, 2015. ROA.2939. He was so regressed in his therapy that it was difficult for him to learn or even go to school. ROA.2363:16-24; ROA.2360:21-25 through ROA.2361:1. O.W.'s anxiety increased, he tried to avoid going to school, and he picked at his skin and ears until they bled. ROA.1712.

Ms. Martir later testified that of 40 days O.W. spent in the Ridgecrest/AB classroom, he exhibited one of the targeted behaviors on 33 days. O.W. did not improve in behavior; he stayed at Level 1, the lowest behavioral level. ROA.2936:4-7; ROA.2939:10-19. At the end of fifth grade, O.W. exhibited overall unsatisfactory conduct. ROA.208, ¶123, RE at Tab 6.

O.W.'s nonacademic benefit at Ridgecrest/AB was *de minimis*. He was subjected to numerous time-outs, at least eight physical restraints and four police interventions. ROA.3068:8-15. School began at 7:30 a.m. ROA.3177:24. O.W. had a late start of 9:00 a.m. and then a shortened (3 hour) day without ARD committee consideration or approval. ROA.1917-1945; ROA.1713. The District denied O.W. a commensurate school day in the AB program for at least the last 20 days of school. ROA.3191.

On or about May 6, 2015, the District developed a "20 day plan" for O.W. to get him through the school year, which would provide him first a late start and later just 3 hours of school per day. ROA.1955; ROA.1961. Due to O.W.'s heightened

anxiety, the "20 day plan" was implemented from May 6, 2015 to May 29, 2015. ROA.1962. It was a staff member, Ms. Teater's, idea to have a shortened school day because things were going so badly that Ms. W. wanted to pull O.W. out of school altogether during this "crisis" time. ROA.3057:2-10. Police had been called four times to Ridgecrest and twice to Nottingham. ROA.3068:8-15.

The District failed to hold any ARDC about reducing O.W.'s time to a half-day program. ROA.3057-3058. The idea came up in an informal "hallway" meeting at Ridgecrest. ROA.3069:16-25 – ROA.3070:1-8.

X. Parents Opt for Private School.

Ms. W. testified that she mentioned the idea of outside placement several times to school staff. ROA.3060:4-20; ROA.3061:20-25 through ROA.3062:1-5. At the same "hallway" meeting at Ridgecrest/AB to discuss O.W.'s lack of success there, Ms. W. asked about the District paying for a private school. Staff told her that "we don't like to do that." ROA.3070:9-22. In the spring of 2015, Ms. W. again mentioned private school when Ms. Martir said that O.W. was behind in math and that the family should get him math help and also he needed to heal relationships with teachers. ROA.3059:20-25. When staff said O.W. needed math tutoring, his parents dutifully went to Fusion Academy to obtain math tutoring for O.W. That is how they were lead to have O.W. attend Fusion Academy for the summer of 2015. ROA.3060:1-3 and 20-21; ROA.2600:4-23.

In the summer of 2015, Ms. W. spoke to staff member Ms. Fernandez and told her that O.W. was doing really well at Fusion Academy. Ms. Fernandez said O.W. could be moved back to a general education placement. But Ms. W. explained to Ms. Fernandez that she felt O.W. was special education, needed more support and that moving him from Fusion Academy would be too difficult. Also, since she had been told several times that "We don't like to do that," as far as private school, Ms. W. told Ms. Fernandez in that conversation that she would hire an attorney then and ask that way. ROA.3061-3062.

On August 14, 2015, in response to an email from SBISD in July, 2015, Ms. W. wrote the District stating: "Sorry for the late notice. O.W. will not be attending Spring Forest in the fall of 2015." ROA.1687.

O.W.'s parents correctly understood the District's only offer of programming for O.W. for 2015-2016 was an AB program at Spring Forest Middle, a program like the failed Ridgecrest/AB. The family didn't want to move him out of Fusion Academy, which appeared to be working. ROA.2602:19-25. O.W.'s parents did not know that they could ask for an IEP meeting to talk about the district paying for Fusion Academy. ROA.2603:1-10.

XI. The 2015-2016 School Year at Fusion Academy (Sixth Grade).

O.W. attended Fusion Academy during the 2015-2016 school year, while the hearing in this matter was pending. The District proposed no different program for

O.W. other than the March 2015 IEP that would return him to an AB program, albeit one at Spring Forest Middle School. ROA.2105.

Fusion Academy utilizes a 1:1 teaching strategy approach. ROA.1190-1209. Teachers report on the child's day on a nightly basis. ROA.2641. It serves students without disabilities and with disabilities. ROA.1207. Classes are year-round, so students can take fewer classes at a time, often just three. ROA.2638; ROA.2628-2630. (For example, O.W. began in the summer of 2015. ROA.2637.) There is a special education coordinator on each campus. ROA.2637. The school uses a formalized individual plan for each student. ROA.2639. Fusion Academy focuses on helping the children build relationships with their teachers. ROA.2628-2630.

At Fusion Academy, O.W. did well. ROA.2648-2649; ROA.2640. He was not suspended during summer of 2015, or the entire 2015-2016 school year. ROA.2652. Fusion Academy worked with Dr. Powell-Williams to support O.W. ROA.2654-2655. Fusion Academy was appropriate for O.W. because it met his academic needs and his behavioral concerns. ROA.2710:9-23.

O.W.'s English teacher, Mr. Hernandez described working with O.W. ROA.2382-2403. He explained that working with O.W. even in a one-to-one setting, O.W. has difficulty communication how he is feeling and Mr. Fernandez works with O.W. if he is feeling down. ROA.2400. O.W. was not restrained at Fusion Academy. ROA.2421.

Special education administrator Joni Warren testified that the District did not inform parents about non-public schools, and did not pay for them unless they were required to do so. ROA.2607:6-14; ROA.1431-1432; ROA.1435:8. ROA.1442:4-5; ROA.1447; ROA.1450. O.W.'s parents were not told about the non-public schools list. ROA.1448-1449. The District has no placement that provides 1:1 instruction from a teacher all day long, like Fusion Academy does. ROA.2606; ROA.1459:19-24; ROA.1460:2-12.

XII. The Due Process Hearing Complaint and Decision.

On October 28, 2015, O.W.'s parents requested a special education hearing. ROA.170. An amended due process request was filed on February 22, 2016 which clarified that O.W. was in Fusion Academy at the expense of his parents. ROA.170. The hearing was held on May 24-26, 2016. ROA.173. After listening to all of the evidence, and reading the transcripts and exhibits, the SEHO issued a detailed 108 page decision on August 3, 2016. ROA.165-273, RE at Tab 6.

The SEHO concluded that the preponderance of the evidence established that the District knew of O.W.'s ADHD-Combined Type diagnosis in August 2014, and his behavioral difficulties since he was a toddler. ROA.201, ¶103, RE. at Tab 6. She further concluded that by October 1, 2014, the District was aware of Dr. Rosin's diagnoses of O.W. as a child with ADHD, Mood Disorder, and ODD. ROA.201, ¶104, RE at Tab 6.

The SEHO decided that Ms. W.'s request for a special education evaluation was made and rejected at the Section 504 committee meeting on October 8, 2014. ROA.201, ¶105, RE at Tab 6. The SEHO concluded that the District should have suspected that O.W. had areas of disability that had not been evaluated and for which he might be eligible for special education and related services. ROA.201, ¶106, RE at Tab 6. The SEHO held that despite being aware of O.W.'s medical diagnoses by at least October 1, 2014, the District did not evaluate O.W. in all areas of suspected disability until February 2015 and did not offer him special education and related services until March 23, 2015. ROA.201, ¶107, RE at Tab 6.

On the basis of these facts, the SEHO determined that "the District did not timely refer Student for a special education evaluation." ROA.201, ¶108, RE at Tab 6. The SEHO concluded, under these unusual facts, that O.W.'s return to the District for the 2015-2016 school year could have resulted in serious emotional harm to him as he would have been placed in an AB program. According to Dr. Powell-Williams, Student was so regressed in his therapy after some time at Ridgecrest/AB that it was difficult for him to learn or even go to school. ROA.189-190, ¶82; ROA.206-207, ¶117(j)(k)(n); ROA.231, ¶24; ROA.248-249; ROA.269, ¶33; ROA.268-269, RE at Tab 6. The SEHO found that Dr. Powell-Williams had testified that returning O.W. to school in the District under any of the programs provided to him in 2014-2015 would be very detrimental to Student's continued developmental growth, both academically and socially. ROA.105, ¶28, RE at Tab 6.

The SEHO found that O.W. was receiving an academic benefit from Fusion Academy and a nonacademic benefit from the opportunity to interact with both nondisabled and disabled peers, an opportunity denied him at Ridgecrest/AB. ROA.266-267, RE at Tab 6. She concluded that Fusion Academy was appropriate for Defendant O.W. because it was personalized, used a Mastery Learning Model, teachers were trained, classes met State and Common Core standards, there was therapeutic support, he had the opportunity to do his homework at Fusion rather than at home, and he spent about 6 hours a day at school four days a week. ROA.263-269, at ¶¶1-33, RE at Tab 6. O.W. looked forward to going to school and as of the end of the May 2016 hearing time, was doing well at Fusion Academy. The SEHO found removing O.W. from Fusion Academy would be detrimental to his emotional and academic development, especially given the District's inability to offer him a similar program. ROA. 269, ¶28, RE, at Tab 6.

The SEHO specifically found that:

The District did not fulfill its Child Find obligation as to Student.

The District did not provide Student with a FAPE in 2014-2015 including a commensurate school day for the last 20 days of the 2014-2015 school year.

The District developed an appropriate IEP for Student [but] the District failed to fully implement the IEP as written.

ROA.270, ¶¶6, 7, 12, 13, 14, RE at Tab 6.

The SEHO ordered the District to reimburse the parents $50,250.00 for the cost of the 2015-2016 year at Fusion Academy. As compensatory education for the 2014-2015 school year, she ordered the District to pay for another year at Fusion Academy. ROA.269, ¶¶29-33, RE at Tab 6.

STATEMENT OF PRIOR PROCEEDINGS

On August 30, 2016, Appellants filed a complaint requesting the District Court to reverse the SEHO's Decision. ROA.15. O.W. filed a complaint for fees and the two cases were consolidated. ROA.3295. Thereafter, the parties submitted motions for summary judgment. ROA.3558, ROA.3644; ROA.3683.

Meanwhile, O.W. remained at Fusion Academy, and the SBISD, began paying for O.W.'s program there during the 2016-2017 school year. On January 31, 2017, O.W. filed for a routine maintenance order so that the District would pay for Fusion Academy placement throughout the course of these proceedings. ROA.3482-3488. Unfortunately, O.W. had a mishap, starting a fire at Fusion and was placed on leave until he could obtain therapeutic help. His parents placed him at Little Keswick School, a residential program. ROA.3715; ROA.3795; ROA.3873. After an evidentiary hearing on September 19, 2017, the Court found that Plaintiffs had altered the proposed program at SBISD to include one-on-one instruction and thus found the SBISD program, as altered with one-on-one instruction was the most comparable program to the Fusion Academy program. ROA.4025-4026 at Tab 5.

The parties filed cross-motions for summary judgment. On March 29, 2018, the district court ruled for O.W. sustaining the SEHO's decision in all respects. ROA.4025-4141, RE at Tab 3. The district court found that despite O.W.'s "constant violations of the student code of conduct," the District delayed his special education evaluation, violating Child Find. ROA.4135, RE at Tab 3.The Court noted that by October 8, 2014, the District knew of O.W.'s problems with the district's regular curriculum, had Dr. Wright's letter stating that O.W. suffered from ADHD, had Dr. Rosin's 2012 evaluation identifying O.W. as gifted with various disabilities, had received Dr. Powell-Williams' query about a special education evaluation and had received a request from Ms. W. for a special education evaluation. ROA.4135, RE at Tab 3. The district court also found the District had materially failed to implement O.W.'s IEP, using restraints, time-outs, and police to control the child instead of the positive calm approach required by the IEP. ROA.4136-4138, RE at Tab 3. Concluding that O.W. had received an appropriate program at Fusion Academy, the district court ordered the District to reimburse the parents for the 2015-2016 school year up to $50,250.00 and to pay for one year of Fusion Academy as a remedy for the 2014-2015 school year. ROA.4138-4142, RE at Tab 3.

The District timely appealed to this Court. ROA.4897-4898; RE at Tab 2. O.W. did not appeal any portion of the district court's order and decision. Attorneys fees and costs remain pending in the district court. ROA.4151-4962.

SUMMARY OF ARGUMENT

The District has failed to establish in any way that the district court committed clear error. The district court correctly held that the District unreasonably delayed O.W.'s referral for a special education evaluation, despite constant violations of the student code of conduct, failing grades, private evaluations describing disabilities of Mood Disorder, Depression, ADHD, a history of psychiatric medications and prior attendance at a therapeutic school.

The district court also correctly held that after the district placed O.W. into special education at the district's Ridgecrest/AB program, the District materially failed to implement the positive behavioral approaches of O.W.'s IEP. The District repeatedly used time-outs, restraints, and called the police on four occasions. O.W. regressed. On May 6, 2015, staff recommended a "20 day plan," giving O.W. a late start (9:00 instead of 7:30). ROA.1955. On May 18, 2015, staff stated: "In order to "survive" the last 11 days of school, let's shorten his day from 9 to noon." ROA.1955. O.W. was denied a FAPE.

In contrast, the parent's unilateral placement, Fusion Academy worked. The focus was on relationship building with teachers, not time-out, restraint and police.

As the District unreasonably delayed O.W.'s special education referral and then materially failed to implement his IEP, the Court should sustain the district court's remedy of reimbursement and compensatory education at Fusion Academy.

ARGUMENT

I. Standard of Review

The court reviews the district court's decision *de novo*, as a mixed question of law and fact, but reviews its findings of underlying fact, for clear error. *Krawietz v. Galveston Indep. Sch. Dist*., 900 F.3d 673, 676 (5th Cir. 2018); *E.R. v. Spring Branch Indep. Sch. Dist*., 2018 U.S. App. LEXIS 33407 (5th Cir. 2018), citing to *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F*., 118 F.3d 245, 252 (5th Cir. 1997). The clear error standard of review precludes reversal of a district court's findings unless the court is left with a definite and firm conviction that a mistake has been committed. *Houston Indep. Sch. Dist. v. V.P*., 582 F.3d 576, 583 (5th Cir. 2009).

II. The District Court Correctly Found the District Denied O.W. a FAPE, Including an Unreasonable Delay of Child Find.

On August 25, 2014, O.W.'s very first day of fifth grade in the district, he drew violent pictures with images of murder, and death. ROA.1857. The next day he swore, threw items, and cussed at his teacher and principal. ROA.1857. Ms. W. made extensive efforts as school began to explain O.W.'s needs to the district, including bringing them Dr. Wright's letter, signing releases and giving the school permission to work with Dr. Powell-Williams. ROA. 2024-2028, 3067, 2019, 3066-3067; ROA.3038:6-15; ROA.3040:11-15; ROA.180, ¶¶28-29, RE at Tab 6.

Although the District knew O.W. was re-entering public school from a therapeutic school, had multiple disabilities, was under the care of a psychiatrist and

counselor, and constantly violated the school code of conduct, the District did not begin to serve O.W. through special education until March 23, 2015. The District refused Ms. W.'s October 8, 2014 oral request for a special education evaluation at made at a Section 504 meeting. ROA.2577:9-25; ROA.2019. The District failed to even refer O.W. for a special education evaluation until January 15, 2015, after he hit his coach and assaulted his teacher. ROA.2000. Despite the referral, the District ignored Ms. W.'s request that O.W.'s evaluation be expedited. ROA.2000.

Thus, from August 25, 2014 until March 23, 2015, O.W. was constantly violating the student code of conduct and was without special education. The district court found that the District had sufficient information by early October, 2014 to start a special education evaluation and its delay was unreasonable even allowing it the full time permitted to conduct the evaluation. ROA.4139, RE at Tab 3.

Congress included the IDEA's Child Find provisions to ensure children access to special education. Children with behavioral issues, like O.W., were one of the very groups of children the IDEA is designed to help. The starting point for that assistance is Child Find.

The IDEA's Child Find provision imposes on every local educational agency an affirmative duty to have in place policies and procedures to locate and timely evaluate children with suspected disabilities in its jurisdiction. This includes children who are suspected of being a child with a disability and suspected of being in need

of special education even though they are advancing from grade to grade. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.311(a)(c)(1). *Krawietz v. Galveston Indep. Sch. Dist*., 900 F.3d 672 (5th Cir. 2018. The Child Find duty belongs *only* to the school district. *Krawietz,* at 677 ("…the IDEA imposes the Child Find obligation upon school districts, not the parents of disabled students.")

This Court has explained that Child Find is "triggered" when the local educational agency has reason to suspect the child has a disability and reason to suspect that the child needs special education services to meet the needs of that disability. School districts must do so within a reasonable time after the district is on notice of facts or behavior likely to indicate a disability. *Krawietz,* at 676-677. When a hearing officer considers a Child Find violation, there is a two-part test. First, did the district have reason to suspect the child had a disability and special education services might be needed. Second, did the district evaluate the student within a reasonable time after forming the suspicion or being on notice. *Krawietz,* at 676-677; *El Paso Indep. Sch. Dist. v. Richard R*., 567 Supp. 2d 918, 949-50 (W.D. Tex. 2008). This Court in *Krawietz* explained that there is no one factor that places a school district on notice. This Court upheld the district court's view that the student's academic decline, hospitalization and incidents of theft "taken together" should have led the school district to suspect her need for special education. *Krawietz,* at 677.

In O.W.'s case, like the *Krawietz* court, the district court considered a number of factors "together":

> By October 8, 2014, SBISD knew of O.W.'s problems with SBISD's regular curriculum, had Dr. Wright's letter stating that O.W. suffered from ADHD, had Dr. Rosin's 2012 evaluation identifying O.W. as gifted with various disabilities, had received Dr. Powell-Williams' query about a special education evaluation and had received a request from Ms. W. for a special education evaluation. SBISD also admits that SBISD had conducted regular education interventions with O.W. prior to this date. ROA.4135; RE at Tab 3.

The school district gives no valid reason for waiting to refer O.W. for a special education evaluation because there simply is none.

The district court correctly cited to the requirement of an expedited special education evaluation. 34 C.F.R. § 300.534 provides that a child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action. The basis for knowledge is simple – did the parent express concern or request an evaluation or did a teacher or other personnel express concerns about behavior suggesting a need for special education. Here, both were true. The District contends that O.W. was not proposed for discipline but this is ludicrous. O.W. was suspended for behavior on numerous occasions; he had 14 referrals and could have had more; staff indicated that his conduct was so persistently contrary to

the student code of conduct that he could have been suspended daily. ROA.2021-2023; ROA.2000. Both parents and staff recognized O.W. needed help.

Nor is it true that the regulations were not to be utilized in Child Find matters. The opposite is true. *Letter to Combs*, 52 IDELR 46 (OSEP 2008) explains that regular education interventions (RtI) are not to be used in a way to delay assistance and that expedited evaluations are appropriate for a student not yet eligible who encounters discipline. The IDEA's regulation at 34 C.F.R. § 300.534 does not define the term "discipline." The suspensions that O.W. encountered were discipline.

The district court noted that 34 C.F.R. § 300.534 consistent with 20 U.S.C. §1415(k) required the school district to expedite the evaluation process given that O.W. was constantly violating the student code of conduct. It also noted the school district had conceded before the Court that it was able to complete regular education interventions for O.W. prior to October. ROA.4135, RE at Tab 3. Still, the district court gave the school district the benefit of the doubt, acknowledging in its assignment of remedy that Texas law allows forty-five days from consent to completion of a special education evaluation. ROA.4139, RE at Tab 3. Even with this allowance, the district court found the school district had still unreasonably delayed initiation of a special education evaluation for O.W. from October 28, 2014 to January 15, 2015 (seventy-eight days) and denied him a FAPE for 162 days or over five months. ROA.4139-4140, RE at Tab 3. The District cites to no case law

to establish that 34 C.F.R. § 300.534 is inapplicable to a Child Find matter. Appellant's Brief at 19-20. Such a position is simply untenable since the cornerstone of the regulation is to assist students who are "not yet eligible." As the district court gave the District the benefit of the doubt that it needed the full 45 school days to complete O.W.'s special education evaluation, the Court need not be concerned about the district's claim that it was deprived of sufficient time pursuant to Texas law. ROA.4139; RE at Tab 3.

The District next argues that *Dallas Indep. Sch. Dist. v. Woody*, 865 F. 3d 303, 320 (5th Cir. 2017) supports its unreasonable delay. Appellant's Brief at 21-22. The District admits the case is not squarely on point as opposed to this court's analysis in *Krawietz v. Galveston Indep. Sch. Dist*., 900 F. 3d 673 (5th Cir. 2018). Appellant's Brief at 22. *Woody* was not a Child Find case. Rather, *Woody* was a transfer student case. The school district became aware of the student's existence when it received a letter from her lawyer and a copy of the child's IEP from an out-of-state school district. *Woody* was already qualified as a special education student and was already in private school. It appears that the Woody court reduced the remedy, in part, due to the unusual facts of that case. See, *Woody* at 318-319.

This case is more akin to *Krawietz* but even more tragic. O.W. was a fifth grader in the district school with extremely severe behavioral outbursts occurring nearly daily. His behavior was severely interrupting the teaching and learning of all

students. Based on the school's code of conduct, O.W. could have been suspended daily. ROA.2019;ROA.2000;ROA.2001;ROA.1969. Although the district served O.W. as a preschooler and in kindergarten, the district failed to initially identify him as a special education student. Four years later when O.W. returned to the district from a therapeutic school, with a psychiatrist's letter, prescribed numerous medications, with private evaluations, the district still wrongly delayed referring him for a special education evaluation. Like the student in *Krawietz*, O.W. was a "returning" student. Unlike the *Krawietz* student, unfortunately, O.W.'s parents did not even realize he had been in special education as a preschooler and had not known to request special education assistance when he was failing kindergarten in Nottingham. The severity and constant frequency of O.W.'s behaviors, especially as he was returning to Nottingham for fifth grade from a therapeutic school, put the district on notice in the early part of the year.

The accrual date of the action, October 28, 2014, does not assist the District either. The district court recognized the accrual date of October 28, 2014. ROA.4134, n.4, RE at Tab 3. But the court concluded that having the child's prior psychological evaluation, opportunity to speak with Dr. Powell-Williams, his arrival from a therapeutic school, and his consistent misbehaviors, clearly put the district on notice by early October, 2014 that O.W. might have a disability and might need special education. This fact does not go away because the parents didn't know to

request their hearing sooner. It is weighed, as the district court did, in light of the child's multiple disabilities and constant violations of the student code of conduct. The District cannot lay the blame on the parents' for "not providing any current evaluations demonstrating a need for special education at the time of his enrollment." Appellants' Brief at 25. The school district bears the full responsibility for Child Find. *Krawietz*, supra at 672.

III. The District's Effort to Obscure: The Uncontested *Michael F*. Factors.

The District has briefed issues that are not before the Court, specifically, at least two of the four *Michael F*. indicators. The Fifth Circuit has repeatedly held that the four *Michael F.* factors are to be used as "indicators" and that courts are not required to consider the factors in any particular order or to give any of the factors more weight than others. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293-294, 295 (5th Cir. 2009) ("We have never specified precisely how these factors must be weighed. In practice, we have treated the *Michael F*. factors as indicators of when an IEP meets the requirements of IDEA, but we have not held that district courts are required to consider them or to weigh them in any particular way….") To distract the Court from the real issue in this case—O.W.'s complete lack of academic and nonacademic benefit, including a shortened school day for the last 20 days of fifth grade, repeated restraints, time-outs and use of police to manage his behavior, the District attempts to confuse the issues by unnecessarily briefing whether O.W.'s

IEP was individually tailored to meet his needs, whether O.W. was educated in the Least Restrictive Environment and whether the District ensured collaboration with stakeholders. Appellant's Brief at 30-31, and 32. The Court should not fall for such an approach.

Least Restrictive Environment. The District concedes that LRE is not before the Court. Appellant's Brief at 32. The SEHO found the Ridgecrest/AB program was the LRE for O.W. at the time he was placed into it. ROA. 232-233; RE Tab 6; ROA.4123-4142; RE at Tab 3. The parents had argued before the SEHO that O.W. was incorrectly fast-tracked from a regular fifth grade classroom to the Ridgecrest/AB self-contained classroom. ROA.254-256, RE at Tab 6. But neither party appealed this to the district court. ROA.15-24; ROA.3297-3004. Thus, the LRE issue is not before the Court at this time. The District's compliance with this factor does not show it provided O.W. a FAPE. *Richardson*, supra.

Individualized IEP. The District purports that whether O.W.'s IEP was sufficiently individualized to meet his gifted needs may be before the Court. Appellant's Brief at 30-31. While it is true that the SEHO characterized O.W.'s IEP as "inadequate" because of its failure to meet O.W.'s gifted needs, the district court stated that this issue didn't matter due to the failed Child Find and egregious failure to implement O.W.'s positive behavior plan and instead use restraints, time-outs and police to manage him. ROA.4124, n. 2; RE at Tab 3. The court held that this ruling

was not the basis for the SEHO's decision or the remedies awarded and that such a ruling would not change the analysis within the district court's opinion or the remedies awarded and the court did not discuss it further. Instead, the district court directed its attention to the *Bobby R.* implementation/benefit analysis. ROA.4124, n. 2; ROA.4136-4137, RE at Tab 3. *Bobby R.*, at 348-349. The District raises this argument only to attempt to divert the Court's attention from the real issues before it: did the District fail to implement O.W.'s March 2015 IEP?

IV. The District's Failure to Implement O.W.'s IEP Denied O.W. a FAPE and is Not Cured by Proving Collaboration.

Next, the District claims that because the SEHO found the program was carried out in a collaborative manner between the stakeholders, this *ipso facto* proves that the District provided O.W. a FAPE. Appellant's Brief at 32-38.[4] This is incorrect as a matter of law. Because the school district, not parents has the responsibility to create and implement an IEP consistent with the IDEA, any parental agreements to various changes do not prove that the inadequate program causing the crisis provided FAPE. *HISD v. V.P.*, 582 F.3d 576 (5th Cir. 2009). Moreover, the SEHO actually said the opposite; that is, although the stakeholders collaborated, the lack of benefit denied O.W. a FAPE. ROA.245, RE at Tab 6. That is, even though the family had discussions with school staff, met with school staff, learned about

[4] Appellant incorrectly cites to the SEHO's decision at ROA.248; RE at Tab 6.

O.W.'s program from school staff or even agreed to the 20 day plan, this simply does not overcome what the school staff failed to do: implement O.W.'s program consistent with his IEP. ROA.4137-4138, RE at Tab 3. In other words, this Court could find that the family agreed to the 20 day plan and still find that the necessity of the plan was the result of not implementing O.W.'s behavior plan as it was written.

This Court has repeatedly explained that hearing officers and courts are to use the *Michael F*. factors as indicators, rather than as a robotic formula that met at some low level or weighed as "we met three of the four" proves the provision of FAPE. The factors do not have to be equally weighed. This flexibility allows hearing officers and courts to rely upon them to determine if a child received a FAPE. With the Court's recent enunciation in *E.R. v. Spring Branch Indep. Sch. Dist*., supra, discussing the interplay between *Michael F*. and *Endrew F*., it is clear that because the district's March 2015 IEP for O.W. was not implemented as it directed, it resulted in *de minimus* benefit, falling below the *Michael F*. and *Endrew F*. standard of appropriately ambitious.

Or, as the district court explained, having already concluded the District failed the Child Find component, the District's egregious failure to conform with the IEP denied O.W. a FAPE:

> The IEP does not state that time-outs or restraints would be used as a tactic to address any of the above conduct. Based on the record, many of these strategies were not followed by SBISD. Most telling, sixteen of O.W.'s forty days in the AB program he was sent to automatic time-

> out, he was physically restrained at least eight times, and police were summoned on at least four occasions. Additionally, O.W.'s school day was shortened for the last twenty days of school, something not contemplated under the IEP. These actions are undisputedly inconsistent with O.W.'s IEP. As such, the Court agrees with the hearing officer and finds that SBISD failed to implement O.W.'s IEP. Further, the Court finds that this failure was substantial and denied O.W. the educational benefits sought under the IEP, and that such failure denied O.W. a FAPE.

ROA.4138, RE at Tab 3.

The suggestion that collaborating with parents (talking, emailing) solves a material failure to implement is ludicrous. Special education and related services must be provided in conformity with a child's IEP. 20 U.S.C. § 1401(9). The Court relies upon the statute; the statute means what it says and says what it means. *Tex. Educ. Agency v. United States Department of Education*, 2018 U.S. App. LEXIS 31553, at *11-15 (5th Cir. 2018). The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999 (2017). This Court has recently explained that the standard as to whether a child has received a free appropriate public education is an application of the *Michael F.* factors read in conjunction with the *Endrew F.* opinion. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2018 U.S. App. LEXIS 33407 (5th Cir. 2018). This Court continues to maintain the explanation of what "conformity" with an IEP means as it previously explained in *HISD v. Bobby R.*, 200 F.3d 341, 348-349 (5th Cir. 2000). That is, the material or substantial failure to

implement a child's IEP in conformity with the IEP denies a child a free appropriate public education.

In this instance, the SEHO applied the two-prong *Rowley* test and the *Michael F*. factors since the parents challenged the March 2015 IEP in their due process complaint. ROA.243-245, RE at Tab 6. In affirming the SEHO, the district court applied the two-prong *Rowley* test, *Endrew F*., *Michael F*. and *Bobby R*. ROA.4030-4131, RE at Tab 3. The district court correctly observed that neither party was actually challenging the appropriateness or adequacy of the IEP before the district court. ROA.4131-4132, RE at Tab 3. The district correctly upheld the SEHO's analysis about the adequacy of the IEP using the *Michael F*. standards since neither party appealed the SEHO's finding that the March 2015 IEP was appropriate.

In the *HISD v. Bobby R*., 200 F.3d 341, 348-349 (5th Cir. 2000) case decided post *Michael F*., this Court established a standard for determining if a child has been denied a free and appropriate public education when the allegation is that the district failed to fully implement the child's requisite IEP. In *Bobby R*., issued after *Michael F*., and before *Endrew F*., this Court explained in a case alleging implementation issues, the general standard starts by an examination of the four *Michael F*. factors but the additional factor of conformity is required by 20 U.S.C. § 1401(9). The failure to conform with the IEP factor cannot be "cured" by meeting any of the four basic *Michael F*. factors.

Analyzing the case based on the four *Michael F.* standards, the SEHO explained that the fact that the Adaptive Behavior program was administered in the LRE and the services were provided in a coordinated and collaborative manner by the key stakeholders does not overcome the lack of positive academic and nonacademic benefits. ROA.245, RE at Tab 3.

Turning to the implementation/benefit analysis of *Bobby R.*, the district court did not commit clear error. There was no mistake made. The administrative record is replete with proof that the SEHO and the district court relied upon to establish that the District simply failed to implement O.W.'s IEP. The SEHO held:

> It is undisputed that the behavioral interventions in Student's IEP were not always correctly implemented. The IEP required Ridgecrest staff to use a calm interaction style with O.W. and to minimize verbal interactions. Student was to have access to a cooling off period. Staff was to avoid power struggles. Yet Ridgecrest staff repeatedly used time-outs, used at least eight physical restraints, and 16 automatic isolations. In addition, campus police were called on up to four occasions, the last occasion being so traumatic for Student that he was placed on a 20-day plan, shortening school days, just to get him through the end of the school year. Petitioner proved by a preponderance of the evidence that Student's IEP was not fully implemented and, in fact, was modified without approval of or notification to the ARD committee. ROA.254, RE at Tab 6.

The district court examined the record and concurred that the District failed to implement O.W.'s IEP, that the failure was substantial and denied O.W. the educational benefits sought under the IEP, and so denied him a FAPE. ROA.4138; RE at Tab 3. The district court rejected the District's suggestion that the repeated

use of time-outs, summoning of police, use of at least eight physical restraints and 16 automatic isolations was consistent with a plan for calm interaction, cooling off periods, and avoiding power struggles. ROA.4138, RE at Tab 3. The district court explained that either the district's failure to follow the procedures in O.W.'s IEP were causing escalations and creating emergency situations and denying him a FAPE or the procedures in the IEP were inappropriate given the district's inability to prevent up to twelve emergency situations in forty days. Either way, the court concluded, the District denied O.W. a FAPE. ROA.4138, n.8., RE at Tab 3.

The district court explained that O.W.'s IEP included a behavioral intervention plan "focused on using positive behavioral approaches." ROA.4137, RE at Tab 3. The IEP had three goals to address three main areas of O.W.'s misbehavior: physical aggression, verbal aggression and leaving the classroom. ROA.4137, RE at Tab 3; ROA.1137-1138. The IEP included a behavioral intervention plan focused on using positive behavioral approaches to improve O.W.'s behavior in these three areas. ROA.4137, RE at Tab 3; ROA.1165-1168. For physical aggression (e.g. throwing objects, hitting, kicking, destroying school property), staff were to help O.W. learn replacement behaviors (e.g. removing himself to a cooling off area, implementing deep breathing, calming sequences, stop and think. ROA.4137, RE at Tab 3; ROA.1165. Staff were to avoid power struggles and arguments and instead offer O.W. choices, frequent/movement breaks, and

access to preferred activities. *Id*. For verbal aggression, (e.g. threats, profanity, obscene gestures, name calling), staff were to teach O.W. alternative phrases, avoid power struggles, allow frequent/movement breaks, provide access to preferred activities and a cooling-off area, and provide direct instruction on ways to verbalize discontent. ROA.4137, RE at Tab 3; ROA.1167. Again, staff were instructed to use calm interaction styles and minimize verbal interactions. *Id.* To help O.W. with his behavioral problem of leaving the classroom, staff were to provide him a visual schedule, clear rules, offer choices, frequent/movement breaks, provide access to preferred activities or a cooling-off area, and reinforce desired behaviors. ROA.1167-1168. Again, the plan required staff to use a calm interaction style and redirect O.W. back to assigned areas and remind him of his ability to access the cooling off area. *Id.*

O.W.'s IEP, and especially the behavior plan, simply does not include reliance on the use of physical restraints, time-outs and police but Ridgecrest/AB staff used those approaches. ROA.2916:12-20; ROA.2918. Ridgecrest/AB staff did not implement the IEP as written; instead, they used approaches that were directly opposite the plan. On 16 of his 40 days in Ridgecrest/AB, O.W. was sent to automatic time out. ROA.2922:4-20; ROA.3176:7-15. O.W. was physically restrained at least eight times. ROA.1917-1945. Before he went to the Ridgecrest/AB program, the parents had expressed concern about calling the police

and staff reassured them police would not be necessary. ROA.3051. Police were called on four occasions intensifying O.W.'s anxiety. ROA.220, ¶¶180-184, RE at Tab 6; ROA.3068:8-17; ROA.3052:2-3; ROA.3178:9-12; ROA.3176:19-25 – ROA.3177.

O.W. was denied a commensurate school day at Ridgecrest/AB, something not recommended at all in his IEP. On May 6, 2015, the staff recommended the "20 day" plan reducing his day by a late start (9:00, instead of 7:30 a.m.) ROA.1955. On May 18, 2015, the staff reduced it further to a three hour day in order to "survive" the last 11 days of the year. ROA.1961. O.W. was not progressing at the end of the year; his situation was getting worse.

A. The District Improperly Used Time Outs Contrary to O.W.'s IEP.

The use of "time outs," if inconsistent with a child's IEP, is a denial of a free appropriate public education. *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP, 1995). Where a child is struggling with behavioral needs, the district has an obligation to review the situation and develop an improved behavioral program. *Indep. Sch. Dist. No. 2310,* 28 IDELR 933 (MN SEA 1998). The District concedes that Ridgecrest staff used a type of "take 5" or "take 10" but claims that this is not legally considered "time out." Appellant's Brief at 35-37.

The evidentiary record reveals these were time-outs. O.W.'s Ridgecrest/AB primary teacher Ms. Martir testified that the "Take Ten" and "Take Five" were

directives from staff and the process was: "automatic isolation, automatic timeout, isolation, timeout." ROA.2920:17-23; ROA.2918:15-24; ROA.2919:8-13. Ms. Martir said that if a student refused to go to time-out, then the student would be subject to automatic time-out and then automatic isolation. Ms. Martir's testimony was that O.W. was sent to "automatic time-out" on 16 of his 40 days and that the time-outs could have even been more than one time per day. ROA.2920-2921. Ms. Martir used an impulse control system, beginning with redirection, then a warning, then two warnings and then a "time-out." ROA.2932. Time-outs were used.

Texas special education law governs the use of "time-outs." 19 Tex. Admin. Code § 89.1053(i) requires that the regular use of time-out must be addressed in the IEP. 19 Tex. Admin. Code § 89.1053(b)(3) provides that separation from other students can constitute a time-out. 19 Tex. Admin. Code § 89.1053(g) provides that "time-out may only be used in conjunction with an array of positive behavior intervention strategies and techniques and must be included in the student's IEP and/or BIP if it is utilized on a recurrent basis to increase or decrease a targeted behavior." The District's use of time-outs was contrary to O.W.'s plan that stressed a calm interaction and avoiding power-struggles. ROA.4137-4138, RE Tab at 3.

B. The District Used Restraints Contrary to the IEP.

The parties agree that O.W.'s IEP did not include restraints. ROA.2916:12-20. There is also no dispute that O.W. was restrained at least 8 times while in the AB

program. ROA.1917-1945 (District's restraint records). Citing to 19 Tex. Admin. Code §89.1053(b)-(c), the District claims that Texas state law permits the use of physical restraints in "emergency situations." Appellant's Brief at 37. Even assuming that to be true, the repeated use of restraints is an indicator of a failing program. O.W. had at least 8 "emergency situations" between March 23, 2015 and May 29, 2015, even though on some of those days he was only in school 3 hours a day. ROA.1917-1945 (District's restraint records). The repeated use of restraints – in a so-called emergency situation - can be an indicator of a program that is not meeting the behavioral needs of a student. *Richardson Indep. Sch. Dist.*, 114 LRP 9514, Dkt. 180-SE-0413 (TEA Hearing Officer Lockwood, 2013); affirmed in part, *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009) (finding IEP inappropriate for regressive behavior and failure of school to improve behavior); *Dear Colleague Letter*, 68 IDELR 76 (OSEP, 2016) (student's continued misbehavior should trigger providing different positive behavior supports); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). The IEP did not include the use of restraints *and* the use of restraints was contrary to the positive behavioral approaches cited throughout the IEP and behavior intervention plan. ROA.1000-1003. The district court explained that the repeated use of restraints was contrary to the IEP's plan of a calm approach to working with O.W. ROA.4137, RE at Tab 3.

C. District's Reliance on Police Proves a Failed Behavioral Program.

The District argues that it is permitted to use police assistance. Appellant's Brief at 37-38. The issue is not whether staff can call police when its teachers are failing to control, let alone improve O.W.'s behavior. Sixteen of forty days, O.W. was sent to automatic time-out, he was physically restrained eight times, and police were summoned on four occasions. ROA.3176:7-14; ROA.3068:8-15; ROA:2596:11-15; ROA.4138, RE at Tab 3. This is a sign of failure of the Ridgecrest/AB program. O.W.'s IEP called for the use of positive approaches, calm instruction and avoiding power struggles. Here, the IEP called for positive approaches, but instead, Ridgecrest/AB staff used time-outs, restraints and the police. While the district can call police, use time-outs and use restraints, as the district court noted, doing so only shows that the program was either not well-designed for O.W. or it was not being provided the way that it should have been and "either way," O.W. was denied a FAPE. ROA.4138, n.8, RE at Tab 3.

D. The District's Failure to Hold ARDC To Amend IEP Indicating Reduced Services Was a Failure to Implement.

The District argues that its failure to hold an ARD when it first agreed to a 20-day plan and then a three-hour plan of services for O.W. was a mere procedural misstep. It points to 34 C.F.R. § 300.324(a)(4), which allows an IEP team to amend an IEP without an actual meeting. Appellant's Brief at 34-35. The regulation does allow a parent and district to make changes to an IEP by written agreement. But

here both the parent and the school staff thought an ARD would be scheduled. It was simply never held. The "20 day" plan and the "survival" plan do not suggest progress and provision of a FAPE. ROA.1955; ROA.1961.

Ms. W. was considering pulling O.W. out of Ridgecrest/AB due to the escalating behaviors. Staff proposed a shorter school day and told her that the ARD Committee would have to approve the change, but no ARDC was ever held. Ms. W. believed the meeting would be May 22, 2015. But the brief ARD was cancelled on May 28, 2015. ROA.1962-1953; ROA.3056-3057.

Ms. W. expected an ARD, so it begs reason to suggest she agreed to change O.W.'s program through § 300.324(a) procedures. Since no ARDC convened, O.W.'s program for fall of 2015 was unclear and thus, the shortened school day was a substantive failure, not just a procedural error.

V. O.W. Received *De Minimus* Benefit Academically and Behaviorally.

The District contends O.W. received academic and nonacademic benefits during the 2014-2015 school year. Appellant's Brief at 39-44. It argues that it isn't responsible to "cure" O.W.'s behavioral problems and that O.W. made sufficient academic progress. The issue is not curing; the issue is an appropriately ambitious IEP and more than *de minimus* progress.

The Court must give deference to the lower court and to the SEHO's findings that O.W.'s academic benefit and nonacademic benefit during fifth grade were *de minimis* contrary to *Endrew F*., supra. ROA.4131; ROA 4137-4138, RE at Tab 3.

The District repeatedly suggests that O.W. improved his academic performance once his Section 504 plan began on October 8, 2014. On February 24, 2015, the staff reported O.W.'s academic performance. ROA.1114[5]. Staff reported that despite O.W.'s above average intellectual ability, he had produced "limited work all school year and currently his grades are failing." ROA.1129; ROA.1799. The report shows that O.W. was doing *worse* with the 504 plan; he was failing 3 of 4 classes by the end of 1st semester.

Subject	1st 9 Weeks -08/25-10/21	2nd 9 Weeks -10/22-12/19
Language Arts	73	64*
Math	51*	50*
Science	72	74
Social Studies	70	66*
Health Fitness/Music/Art	S/S/S	S/S/E/

Remarkably, and based on a "corrected" report card of March 26, 2015, O.W.'s *highest* grades were during the third nine weeks when he was mostly in the

[5] Language Arts includes sub-grades in Oral Language, Reading, Spelling and Writing. Health/Fitness, Music and Art issue N, S, or E grades.

TOTAL program. ROA.1186-1187. (January 6- March 13, 2015; ROA 1715). It is undisputed that O.W. was not even required to complete work in the TOTAL program and instead was allowed to spend much of his time asleep. ROA.2693:6-25-2694:1-8. Despite not attending full-time for the last 20 days of school, O.W. somehow "passed" fifth grade. He failed three of four classes during the second nine weeks. O.W. failed fifth grade math for the year. ROA.1114; ROA.1886.

Nor did O.W. make progress behaviorally. Although the District argues that he was beginning to improve, Ms. Martir testified and documented that O.W. did not meet any of his three behavior goals. And, he was not progressing at the rate necessary to meet those goals by the next review in March of 2016. ROA.1969; ROA.1894-1895; ROA.3197; ROA.1887-1888; ROA.2062. He never increased from Level 1, the lowest behavioral level. ROA.2936:4-7; ROA.2939:10-19. Police had been called four times to Ridgecrest. ROA.3068:8-15.

If O.W. had been doing so well at Ridgecrest/AB, there would have been no need for Ms. Teater to suggest a "20 day" plan. ROA.1955. Nor would staff have recommended on May 18, 2015 that "in order to survive the last 11 days of school, let's shorten his day from 9:00-noon." ROA.1961.

VI. Remedy.

The District complains the Court should reverse the district court on the remedy ordered, calling it "excessive" and a "penalty." Appellant's Brief at 44-50.

There is no legal basis to reverse the district court which carefully analyzed the remedy.[6]

O.W. is entitled to both a free and an appropriate program. 20 U.S.C. §1401(9). O.W. was denied FAPE during the 2014-2015 school year (5th grade) turbulent year in SBISD. O.W. was in Fusion Academy for the 2015-2016 school year (6th grade) at parent expense. Both years and both placements were litigated before the SEHO as the SEHO's decision was not issued until August 3, 2016. ROA.169-170, RE at Tab 6.

The district court explained that the SEHO awarded O.W. one year of compensatory education in the form of Fusion Academy tuition reimbursement ($50,250) for SBISD's violation of its Child Find duty and its failure to implement O.W.'s IEP during the 2014-2015 school year. ROA.4138, RE at Tab 3; ROA.262-269. It affirmed this award. ROA.4139-4140, RE at Tab 3. Next, the district court upheld the SEHO's order of compensatory education for one year of placement at Fusion Academy as a remedy for the 2015-2016 school year. ROA.4140-4142, RE at Tab 3; ROA.262-269, RE at Tab 6. The court explained that this was based on a finding that the district did not make FAPE available to the student in a timely manner and that O.W.'s placement at Fusion Academy was appropriate. ROA. 4138-

[6] Indeed, the district court order supplemental briefing on the question of the two-year remedy. ROA.4056. Both parties submitted supplemental briefs on this point. ROA.4108-4118; ROA.4057-4067.

4139; ROA. 4140-4142. 20 U.S.C. § 1415(i)(2)(c)(iii) allows a reviewing court to "grant such relief as it determines is appropriate" and that is what the district court awarded in this instance.

The District first argues that Fusion did not provide O.W. special education. Appellant's Brief at 44-45. But, parents are not required to find a special education school that uses IEPs when they must turn to the private market for a school. This Court recognized this common-sense approach in *Alamo Heights v. State Board of Education*: "The *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act." *Alamo Heights v. State Board of Education*, 790 F. 2d 1153, 1161 (5th Cir. 1986). Later, the Supreme Court agreed. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 14-16 (1993) ("Nor do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards . . . the 1401(a)(18) requirements . . . do not apply to private parental placements."); *Burlington Sch. Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985). This same approach was later reduced to regulation. 34 C.F.R. § 300.148(c) (stating that a parental placement may be found to be appropriate even if it does not meet state standards that apply to local educational agencies). The district court explained that at Fusion Academy, O.W. received an academic benefit from one-on-one individualized instruction and a nonacademic

benefit from the opportunity to interact with both non-disabled and disabled peers. ROA.4141, RE at Tab 3. The evidence before the SEHO showed substantial benefits to O.W. since enrolling at Fusion Academy. And, the district court explained that the Fusion Academy staff were able to "approach and handle O.W. with the calm interaction style sought by O.W.'s IEP." ROA.4141, RE at Tab 3.

The District next argues that the remedy should be reduced because the parents did not provide notice to the school of their intent to place O.W. at Fusion Academy. Appellant's Brief at 46-48. The district court explained that the reimbursement for a private school placement *may* be reduced or denied if written notice was not given. 34 C.F.R. § 300.148(d). However, the court decided such a reduction was not appropriate given the district's five month failure to provide O.W. a FAPE, and O.W.'s continued regression. The district court also agreed with the SEHO that O.W.'s return to SBISD would have been likely to result in physical or emotional harm to the child[7] given SBISD's repeated demonstration that they could not handle his educational needs appropriately. ROA.4141-4142, RE at Tab 3.

Finally, the District claims that the SEHO erred by awarding two years of remedy even though O.W. only attended the district for one year. Appellant's Brief

[7] O.W.'s long-time counselor, Dr. Powell-Williams testified that it would be detrimental for O.W. to return to the AB program. ROA.2336:10-18.

at 48-50. Presuming the District meant its complaint to be of the district court's decision, the District is incorrect. Compensatory education is a judicially created remedy. It is intended as a remedy to compensate the student for rights the district already denied because the school district violated statutory rights while the student was entitled to them. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990). One of the primary cases on tuition reimbursement, *Florence Cnty. Sch. Dist. Four v. Carter ex rel Carter*, 510 U.S. 7, 16 (1993), involved an equitable award of three years of private school tuition reimbursement for a student who qualified for special education only in the last month of the last year she attended public school and whose parents rejected the very first IEP they were offered. A student's remedy is not limited to the actual loss experienced. Even so, O.W. lost the 2014-2015 school year (5th grade) in the district and was in Fusion Academy for the 2015-2016 school year (6th grade) at parent expense. Thus, a two year remedy is very reasonable.

As to the 2015-2016 year, the Fifth Circuit explained in *HISD v. V.P.*, a parent is entitled to reimbursement for the time when the case is pending. *HISD v. V.P.*, 582 F.3d 576 (5th Cir. 2009). Here, the district court agreed with the SEHO that O.W. had been denied a free appropriate public education during the 2014-2015 school year (5-7 months). The SEHO had found O.W.'s parents were entitled to $50,250 of the tuition the parent had paid for the 2015-2016 school year. ROA.269, ¶¶28-33. To ensure a fair remedy for nearly two years of a denial of FAPE, the SEHO also

ordered the District to pay for O.W.'s placement at Fusion Academy for the upcoming year (2016-2017). ROA.271, ¶22, RE at Tab 6.

The SEHO detailed reasons why Fusion Academy was appropriate for O.W. The Fusion Academy is personalized, has self-paced classes, uses a Mastery Learning Model to ensure proficiency, uses 1:1 teaching, teachers are trained in various disabilities, homework is done at school through Homework Café, classes meet State and Common Core standards, with lessons tailored to each student, and Fusion has a Wellness program and therapeutic support. ROA.263-269, RE at Tab 6. Unlike the District's staff, Fusion staff worked with Dr. Powell-Williams to help O.W. Dr. Powell-Williams recommended O.W. have dyadic (1:1) instruction, and positive reinforcements, as physical touch and restraint was not appropriate for him. ROA.263-269, ¶¶7-8, RE, at Tab 6. The SEHO explained that Fusion Academy was working for O.W. during his sixth grade year (2015-2016):

> Removing O.W from Fusion, where he is finally enjoying academic success and a state of emotional well-being, would be detrimental to Student's emotional and academic development, especially in light of the District's apparent inability to offer Student a similar program. ROA.269, Conclusion No. 28, RE at Tab 6.

Fusion Academy provided O.W. an appropriate program of education (although not free since his parents were paying for it) during the 2015-2016 school year, O.W.'s sixth grade year. ROA.263, RE at Tab 6.

The district court agreed with the SEHO that Fusion Academy was appropriate. ROA.4141, RE at Tab 3. O.W. received an academic benefit from one-on-one individualized instruction and a nonacademic benefit from interacting with both non-disabled and disabled peers at the school. Fusion Academy staff were able to approach and handle O.W. in the calm interaction style sought by O.W.'s IEP and that he had substantial benefit from the placement. ROA.4141, RE at Tab 3.

The district court correctly awarded the remedy of the cost for the 2015-2016 school year to O.W. It held that such a reduction was not appropriate given the District's five month failure to provide O.W. a FAPE as well as O.W.'s continued regression. The Court was also very concerned that requiring O.W. to return to the District "**would likely result in physical or emotional harm to the child** given SBISD's repeated demonstration that they could not handle O.W.'s educational needs appropriately and its numerous uses of physical restraints." ROA.4141-4142, RE at Tab 6. (Emphasis added.) The district court did not err in issuing a two year remedy.

CONCLUSION

O.W. was denied a FAPE because the district failed to timely comply with its Child Find responsibility. After that failure, it did not fully implement O.W.'s IEP. The parents' unilateral placement at Fusion Academy worked for O.W. during the 2015-2016 school year. For all of the reasons explained above, the Court should affirm the decision of the district court.

/s/ Sonja D. Kerr
Sonja D. Kerr
State Bar # 24095771
Lead counsel for Plaintiffs
Hollingsworth & Zivitz, P.C.
9600 Great Hills Trail, Suite 150
Austin, TX 78759
Telephone: (512) 637-1083
Facsimile: (512) 717-5204
Email: skerr@hzlegal.com
Attorneys for Defendant-Appellee
Hannah H. and Daniel W. obo O.W.

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2018, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

I further certify that (1) the required privacy redactions have been made, 5th Cir.R.25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir.R.25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I further certify that I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Sonja D. Kerr
Sonja D. Kerr
Attorney for Defendant-Appellee
Hannah H. and Daniel W. obo O.W.

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B) and Local Rule 32.3, the undersigned certifies:

1. This Brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B)(i) because:

A. This brief contains 12,806 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because

A. This Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman font in text and 12 point Times New Roman font in footnotes.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32(a)(7)(B0(i) may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

/s/ Sonja D. Kerr
Sonja D. Kerr
Attorney for Defendant-Appellee
O.W. by next friend, Hannah W.