MISSISSIPPI DEPARTMENT OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[redacted]

Case No. D01132021-17

Petitioner,

Preston Rideout,
Hearing Officer

-against-

Rankin County School District,

Respondent.

DUE PROCESS OPINION

This matter having been brought on before this hearing officer for hearing and decision, the following are the hearing officer's findings of fact, conclusions of law, and decision:

I.

The Burden of Proof

At the administrative level, the party challenging an IEP bears the burden of proof. Schaffer v. Weast, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); and, Richardson v. ISD v. Michael Z., 580 F. 3d 286, 292, n. 4 (5th Cir. 2009).

II.

The IDEA Does Not Require Transition Plans Prior to Age 16 But The State Regulations Do Beginning at Age 14 and Transition Plans are

Required Only For Post-Secondary Goals

[redacted] testified that at the November 9, 2020, IEP meeting the November 9th letter from Maureen Long, Principal at CARES, to Ms. Amy Bullock, Rankin County SPED Director, was made known to the IEP Committee. In the letter [redacted] advised Ms. Bullock effective on or before December 18, 2020, CARES was withdrawing [redacted] as a CARES student because [redacted] was almost [redacted] and the "oldest in his class by several years;" and, CARES did not have a curriculum to meet his needs. (Tr. II, at 307-308; and, Ex. R-15, at 251). According to [redacted] when this information became known to the District, "the district had a responsibility of providing [redacted]. with the services needed." (Tr. II, at 308).

[redacted] testified CARES had created a transition plan but she didn't remember whether the IEP committee had actually discussed it or not. (Tr. IV., at 641). [redacted] said [redacted].'s transition to [redacted] School had been recommended at the November 9, 2020, IEP meeting. She also testified the issue of transition for functional skills had been raised at least a year before the November 9, 2020, IEP meeting but whether or not [redacted] School had a functional skills program was not established at the meeting. (Tr. II, at 314-317).

[redacted] said there was no need to establish at the November 9, 2020, IEP meeting whether [redacted] School had a functional skills program because "the functional skills program was already in place at [redacted] School. (Tr. II, at 317)

With regard to interventions listed in [redacted].'s Behavior Intervention Plan, Ms. [redacted] said none of those listed in the BIP were included in the transition plan for [redacted].'s transition from CARES to [redacted] School. (Tr. II, at 292). She also said the issue of elopement was not addressed in the transition plan; (Tr. II, at 292), and that she at no point

recommended that anyone from [redacted] be a part of the committee involved in developing the transition plan. (Tr. II, at 293).

"Transition Services" are defined in 20 U.S.C. §1401(34) to include those whose purpose is "to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation."

In 34 C.F.R. §300.43(b) it also provides that "Transition services for children with disabilities *may be special education*, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education." (emphasis added)

Petitioner argues the District failed to provide FAPE when it failed to create an appropriate transition plan from CARES to the District and in its failure to develop a post-secondary transition plan, since [redacted] reached the age of [redacted] during the year covered by the IEP.

As authority Petitioner cites 34 CFR §300.320(b) and R.E.B. v. Hawaii, 870 F. 3d 1025, 1027-28 (9th Cir. 2017). The only transition plans provided for by 34 CFR §300.320(b) are those concerned with "[a]ppropriate measurable post-secondary goals."

In this case the larger part of the argument is over a plan to make the transition from CARES, a private school, to a public school within the Rankin County School District. Such a transition plan may, or may not, be concerned with "post secondary goals" and, if not, it is not required by 34 CFR §300.320(b)

The R.E.B. v. Hawaii opinion has been withdrawn at R.E.B. v. Hawaii, 886 F. 3d

1288 (9th Cir. 2018). Later the District of Hawaii Court noted:

> The Decision correctly noted that the IDEA does not specifically require a plan to ease the transition between placements....The IDEA lists requirements to be included in an IEP and states that no additional information is required to be included in an IEP that is not "explicitly required in this section." 20 USC § 1414(d)(1)(A)(ii). *The question of whether the IDEA otherwise requires transition plans to be included in an IEP is unsettled.* See R.E.B. v. Haw. Dep't of Educ., 870 F.3d 1025, 1027-28 (9th Cir. 2017) reh'g granted, opinion withdrawn by 886 F.3d 1288 (9th Cir. 2018). Dep.t of Educ. v. L.S., 2019 U.S. Dist. LEXIS 55036, at *22 (D. Haw. 2019). (emphasis added)

The regulation which petitioner does not cite is state rule 74.19 which requires post secondary transition plans beginning at age [redacted]. Rule 74.19, at 300.320(b). The state rule mirrors the federal rule in all material particulars except it lowers the threshold age for post secondary transition plans from [redacted]).

There is no statutory or regulatory requirement for a transition plan from a private to a public school. Unless the transition from CARES to Brandon School District is post-secondary, It follows then, there is no violation regarding failure to put a transition plan in place.

[redacted]. was born on [redacted]. He was [redacted] on November 14, [redacted] No post secondary transition plan having been put in place for [redacted]., state regulation Rule 74.19, at 300.320(b) has been violated. It is therefore ordered that [redacted]s IEP Committee meet on and put in place a post secondary transition plan within fourteen (14) days following the transmission of this Opinion to counsel for the parties. The post-secondary plan may include special education so long as it meets the definition found in Rule 74.19, at 34 C.F.R. §300.43.

III.

IEP BY CONSENSUS

Complainant's advocate, Ms. [redacted], testified:

> [T]he purpose of the IEP committee is to reach consensus. That is – the goal is to reach consensus, where every voice is heard, every voice is considered. So the idea is that we may not all agree in detail to the entire IEP, but we should all agree in theory – to the totality of the IEP....So if the parent refuses to participate or fails to respond, they can go on without the parent. ([redacted], Tr. Vol. III, at 481-82)

Ms. Amy Bullock, the school district's SPED Director testified in reference to adopting an IEP:

> They don't vote. There's consensus, and consensus is a majority of the committee, so there's not really an actual vote. ....Consensus – every definition I have read it always...refers back to the majority. And if the majority can't come to consensus, at that point, the agency representative makes the final determination in the meeting....(Amy Bullock, Tr. Vol. IV, at 763)

IEP's can be changed by agreement, 20 U.S.C. §1414(d)(3)(D), or by amendment, 20 U.S.C. §1414(d)(3)(F). To change the IEP by agreement requires parental consent. In the case of an amendment, the entire IEP team must meet.

As the court noted in [redacted] v. Fulton County Sch. Dist., 2012 U.S. Dist. LEXIS 136327 (N.D. Ga. 2012):

> Parents play a significant role in the process, and the concerns parents have for enhancing the education of their child must be considered by the team....But the school is not required to obtain the parents' seal of approval to implement an IEP change....[T]he IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. Rather, the IDEA requires that parents be afforded

> an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions....There is no requirement in the IDEA that the parties must reach consensus on all aspects of an IEP before it is valid. Rather, the proper recourse for parents who disagree with the contents of their child's IEP is to request a due process hearing....*Id.,* 2012 U.S. Dist. LEXIS 136327, at *9 -*11.

The IDEA "assures the parents an active and meaningful role in the development or modification of their child's IEP." However, IEP team consensus does not require parental agreement in order to satisfy the IDEA. "[J]ust because the placement was contrary to the parents' wishes, it does not follow that the parents did not have an active and meaningful role in the modification of their daughter's IEP...." Rosinsky v. Green Bay Area Sch. Dist., 667 F. Supp. 2d 964, 984 (E.D. Wisc. 2009) citing Hjortness v. Neenah Joint Sch. Dist., 507 F. 3d 1060, 1064 (7th Cir. 2007) and Bd of Educ. v. Ross, 486 F. 3d 267, 274 (7th Cir. 2007).

See also N.B. v. Demopolis City Bd. Of Educ., 2012 U.S. Dist. LEXIS 173793 (S.D. Ala. 2012), at *41 ("IEP team consensus does not require parental agreement in order to satisfy the IDEA."). Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 396 (5th Cir. 2012) ("The IDEA requires that school districts allow parents to play a significant role in the development of IEP's.")

[redacted] testified an IEP meeting had been set up for December 17, 2020, "to develop an IEP for [redacted] for [redacted] School." (Tr. IV, at 642-43) See also exhibit R-18, at 260, which is a December 11, 2020, email from [redacted] to [redacted]. inviting her to attend an IEP meeting scheduled for Thursday, December 17, 2020, at 9:00am "to develop

[.'s] IEP and to review his behavior plan.."[1] No venue was given but there was a request, "Please let us know if this date and time are convenient for you." said the December 17th meeting did not take place because was not able to attend. (Tr. IV., at 643) and no meeting was ever held to develop an IEP for for School. (Tr. IV., at 643).

agreed . had suggested other schools for . in the district such as School but no one ever reported back to the committee about ever having visited any of these schools. (Tr. IV., at 644).

The IDEA requires both the district and the parents advocate with an open mind. The parents must consider the district's proposals with an open mind and the district must consider the parents' proposals with an open mind. The parties reach a legitimate impasse when they have discussed the issues with an open mind and still been unable to come to terms for the IEP.

It is at this point, after a legitimate impasse has been reached, the district may unilaterally implement its proposals in the form of an IEP so long as the IEP provides "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" E.R. v. Spring Branch Indep. Sch. Dist., 909 F. 3d 754, 765 (5th Cir. 2018) citing Endrew F. v. Douglas Co. Sch. Dist., U.S. , 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017). If dissatisfied with the IEP, the parent should file for a Due Process hearing.

Neither 's mother nor the school district have considered the other's proposals

[1] She identified Ex. R-18, at 260, as "a notice of invitation to committee meeting." (Tr. IV., at 642).

with an open mind with regard to which school in the district [redacted]. should attend. [redacted]'s mother refuses to consider [redacted] School as a choice and the District refuses to consider any school in the district other than [redacted] School as a choice. Nevertheless, elopement is a safety issue which must be addressed.

IV.

Elopement Is A Safety Issue
Which Must Be Addressed

[redacted]'s Functional Behavior Assessment, (Ex. R-10), defines [redacted].'s "elopement" as [redacted] "using his body to leave an assigned location/area without first gaining permission from staff."[2] (Tr. II, at 263). Another definition is "walking or running more than five feet from an adult without permission under circumstances when doing so was not appropriate or when Student did not have actual or implied permission to leave." E.C. v. Fullerton Sch. Dist., 2021 U.S. Dist. LEXIS 114511, at *12 (C.D. Ca. 2021). Black's Law Dictionary defines it as: "Elopement is the noun form of the verb elope. An archaic definition of elope is [t]o run away; escape." Black's Law Dictionary, Elope, p. 560 (8th Ed. 2004) cited in Chandler v. Volunteers of Am., N. Ala., Inc., 2013 U.S. Dist. LEXIS 27445, at *n. 57 (N.D. Ala. 2013). (internal quotations omitted).

Petitioner argues because of [redacted].'s elopement tendencies, sending him to [redacted] School creates a substantial risk to his physical safety.

[redacted] testified other than the transition plan provided at the November 9, 2020, IEP meeting (Ex. R-15, at 254-55), there had been no discussion at the meeting regarding any other alternative for dealing with [redacted]'s elopement. (Tr. II, at 292, 318).

[2] Ex. R-10, at 83.

[redacted] also said in the Transition Plan for the transition back to [redacted] School there was nothing included in the plan to address elopement. (Tr. II, at 292).

[redacted]'s November 9, 2020, IEP reports under "Supports for Personnel" that "Staff are trained to be prepared to deal with aggressive behavior and to understand issues involved in better dealing with Autistic students in order to keep all students and staff safe." (Ex. R-7, at 043). There is, however, no mention of training to either prevent or deal with elopement.

Petitioner, [redacted]'s mother, was questioned about [redacted].'s elopement history and she testified on cross-examination during the 2020-2021 school year at CARES he ran down the hallway from his teachers and had to be re-directed "on several occasions." (Tr. I, at 78)

During the 2019-2020 school year at CARES while trying to board his bus, he ran out of the building in front of a stationary bus and the bus driver who was standing by the bus caught him. (Tr. I, at 79). [redacted] said there were no other elopement issues out of the building during 2019-2020. (Tr. I, at 80)

As far as elopements inside the CARES facility during 2019-2020, O.A. testified, "I couldn't tell you his name if I tried. But he's always at the front desk, real nice little older man, and he said, 'He's always trying to get out that door but, you know, he can't, but he sure does try.'" (Tr. I, at 80).

Principal Long on direct examination reviewed 17 weeks of "Behavior Sheets" from CARES regarding [redacted]'s conduct during the time frame of August 17 through December

11.[3] (Tr. II, 204-212). She testified that during this time period [redacted] had two elopement related issues. In the first he ran out of the room and when he calmed down, he returned to class. In the second he went into a break area which was a restricted area for students. (Tr. II, 204-212)

As far as elopement prevention at home, [redacted]. said everyone in the household know to keep up with [redacted]. She has deadbolts on all the doors, they keep the keys away from [redacted]., and the windows are either locked or the type [redacted]. cannot manipulate. The gates are locked, the cars are locked, and the Brandon police department has [redacted]'s picture on file which is updated bi-yearly. She explains [redacted]'s situation to the neighbors. (Tr. I, at 43-44). She says all the neighbors know [redacted]'s situation and he's not supposed to be out alone and if they find him, they know they can either bring him home or give him to the police to bring him home. (Tr. I, at 44).

She testified because [redacted]. started leaving the yard, she got him a bright yellow arm bracelet. Tr. I, at 47) It has [redacted].'s phone number on it and a note saying "I have a severe autism and I'm nonverbal." (Tr. I, at 45)

When [redacted]. was a student at CARES, he attended school behind locked doors. [redacted] described Cares lock system as:

> [T]hey keep him from running away because...it's a locked facility. He can't get out the front door. He can't get out of his classroom door. He can't get out of the building without...a card....He can't get past the front door, but even if he did get past the front door, there's a gate on the outside to keep him from getting into the road. (Tr. I, at 37)

The transition plan is in the record (Ex. R-16, at 254-55). The plan provides [redacted].

[3] I am assuming this was for the 2020-2021 school year.

was to have attended [redacted] School for one day a week beginning with the week of November 16, 2020. As to elopement it provides:

1. If there are fewer than three incidents of elopement out of the school building per week; and,

2. If IEP goal number 5 was maintained;[4]

Then [redacted]. would attend 2 days per week for the week of November 30; 3 days for the week of December 7; and, 4 days per week for the week of December 14.

[redacted] agreed there was nothing in the transition plan where the district would begin using certain services or modifications in his BIP to prevent elopement. (Tr. II, at 295). Said, in a more direct way, there was nothing in the transition plan to prevent [redacted] elopement. (Tr. II, at 297, 299).

[redacted] after being asked the question four times whether there were any safeguards to prevent [redacted]'s elopement during arriving and leaving his bus, finally replied,

> This is a transition plan CARES...wanted to put in place for [redacted]. to transition back. Once [redacted]. transitioned back to Rankin County, services, accommodations and modifications would be put in place to provide [redacted]. with the services he needed. (Tr. II, at 298-99).

This means therefore Rankin County knew what accommodations [redacted]. needed but did not intend to implement them until after [redacted] was back in school at [redacted] School or did not know what accommodations [redacted]. needed but would determine what they were and put them in place after [redacted]. was already attending [redacted] School.

[4] Goal number 5 in [redacted]'s 2020-2021 IEP is: "By the end of 2020-2021 academic school year, [redacted] will refrain from physical aggression (kicking, hitting, pushing, flicking his fingers on others) across all enviornments in school for 4 consecutive weeks in 90% of observed opportunities." (Ex. R-7, at 038).

Either way, Rankin County did not intend to implement needed changes, if any, to deal with the safety issue (elopement) until after [redacted]. was enrolled and attending [redacted] School.

[redacted]. underwent a Functional Behavior Assessment ("FBA") on May 22, 2018. (See Ex. R-10, at 076). At the time he was a student at CARES.[5] Running from staff was listed as Problem Behavior No. 3. It ranked 5 out of 5 with regard to being manageable with 5 being "the most unmanageable." It ranked 5 out of 5 as far as being disruptive with 5 being "the most disruptive." It also recorded that running from staff was happening 4-6 times each day. (See Ex. R-10, at 077).

There were three direct observations in the FBA. In the first [redacted] was the observer. She observed [redacted] slapping [redacted] s arm. Then [redacted] got agitated and as soon as [redacted] let go, [redacted]. "got up and ran out of the classroom." [redacted]. [redacted] followed him and stopped him from running down the hallway. He then slapped [redacted]. [redacted] on the leg and she was able to direct him back to the classroom. (Ex. R.10, at 080).

[redacted] was the observer in the second observation. In her observation, she said "[redacted]. complied to transition to lunch but did not wait at the door prior to leaving the room." She redirected him to return to the classroom and he complied. (Ex. R.10, at 080).

Elopement was listed in the FBA as Target Behavior number 3. It was defined as "the student using his body to leave an assigned location/area without first gaining permission from staff." (Ex. R.10, at 082). Summary Statement number 5 in the FBA says

[5] [redacted]. enrolled at CARES on November 6, 2017. (See Ex. R-11, at 089 under "Intake.).

"When asked to complete a task..., the student will elope...to escape the given task/person...." (Ex. R.10, at 082). The FBA also noted [redacted]. had a "documented difficulty...successfully completing task demands that are placed in him throughout the school day...." (Ex. R.10, at 083).

The FBA gives a number of strategies to deal with [redacted]'s targeted behaviors, one of which (#3) is elopement: visual schedule; high probability tasks followed by low probability tasks; first/then charts; student communication/choice board; student office; close proximity to teacher during transitions; pairing procedures; and lunch. (Ex. R.10, at 083-085).

The FBA also has a section titled "Addressing Problem Behaviors." It provides when [redacted] "engages in behaviors that may cause harm to himself or others," then "the teacher should follow school safety procedures...." (Ex. R.10, at 085). This FBA was written while [redacted]. was a student at CARES. There is a modicum of testimony in the record from which it can be determined what "safety procedures" CARES had in place.

When [redacted]. enrolled at CARES, [redacted]. said her biggest concern was [redacted].'s elopement but CARES had a written elopement protocol. She said when she raised the elopement issue upon initial enrollment at CARES, CARES personnel "they had printout sheets to show me how...and what was in place to keep elopement from happening and what they did if elopement did happen." (Tr. I, at 39-40).

Thus, CARES had an elopement protocol. [redacted] School and/or other Rankin County Schools may likewise have an elopement protocol which may be just as good or even better than CARES. There is just no evidence in the record explaining what protocols or procedures the District has in place to deal with [redacted]'s elopement.

In Lillbask ex rel. Mauclaire v. State of Connecticut Depot of Educ., 397 F. 3d 77, (2nd Cir. 2005) Petitioner made various safety complaints (the more direct including leaving the child within reach of potential dangers, such as electrical cords; and, insuring feeding to avoid choking hazards). Petitioner also identified several more attenuated safety concerns such as training and availability of substitute teachers and aides; the need to use a car seat when transporting; need for assistive devices, such as his prone sander, wheelchair, and special seats; and, avoiding placement on a dirty floor during physical education.).

The Administrative Hearing Officer concluded: "a special education hearing officer lacks the jurisdiction to investigate safety complaints." " *Id.,* 397 F. 3d at 93. The District Court upheld this conclusion and the Second Circuit reversed saying:

> However weakly Lillbask may have supported her claim, we conclude that her jurisdictional assertion is correct. IDEA requires a state to implement procedural safeguards providing parents or guardians with "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(6) This broad language suggests that Congress did not intend to exclude from consideration any subject matter - including safety concerns - that could interfere with a disabled child's right to receive a free appropriate public education." *Id.,* 397 F. 3d at 93. (emphasis the court's).

I find should [redacted] enroll in [redacted] School, elope and be injured in a more than minor pedestrian/motor vehicle accident, this would certainly "interfere with" his "right to receive a free appropriate public education."

Safety is a mandatory subject for discussion among the members of the IEP team. Albertville City Bd. Of Educ. v. Moore, 2020 U.S. Dist. LEXIS 93145, at *13 (N.D. Ala.

2020) (Issues of student safety may properly be raised in a substantive challenge under the IDEA).

There are a number of ways to address elopement. Just by way of illustration, some elopement plans have elements including: not sitting the student near an exit and ensuring a staff member is always close by the student. Broward County School Board, Florida Educational Agency, 118 LRP 14786 (2017). Others include: developing progressive goals, including those for staying in an assigned area; positive behavior re-enforcement, including the ability to earn activities and privileges for good behavior. Bruno v. Northside Indep. Sch. Dist., 2018 U.S. District LEXIS 233950, rev'd in part on other issues at 788 Fed. Appx. 287 (5th Cir. 2018). Others include having someone with the student at all times to prevent elopement. Also, allowing the students to leave the room for assigned chores to teach the students there are rules and also to help with elopement problems. Sch. Bd. Of Lee County v. E.S., 561 F. Supp. 2d 1282 (M.D. Fla. 2007).[6]

Up to this point the School District has considered [redacted] School as the *only* school within the District where [redacted] may continue his education. As the obverse of the coin, [redacted] School is the only school in the District where Petitioner says she will *never* enroll [redacted] So the immovable object has met the irresistible force.

In these circumstances I find the issue of safety, as related to elopement, has not yet been discussed by [redacted].'s IEP Committee with all members bringing an open mind to the table. The parties, in the course of discussing what school [redacted] shall attend, are, therefore, directed to discuss in specific detail each and all the safety issues raised by

[6] This residential school provided a comprehensive program. Well worth the read.

[redacted]s mother and/or advocate. After discussing these issues with an open mind, the IEP committee is directed to modify, to the extent required, [redacted]'s IEP on all elopement related safety issues raised by [redacted].'s mother, [redacted] and/or [redacted]s advocate.

The parties, in the course of discussing elopement, are directed to discuss in specific detail each and all the safety issues raised by [redacted].'s mother and/or advocate. After discussing these issues with an open mind, the IEP committee is directed to modify, to the extent required, [redacted]s IEP on all elopement related safety issues raised by [redacted].'s mother, [redacted] and/or [redacted].'s advocate. The resolution, in the first instance, is for the IEP committee to decide. To the extent the suggestions of [redacted]. and [redacted].'s advocate are not adopted, the IEP meeting minutes shall state specifically why the suggestion(s) have not been adopted.

V.

Choosing A School May Be Done Unilaterally By The District Unless There Has Been A Fundamental Change in the IEP

"The Fifth Circuit has a 'narrow interpretation' of 'change of placement.'" Cornelius v. Houston Indep. Sch. Dist., 333 F. Supp. 3d 674, 694 (S.D. Tex. 2017).

"While the Fifth Circuit has not defined then-current educational placement in the specific context of stay-put, [e]ducational placement as used in the IDEA, means educational program.....[E]ducational placement [is] not a place, but a program of services." E.M. v. Lewisville Indep. Sch. Dist., 2018 U.S. Dist. LEXIS 50237, at n. 10 (E.D. Tex. 2018) (internal citations and quotations omitted)

"[A] change in the particular school site at which a disabled student's individualized

education program (IEP) is implemented does not constitute a change in educational placement." Veazey v. Ascension Parish Sch. Bd., 121 Fed. Appx. 552, 553, 2005 U.S. App. LEXIS 107 (5th Cir. 2005). (internal quotations omitted).

As the Fifth Circuit noted in Weil v. Board of Elementary & Secondary Educ., 931 F. 2d 1069 (5th Cir. 1991):

> We are not persuaded that the cited [prior written] notice provisions were mandated in the instance of Kimberly's transfer from Cooley to Kiroli because that transfer did not constitute a change in educational placement within the meaning of 20 U.S.C. §1415(b)(1)(C). The programs at both schools were under [School Board] supervision, both provided substantially similar classes, and both implemented the same IEP for Kimberly. We conclude that the change of schools under the circumstances presented...was not a change in educational placement. *Id.,* 931 F. 2d at 1072.

The transition back to the [redacted] School was made known at the IEP meeting on November 9, 2020, and was to begin a week later on November 16, 2020. (Tr. II, at 299). [redacted] said she understood [redacted]'s parental concern with [redacted]. getting off the bus and having the opportunity for elopement. (Tr. II, at 297). She also said there was nothing in the CARES transition plan to address [redacted].'s elopement. (Tr. II, at 299).

The physical location of the IEP placement is generally an administrative decision which can be made without prior consultation with the parents. The seminal Fifth Circuit case is White v. Ascension Parish Sch. Bd., 343 F. 3d 373 (5th Cir. 2003). The White Court said educational placement" as used in IDEA, means an educational program – not the particular institution where that program is implemented."*Id.*, 343 F. 3d at 379. It said the provision in the IEP which requires specification of the physical location is "primarily administrative." *Id.*

The White decision can be reduced to a single sentence: "that parents must be involved in determining 'educational placement' does not necessarily mean they must be involved in site selection." *Id.* One court has interpreted this sentence in White to mean "Because of this, a district is not obligated to consider parent's opinions on which school location is appropriate." E.R. v. Spring Branch Indep. Sch. Dist., 2017 U.S. Dist. LEXIS110524, at *47 (S.D. Tex. 2017).

Citing White, *supra.* and Weil, *supra.*, the court in E.R. v. Spring Branch Indep Sch. Dist., 2017 U.S. Dist. LEXIS 110524 (S.D. Tex. 2017) took it one step further:

> [O]ne must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change [in schools] to qualify as a change in educational placement. *Id.,* 2017 U.S. Dist. LEXIS at *48.

Other cases discussing White and coming to the same conclusions include: Comb v. Benji's Special Educ. Acad., Inc., 745 F. Supp. 2d 755 (S.D. Tex. 2010); and, I.F. v. Houston Indep. Sch. Dist., 2009 U.S. Dist. LEXIS 86065 (S.D. Tex. 2009).

I find that a change in location can be a change in placement in the case where the change in location is also a fundamental change in, or elimination of a basic element of the education program. Moving [redacted] from CARES where he was always behind locked doors to prevent his elopement out of the building and behind a gate in the school yard to put him in Brandon Middle School where he would not be behind locked doors to prevent his elopement outside the building is the elimination of a fundamental safety element of [redacted]'s IEP; and, as stated above safety is a mandatory issue for the IEP committee to deal with. For that reason before [redacted].'s school in the district may be chosen, the safety issue in reference to elopement must be addressed by the IEP committee with an open mind.

VI.

Predetermination

The School District has decided the *only* school in which [redacted]. may continue his education in the District is [redacted] School. It is my opinion this meets the definition of predetermination.

> Predetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team....To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child....But, [t]he right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such. E.R. v. Spring Branch Indep. Sch. Dist., 909 F. 3d 754, 769 (5th Cir. 2018).

Amy Bullock is the Special Education Director for the Rankin County School District. She was not a member of [redacted]'s IEP Committee.

[redacted]'s mother, [redacted]., contends [redacted].'s placement upon return to RCSD had been pre-determined to be at the [redacted] School. She contends [redacted], a member of the IEP team, made statements at the November 9, 2020, IEP meeting which prove pre-determination.

At the November 9, 2020, meeting [redacted] asked [redacted] what was the issue with [redacted] going to [redacted] School. [redacted] replied, "He is zoned for Brandon and students that are returning go to their home school." (Tr. I, App'x I, at 14).[7] [redacted] replied, "You have made it very clear that it's Rankin County School's

[7] At the same meeting [redacted] said, "Well, at this time, due to the fact that [redacted]'s residence is in the Brandon zone, he will be placed at Brandon [redacted] School." (Tr. I, App'x, at 10).

decision that he go back to [redacted] School without considering all of her concerns, all of the past history. It's just, 'It's policy; that's the way we do it.' That's not acceptable. That's neither the spirit nor the letter of the law." (Tr. I, App'x I, at 25). To which [redacted] replied, "I have discussed with Amy Bullock [redacted]. returning – transitioning back to the district, and, per Amy, he is to return to his home school, which is [redacted] School." (Tr. I, App'x I, at 26).

This is borne out by Amy Bullock (not a member of [redacted] IEP Committee), the Special Education Director, who, in ¶10 of her Affidavit submitted in support of the District's position on the "stay-put" motion said:

> According to Rankin County School District policy, all students will be expected to attend the school which lies within the attendance zone in which they reside. Transfer of students within the District shall be permitted by action of the Board of Education only in exceptional cases, unless the family of the pupil has removed its residence from one attendance zone to another.

The burden of proof on pre-determination is to prove one or more of the following: bad faith exclusion; refusal to listen to the parents' input; refusal to consider parents' input; or, the school district "seriously hampered" the parents' opportunity to participate in the IEP formulation process. *Id.;* Rockwall Indep. Sch. Dist. v. M.C., 816 F. 3d 329 (5th Cir. 2016); Wood v. Katy Indep. Sch. Dist., 163 F. Supp. 3d 396 (S.D. Tex. 2015); D.C. v. Klein Indep. Sch. Dist., 2020 U.S. Dist. LEXIS 82991 (S.D. Tex. 2020); and, Gonzalex v. Puerto Rico Depot of Educ., 969 F. Supp. 801 (D. P.R. 1997).

The District contends Petitioner's "IEP Committee developed an appropriate special education and related services program to be provided at [redacted] home school, Brandon

[ ] School."[8] According to the District, "At all times, Petitioner was an active member of the IEP Committee" and "Petitioner was afforded an opportunity to provide meaningful input in accordance with the IDEA. The IEP committee considered Petitioner's input and, in many instances, accepted Petitioner's input as part of s program. The IEP is appropriate as it is individualized on the basis of 's assessment and performance data." (District's Response In Opposition to Stay-Put Motion at ¶3)

Quite to the contrary the Petitioner alleges, "The placement decision for Brandon School was unilaterally predetermined by the District and completely dismissed the Parent's input." (Petitioner's Stay-Put Motion at ¶2)

The threshold question: whether a change from CARES to School was a change in placement? If so, refusing to discuss the change was predetermination. Otherwise, it was not.

"[N]othing in the IDEA or its regulations prohibits a school district from coming to an IEP meeting with tentative recommendations for its development prepared in the parents absence." Rockwall Indep. Sch. Dist. v. M.C., 2014 U.S. Dist LEXIS 200595, at *30-*31 (N.D. Tex. 2014). Nevertheless, I find the decision by the District that School was .'s only choice for a district school deprived his mother of a "meaningful opportunity" to fully participate as an equal member of the IEP team on the issue of safety in relation to 's elopement; and, thus the school district has "seriously hampered" the parents' opportunity to participate in the IEP formulation process.

Petitioner argues the decision to make the physical location of 's placement at

[8] The District says "Brandon School." The Petitioner says "Brandon School." It is clear from the context when the District refers to "Brandon High School," it meant "Brandon School."

[redacted] School was unilaterally made with no parental input. For the reasons discussed I agree. To be clear though the issue is not the physical location of the placement. The issue is whether bringing [redacted]. out from behind the locked doors at CARES has resulted in a fundamental degrading of the safety protocols in place to protect [redacted] should he elope. Based on the evidence now in the record, I find this to be a fundamental change in the IEP. The District and the parents must meet in an IEP meeting with both having an open mind to deal with the safety issue.

The mistaken belief the IEP team had no discretion to determine [redacted]'s placement in any school other than [redacted] School meets the definition of predetermination.

"[T]he general rule is that placement should be based on the IEP." Spielberg v. Henrico Cty Pub. Schs., 853 F.2d 256, 259 (4th Cir. 1988). "As such, the logical progression of developing an annual IEP would first require the team to identify the student's needed programs and services, research placement options, and only after doing so, make its final geographical placement decision in light of this information." J. G. v. Hawaii, 2018 U.S. Dist. LEXIS 132945 at 39* (D. Haw. 2018).

34 CFR §300.116(b)(2) provides that "The Child's placement...[i]s based on the child's IEP. Therefore, the final school choice where placement is to be made cannot be decided upon unless and until there is at least a proposed IEP.

For these reasons, I find predetermination has occurred. The clearest case most on point is [redacted] v. Miami-Dade County Sch. Bd., 757 F. 3d 1173 (11th Cir. 2014). In this case [redacted] at different times had differing diagnoses including Asperger Syndrome, Autism Spectrum Disorder and ADHD. He had serious problems with OCD, anxiety, and sensory overload "when there is too much going on in his surrounding environment." His worst

problems appeared when he was placed in school with a large population causing anxiety, sensory overload and vomiting. *Id.,* 757 F. 3d at 1178.

Much like [redacted]., [redacted] has had diagnoses of autism, ADD, OCD, and sensory processing disorder. (Tr. I, at 24).

[redacted]. was making the transition from [redacted] School to [redacted] School. [redacted]. is making the transition from a private to a public school. The parents in both cases argue their child would do better in a smaller school with fewer students.

In both cases the School District gave the parents a "take-it, or leave-it" response. In [redacted] the parents were told their child could attend [redacted] School and no other site would be considered." . *Id.,* 757 F. 3d at 1179. In [redacted].'s case his mother has been told her son has no choice. He either goes to school at [redacted] School, he gets permission from the Board as an "exceptional case," or his mother withdraws him from school.

The [redacted] in [redacted]. found his IEP failed to meet his educational needs in two respects: (1) anxiety, stress, and sensory management; and, (2) reading comprehension. The [redacted] went on to find that due to the significance of these shortcomings, the entire IEP deprived [redacted]. of his right to a free appropriate public education. . *Id.,* 757 F. 3d at 1180.

Citing 34 CFR §300.116(b), the Eleventh Circuit concluded that predetermination is based on the logic that a child's placement must be based on the contours of the child's IEP. Therefore, "[a]s a result the state cannot come into an IEP meeting with closed minds, having already decided material aspects of the child's educational program without parental input." . *Id.,* 757 F. 3d at 1188.

To comply parental input must also be "*meaningful*." *Id.* (emphasis added). The

Eleventh Circuit said to avoid, predetermination there must be evidence "the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *Id.*

The District, in refusing to consider the parents choice for a school, said they could not consider the school proposed by the parents for "administrative reasons." The Academy the parents wanted was, the District said, "not an option on the table as far as [the Board is] concerned. What our option is, is that he go to his home school." Rankin County offers Petitioner the [redacted] School, take it or leave it. It is [redacted].'s home school and the only option for [redacted]

The District, interpreting its own policy, determined [redacted]. could return only to his home school, [redacted] School. Predetermination does not require a specific intent to unilaterally make an IEP committee decision. The District may have had the best of motives and, at the same time, had a closed mind. For the following reasons I find that the school district's regulation JDCDA has been preempted.

My finding of predetermination is based on the preemption of the district's school zone attendance policy by IDEA law.

VII.

Preemption

At issue is Rankin County School District policy JBCDA titled "Intra-district Transfer Procedures"[9] which provides a procedure to obtain a transfer for a child from the attendance zone in which he/she resides to a school within an attendance zone in which

[9] A copy of this policy was offered into evidence by the Petitioner as Exhibit P-16.

he/she does not reside. It is allowed "only in exceptional cases."

Ms. Bullock concluded there is no discretion in the matter and thus the only school available to [redacted] and her son, [redacted], is the one in his attendance zone, [redacted] School. According to her thinking, [redacted] and [redacted]. have three choices: Attend [redacted] School; convince the School Board under Policy JBCDA to allow [redacted]. to transfer to a school outside his school attendance zone; or, withdraw [redacted] from schooling in the Rankin County District.

In conflict with JBCDA, is 34 CFR §300.116(c) which provides "*Unless the IEP of a child with a disability requires some other arrangement*, the child is educated in the school that he or she would attend if nondisabled." (emphasis added) While the IEP regulation creates a presumption in favor of the home school, it also clothes the IEP committee with the discretion to provide a child with an IEP a placement which offers services not available at the child's "home" school or simply better suited to the needs of the child.

A number of courts have found the IDEA preempts state law when the state standard conflicts with the federal law or regulations:

- Hacienda La Puente Unified School Dist. v. Honig, 976 F.2d 487, 496 (9th Cir. 1992) (failure to comply with state statute requiring notice of claim of attorney's fees may not bar claim for attorney's fees under IDEA).
- Converse County School District No. 2 v. Pratt, 993 F. Supp. 848, 860 (D. Wyo. 1997) (state rules and regulations prohibiting foster parents from acting as surrogate parents for IEP purposes violates IDEA's federal regulations.) The court saying, "The School Board also contends that...the eligibility of

foster parents to act as parents or to be appointed as a surrogate parent, is dependent upon state law. Ordinarily this is true. However, as noted...in Mrs. C. v. Wheaton, 916 F.2d 69, 73 (2nd Cir. 1990), the court held that where the IDEA "incorporates state substantive standards as the governing federal rule, it does so only if the state standards are consistent with...the IDEA provisions.") *Id.*

- Bray By Bray v. Hobart City School Corp., et al., 818 F. Supp. 1226, 1230 (N.D. Ind. 1993) (state procedure governing residential placement applications, which allowed state to review hearing officer's decision even if no appeal taken, violates IDEA.) There the court said, "In addition, [the Indiana statute] allows the State to circumvent the due process procedures...by permitting the State to review the hearing officer's decision even if no appeal has been taken. Therefore, [the Indiana State statute] clearly violates the finality requirement of the IDEA.").
- Mrs. C. v. Wheaton, 916 F.2d 69, 73 (2d Cir. 1990) (state standard of legal competency for purposes of waiving IDEA's procedural safeguards could not apply because it would be less exacting than federal provision.) There the court said, "Thus, even if the Connecticut substantive standard defined consent for purposes of waiving EHA procedural safeguards in terms of 'legal competency,' such a standard could not govern here because it would be less exacting than the federal provisions since it does not require parental involvement.").
- Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993) (state procedures

requiring additional application and review process resulting in delay in obtaining residential placement violated and was preempted by IDEA.)

Preemption has been applied at least once in a "stay-put" case. See Gonzales ex rel. Doe v. Maher, 793 F.2d 1470, 1485-6 (9th Cir. 1986) (state statute allowing indefinite suspension or expulsion of disabled student during administrative proceedings violates EHA's stay-put provision allowing child to remain in current placement).

Granting the Board the authority to require an application and also the authority to disallow a child's placement in a school in another attendance zone, even if required by the child's IEP, would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives" of IDEA regulation 34 CFR §300.116(c). This regulation envisions the IEP Committee having within its discretion the authority to write and implement an IEP, without prior school board approval, and, which makes "some other arrangement" other than [redacted] having no option except attending a school in his/her attendance zone.

34 CFR §300.116(c) provides as to a child's placement: "*Unless the IEP of a child with a disability requires some other arrangement*, the child is educated in the school that he or she would attend if nondisabled."(emphasis added) School Board Policy JBCDA clearly conflicts with 34 CFR §300.116(c). If an IEP committee or this Hearing Officer were to decide [redacted].'s placement requires services available only at some school in the district other than the child's home school, the School Board could veto this decision under JDCDA simply by requiring an application to the Board and denying the request to change [redacted].'s placement.

I find to allow policy JBCDA to take precedence over 34 CFR §300.116(c), "stands

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the Individuals With Disabilities Education Act, 20 U.S.C. §1400 *et seq*.

In Antkowiak v. Ambach, 838 F. 2d 635, 641 (2nd Cir. 1988) the Second Circuit held:

> Federal courts have authority under the EHA to enforce state procedure consistent with the federal scheme, but procedures inconsistent with the federally-mandated procedures cannot, of course, be enforced by a federal court. While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the EHA and thus enforceable, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable. The EHA considers final any unappealed decision of a hearing officer, see 20 U.S.C. § 1415(e)(1), and no further review appears to be contemplated under the Act. Thus, to the extent that the Commissioner's *sua sponte* review would subject children and their parents to an additional step not required by the EHA, it would seem inconsistent with the finality provision of section 1415 and therefore without official status or standing under the EHA. (Internal quotations and citations omitted)

The "additional step" in Antkowiak was giving the Commissioner the right to *sua sponte* review a hearing officer's decision. The "additional step" in [redacted]'s case is the right given to the Rankin County School Board under Policy JBCDA to review and veto an IEP Committee's decision to make "some other arrangement" other than [redacted]. attending [redacted] School.

In Sarah M. v. Weast, 111 F. Supp. 2d 695, 702 (D. Md. 2000), the Court citing Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941) found the IDEA provision giving parents ten days to give notice to a school district of intent to place a child in a private school preempted a state law which dictated a shorter notice period. The Weast court said, "The critical question is whether the state requirement stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." Weast, *supra.*, 111 F. Supp. 2d at 702.

I conclude that it does. Allowing Policy JBCDA to take precedence over the caveat[10] in 34 CFR §300.116(c) would prevent [redacted].'s placement, without the Board's prior approval, in another school outside his/her attendance zone even if the IEP required it.

VIII.

Reviewing [redacted]'s IEP
Under the Michael F. Factors

First and paramount the IDEA's broad standards are not a license for the Hearing Officer or a reviewing Court to "substitute their own notions of sound educational policy for those of the school authorities which they review." Endrew F. *Ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988,1001, 197 L. Ed. 2d 335 (2017) citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

As the court said in Amanda P. v. Copperas Cove Ind. Sch. Dist., 2020 U.S. Dist. LEXIS 65016 (W.D. Tex. 2020):

> The IDEA presumes a school district's IEP is appropriate. White ex rel. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 377 (5th Cir. 2003). The party challenging the IEP bears the burden of showing the IEP was inappropriate under the IDEA. Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 292 n.4 (5th Cir. 2009). A district court should not substitute its "own notions of sound educational policy for those of the school authorities which [it] review[s]." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). To that end, a district court's task is to determine

[10] The caveat being "*Unless the IEP of a child with a disability requires some other arrangement....*" (emphasis added) which becomes operative if the IEP Committee decides "some other arrangement" includes placement of the child in a school in another attendance zone.

> whether a school district complied with the IDEA and not to second-guess their educational decision making. R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1010 (5th Cir. 2010). *Id.* Copperas Cove*, supra.* at *11.

The issue is whether "the IEP is reasonably calculated to enable the student to receive educational benefits?" Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 396 (5th Cir. 2012).

Under the Supreme Court's Endrew F.[11] decision, "the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." Endrew F., 137 S. Ct. at 999, (emphasis the court's). To make this determination the Fifth Circuit relies generally on the four Michael F.[12] factors. These are whether: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and, (4) positive academic and non-academic benefits are demonstrated.

The Fifth Circuit has "not held that district courts are required to consider [these factors] or to weigh them in any particular way." Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 293 (5th Cir. 2009). See also: D.C. v. Klein Indep. Sch. Dist., 2021 U.S. App. LEXIS 18093 (5th Cir. 2021):

> We have repeatedly emphasized that district courts do 'not legally err by affording more or less weight to particular Michael F. factors.' We have also explained that 'district courts are [not] required to consider' these factors at all, so long as their analysis comports with the substantive standard set forth

[11] Endrew F., 137 S. Ct. 999.

[12] Cypress-Fairbanks Ind. Sch. Dist. v. Michael F. *ex rel.* Barry F., 118 F. 3d 245 (5th Cir. 245).

by the Supreme court (explaining that the 'four factors *can serve* as indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA.' *Id.* at *24-*25. (Internal citations omitted, emphasis the court's)

A. Have There Been Positive Academic And Non-Academic Benefits?

Petitioner, in her January 13, 2021, Due Process Complaint, among other things requested [redacted] Should receive a reevaluation and an new...IEP...." (Ex. P-1, at 6)

[redacted]'s November 9, 2020, IEP states under "Impact of Disability and Student Needs:"

> [redacted]. is a [redacted] year old make (sic.) With an autism ruling. [redacted]. was referred to CARES School on November 6, 2017, due to his OCD tendencies and aggressive behaviors. [redacted]. has severe language deficits that negatively impact his ability to communicate and interact with his teachers and peers. He exhibits inappropriate behaviors (removing his clothes in public. Keeping his hands in his pants, and spitting.)
>
> [redacted]. is unable to write his name on command, give quantities to 15 with 70% accuracy. [redacted]. is also limited in his ability to state his address and phone number when asked. [redacted].'s lack of language and his inappropriate behavior prevents him from participating in the general educational classroom. *He requires one on one/or small classroom instruction to benefit from his school instruction and to prevent elopement in the school setting.* (Ex. R-7, at 031; emphasis added)

The District argues the last IEP was [redacted].'s IEP for the 2020-2021 school year dated November 9, 2021. (Ex. R-7, at 027). This was the same date Maureen Long, the Principal at CARES, sent a letter to Amy Bullock, the Rankin County SPED Director telling her that CARES had made the decision to dismiss [redacted] as a student at CARES on or before December 18,2020, because CARES was not equipped to meet [redacted].'s individualized needs and did not have the curriculum to appropriately meet his needs. (Ex. R-15, at 251).

Principal Long testified on cross-examination that on his initial evaluation at age 7

[redacted] was in the [redacted] grade and at age [redacted], he is functioning on a kindergarten level. Asked for her conclusion as to [redacted].'s academic performance in that 7 year span, she replied, "He has not made a lot of progress academically." (Tr. I, at 127-128).

[redacted] is a 25 year employee at the Rankin County School District. (Tr. II, at 259).[13] She underwent intensive cross-examination on the issue of whether [redacted] had regressed in his academic performance. On cross-examination it was established:

1. The last comprehensive evaluation of [redacted]. took place in 2014 when he was [redacted] and a half years old and he was in the first grade;[14] and,
2. [redacted] years later, in 2021, when he was [redacted] years old, he was working on the kindergarten level.

Counsel for [redacted] asked [redacted] five times whether, in light of this regression from working on the first grade level in 2014 to working on a kindergarten level in 2021, there had been any discussion during this time frame about doing a reevaluation or modifying [redacted]'s IEP? (Tr. II, at 269-273). Finally, the hearing officer asked her whether she understood the question to which she replied she was "thinking." (Tr. II, at 270). She eventually gave an answer but it did not answer the question whether there had been any consideration of a reevaluation or IEP modification.[15] [redacted] finally admitted this was a "a grade level deficit." (Tr. II, at 274).

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[13] Her current job is "Coordinator of educable child, alternate assessment and manager of the project."

[14] Ex. R-8, at 53-54; and, Tr. II, at 266-274.

[15] She answered, "The IEP contains a student's strengths, weaknesses, impact of disability. When goals are written for the IEP, there is a baseline to show where a student is academically and behaviorally. That information is used to determine the goals for the IEP." (Tr. II, at 272)

This regression does not meet the Supreme Court's standard that a minimally acceptable IEP must be "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas Co. Sch. Dist., U.S. , 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017). A regression from the first grade to kindergarten after working under an IEP for six and a half years is not progress and therefore does not meet this standard.

"To demonstrate positive benefits under Michael F.[16], an IEP must produce progress not regression or trivial educational advancement....That is, the demonstrated educational benefit must be meaningful." D.C. v. Klein Indep. Sch. Dist., 2021 U.S. App. LEXIS 18093, at *21 (5th Cir. 2021). To the same effect see: Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 248 (5th Cir. 1997); and, Wood v. Katy Indep. Sch. Dist., 163 F. Supp. 3d 396, 406 (S.D. Tex. 2015).

Based on [redacted]'s regression, the District has failed to meet this Michael F. factor.

B. Services In A Coordinated And Collaborative Manner

As discussed in detail above, the District predetermined [redacted]'s school to be [redacted] School with no other alternative; and, also failed to have a meaningful discussion with [redacted].'s mother on the safety issues related to [redacted]s elopement. Based on these factors, I find the District has failed to meet the collaborative manner Michael F. factor.

C. Is The Program Individualized?

As discussed in detail above, [redacted].'s last evaluation took place when he was [redacted]. He is now [redacted]

[16] Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir. 1997).

[redacted] was asked on cross-examination whether, since there was nothing in the Transition Plan addressing elopement, it would not have been a "huge risk" of [redacted]. getting "seriously hurt" should he elope from his classroom at [redacted] School? [redacted] answered, "No, that particular class at that date and time had four students with three adults." (Tr. II, at 296). She went on to add "Once [redacted] transitioned back to Rankin County, services, accommodations and modifications would be put in place to provide [redacted]. with the services he needed." (Tr. II, at 298).

[redacted] testified they never got to the issue of addressing [redacted]'s elopement at the November 9, 2020, IEP meeting but had they reached that point, [redacted].'s transition plan and behavior intervention plans would have been updated with needed changes, if any, in response to recommendations made in preparation for [redacted] to make the transition to [redacted] School. (Tr. II, at 334).

[redacted] testified an IEP meeting had been scheduled for December 17, 2020, for the purpose of "to write an IEP so that [redacted]. could return to Rankin County." (Tr. IV, at 642). However, this meeting never took place because [redacted]'s mother could not attend on December 17. (Tr. IV, at 643).

See the discussion above on predetermination at pages 22-24. The IEP must precede placement.

The testimony of [redacted] and [redacted] makes clear [redacted] was supposed to have transitioned to [redacted] School on January 5, 2021, a date preceding a consensus Transition Plan and/or IEP making the needed changes in services, accommodations and modifications. In these circumstances his plan was not individualized and would not have been until after the transition to [redacted] School

had been made.

D. Least Restrictive Environment

The November 11, 2020, IEP lists "SD/Separate School" as [redacted].'s Least Restrictive Environment. (Ex. R-7, at 052).

"Least restrictive environment" is defined in Reyes v. Manor Indep. Sch. Dist., 2016 U.S. Dist. LEXIS 12506 (W.D. Tex. 2016):

> The IDEA requires every student with a disability to be educated in the least restrictive environment necessary to meet his needs. 20 U.S.C. §1421(a)(5)(b). A least restrictive environment is defined as "not only freedom from restraint, but the freedom of the child to associate with his or her family and able-bodie peers to the maximum extent possible." Teague Indep. Sch. Dist. v. Todd L., 999 F. 2d 127, 128 n. 2 (5th Cir. 1993). Although thee is a presumption in favor of meainstreaming a child, this presumption may be overcome when a regular classroom will not meet the disabled child's needs. Daniel R.R. v. State Bd. Of Educ., 874 F. 2d 1036, 1044 (5th Cir. 1989)....Indeed, §300.114 further provides that "if the nature or severity of [a child's] disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," then the child may be removed from the regular educational environment. 34 C.F.R. §300.114(a)(2)(ii)
>
> ....Determining whether a student is educated in the least restrictive environment is necessarily a fact-intensive inquiry. Reyes, *supra.,* at *24-*25.

Complainant has raised various arguments regarding "least restrictive environment. I find none to have merit.

E. Summary on Michael F. Factors Analysis

The fact that [redacted] may have a placement in the least restrictive environment does not outweigh the shortcomings in the other three Michael F. factors. In fact, an appropriate

LRE does not outweigh any one of the other three factors. For a similar analysis see: D.C. v. Klein Indep. Sch. Dist., 2021 U.S. App. LEXIS 18093, at *25 (5th Cir. 2021).

IX.

Conclusion

I conclude safety, in reference to elopement or otherwise, is a mandatory issue for discussion by [redacted]'s IEP committee. I conclude while Rankin County School District may unilaterally move [redacted] or any child with an IEP from one school to another within the district, it may do so unilaterally only so long as the move does not result in a substantial change in the child's IEP.

The CARES school kept [redacted] and the other students behind locked doors. Elopement is a recognized safety issue with [redacted] which conceivably could have a catastrophic outcome. In [redacted]'s case safety is a mandatory issue to be discussed when crafting his IEP. Moving [redacted]. to [redacted] School where he would not be kept behind locked doors is a major safety change in his IEP. Since the move would entail a substantial change to [redacted]'s IEP, Rankin County School District cannot unilaterally make that change without predetermination.

[redacted]'s IEP Committee may ultimately determine Brandon [redacted] School is the right fit for [redacted] However, this decision cannot be made unless and until safety, a mandatory subject, has been discussed with an open mind on the part of all parties at the necessary IEP meeting(s).

Provided the committee has reached consensus with or without the parents' agreement and the District lawfully implements the consensus decision. If finding no

consensus after considering the parents' recommendations with an open mind, the District may, but only then, unilaterally implement its decision. If [redacted]. feels aggrieved afterwards she has the right to file a request for another due process hearing.

X.

Remedies

1. Based on my analysis of the Michael F. factors, it is ordered [redacted] should be reevaluated and a new IEP written consistent with the results of the reevaluation and this decision.

2. The parties, in the course of discussing elopement, are directed to discuss in specific detail each and all the safety issues raised by [redacted]'s mother and/or advocate. After discussing these issues with an open mind, the IEP committee is directed to modify, to the extent required, [redacted]s IEP and/or Transition Plan on all elopement related safety issues raised by [redacted] mother, [redacted] and/or [redacted] advocate. The resolution, in the first instance, is for the IEP committee to decide. To the extent the suggestions of [redacted]. and [redacted]'s advocate are not adopted, the IEP meeting minutes shall state specifically why the suggestion(s) have not been adopted.

3. The parties, in the course of discussing [redacted]s placement, are directed also to discuss and, if necessary, modify [redacted]s IEP to reflect the consensus of the IEP Committee on all safety issues raised.

3. The Rankin County School District, with full opportunity being afforded the parents and their advocate for parental involvement, before [redacted]. arrives for class at whatever school he attends in the district, shall have convened an IEP meeting and

discussed with open minds the subject of a risk assessment and shall have in place as a part of [redacted].'s IEP, a definite and reasonable plan of action with its object being prevention of elopements by [redacted], and, which provides a reasonable plan setting out how to deal with an elopement should one occur within the building, and how to deal with an elopement should one occur outside the building. All personnel involved in [redacted]'s care and education shall be trained on executing the plan.

4. Because the stay-put school is Brandon [redacted] School and [redacted] has clearly stated she will never enroll [redacted]. in Brandon [redacted] School, no compensatory education time is being awarded.

5. The only issue remaining before the hearing officer is attorney's fees and costs. Counsel shall within fourteen (14) days following receipt of this decision provide the hearing officer a maximum ten page double spaced memorandum on the issues of whether a hearing officer has the authority to award attorney's fees and cost; and, if so, the applicable rules for awarding attorney's fees and costs.

6. Anything inconsistent with the terms of this order as stated by the Hearing Officer in any previous written order or stated by the Hearing Officer during the hearing of this matter is vacated and held for nought.

Dated: November 4, 2021

/s/ Preston Rideout
PRESTON RIDEOUT, ESQ.
DUE PROCESS HEARING OFFICER

CERTIFICATE OF SERVICE

I, Preston Rideout, do hereby certify that I have this day caused to be served by email the above and foregoing Due Process Opinion to:

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THIS the 4th day of November, 2021.

/s/ Preston Rideout
PRESTON RIDEOUT