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Education Law—A Child Left Behind: Exploring Failures in Effective IEP Implementation—Lamar Consol. Indep. Sch. Dist. v. J.T., 577 F. Supp. 3d 599 (S.D. Tex. 2021)

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**EDUCATION LAW—A CHILD LEFT BEHIND:
EXPLORING FAILURES IN EFFECTIVE IEP
IMPLEMENTATION—*LAMAR CONSOL. INDEP.
SCH. DIST. V. J.T.*, 577 F. SUPP. 3D 599 (S.D. TEX.
2021).**

The Individuals with Disabilities Education Act (“IDEA”) is a law enacted to guarantee access to a free appropriate public education (“FAPE”) for every child with a qualifying disability in the least restrictive environment (“LRE”).¹ Every FAPE must be individually tailored to meet the needs of each student, in compliance with the standards and guidelines set forth in

¹ 20 U.S.C. §§ 1400 (c)(1)-1400(c)(14) (outlining Congress’s findings regarding necessity of IDEA); see *About IDEA*, U.S. DEP’T. OF EDUC., <https://perma.cc/NG2Z-TZ99> (last visited Oct. 10, 2022) (recounting history and purpose behind IDEA). Qualifying disabilities include any combination of or singular “intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness.” 34 CFR § 300.8(a)(1). As codified, a FAPE under the IDEA relates to special education and related services that:

(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d) [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9). Under the statutory IDEA requirements, the FAPes must be administered in the LRE. See 20 U.S.C. § 1412(a)(5). Although the IDEA does not explicitly define LRE, the field of special education has adopted Section 1412(5)(B) as a shorthand denominator for the placement presumption. See *St. Louis Dev. Disabilities Treatment Ctr. Parents Ass’n. v. Mallory*, 591 F. Supp. 1416, 1442 (W.D. Mo. 1984), aff’d, 767 F.2d 518 (8th Cir. 1985). Further, various case law has attempted to define what a LRE looks like in action:

A disabled student’s least restrictive environment refers to the least restrictive educational setting consistent with that student’s needs, not the least restrictive setting that the school district chooses to make available. This requirement expresses a strong preference for children with disabilities to be educated, to the maximum extent appropriate, together with their non-disabled peers.

Avaras v. Clarkstown Cent. Sch. Dist., No. 18-CV-6964 (NSR), 2019 U.S. Dist. LEXIS 162087, at *4 (S.D.N.Y. Sept. 21, 2019) (quoting *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 161 (2d Cir. 2014)). The LRE does not require handicapped students to be educated together with non-handicapped students, or even in the same facilities, although it is generally preferable. See *St. Louis Dev. Disabilities Treatment Ctr. Parents Assoc.*, 591 F. Supp. at 1446; see also *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1009 (5th Cir. 2010) (indicating congressional intent for students to be “mainstream[ed] . . . to the maximum extent appropriate” to meet LRE requirement).

an Independent Educational Plan (“IEP”) or Behavioral Intervention Plan (“BIP”).² Parents who disagree with the school district’s IEP evaluation are entitled to a due process hearing with an impartial hearing officer.³ First established in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, the Fifth Circuit applied a de novo standard of review to determine whether a student’s IEP was reasonably calculated to confer meaningful educational benefits, the validity of which is based on four factors.⁴ In *Lamar Consol. Indep. Sch.*

² See 20 U.S.C. § 1401(9)(D) (providing conformity of FAPE under an IEP); see also 20 U.S.C. § 1414(d) (furnishing definitions and guidelines for practical use of IEPs); 20 U.S.C. § 1415 (issuing procedural safeguards for provision of IEPs); 20 U.S.C. § 1401(9)(D) (outlining requirements for FAPE and conformity with IEP or BIP). An IEP is a written statement that sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instructions and services for the child to meet those objectives. See 20 U.S.C. § 1414(d)(1)(A). Accordingly, a student’s IEP must be annually reviewed and revised to accommodate the child’s shifting needs. See 20 U.S.C. § 1414(d)(2)-(4) (outlining IEP procedural requirements); see also D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ., 465 F.3d 503, 507-08 (2nd Cir. 2006) (explaining significance and requirements of IEPs). Based on the outcome of a Functional Behavior Assessment (“FBA”), BIPs are crafted for the student by identifying the cause of a challenging behavior and implementing a specific plan to improve or replace the behavior; BIPs could result in a change in instruction, support, intervention, or environment type. *Behavior Intervention Plans (BIPs)*, MICH. DEP’T. OF EDUC. OFF. OF SPECIAL EDUC., <https://perma.cc/8HRW-6ZN2> (last visited Oct. 11, 2022) (outlining educational benefits of BIPs); see also 20 U.S.C. § 1414(d)(3)(B)(i) (advising “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior”).

³ See 34 C.F.R. § 300.507(a) (2021) (outlining filing process for due process complaints regarding IEP evaluations); 34 C.F.R. § 300.510(a) (2021) (describing steps for due process hearing); see also Sydney Doneen, Comment, *Education Law—Idea Eligibility: Hindsight Is 20/20*—Lisa M. Ex Rel. J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205 (5th Cir. 2019), 27 SUFFOLK J. TRIAL & APP. ADVOC. 195, 196 (2021) (discussing circuit splits regarding considerations of “hindsight review” versus “contemporaneous review”).

⁴ *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997) (holding specifically tailored IEP was appropriate under IDEA using four-factor analysis). Courts review the effectiveness of an IEP’s ability to provide a meaningful educational benefit based on four factors: “(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.” *Id.* Although the district court must accord “due weight” to any previous findings of a hearing officer, the court is obligated to reach a decision independently, based on “a preponderance of the evidence.” *Id.* at 252 (quoting *Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)). According to the Fifth Circuit, the “academic benefits” prong is one of the most critical factors to consider when assessing an IEP’s validity and appropriateness. *Houston ISD v. V.P.*, 582 F.3d 576, 588 (5th Cir. 2009). “The progress made must be more than minimal, and benefits conferred must be meaningful.” See *Lamar Consol. Indep. Sch. Dist. v. J.T.*, 577 F. Supp. 3d 599, 607 (S.D. Tex. 2021) (quoting *Houston ISD v. V.P.*, 582 F.3d 576, 588 (5th Cir. 2009)). “Whether a child is able to pass general education classes and whether a child’s test scores have increased are important indicators of whether a child has received a meaningful benefit.” *D.C. v. Klein ISD*, 860 F. App’x 894, 904 (5th Cir. 2021); see also *Leigh Ann H. v. Riesel Indep. Sch. Dist.*, 18 F. 4th 788, 798 n.12 (5th Cir. 2021) (finding educational benefits were conferred where there was improvement in grades and standardized test scores).

Dist. v. J.T.,⁵ the Southern District Court of Texas incorrectly applied the *Michael F.* standard where it held mitigating action by Lamar Consolidated Independent School District (“CISD”) taken the semester following educational harm must be considered to determine whether academic and non-academic benefits were conferred upon the student without providing analysis of the first two *Michael F.* factors.⁶

J.T. is a student at George Ranch High School in Fort Bend County, Texas, with various learning disabilities, including Rubenstein-Taybi syndrome.⁷ Due to the consistent nature of his verbal and physical outbursts, J.T. had a designated BIP which outlined appropriate instructive responses to his anticipated behavior.⁸ J.T. had five altercations with a former George Ranch teacher, Regina Thurston, between November 20, 2018, and the end of the fall semester, on or around December 20, 2018.⁹ At the beginning of

⁵ 577 F. Supp. 3d 599 (S.D. Tex. 2021).

⁶ *Id.* at 608 (analyzing implementation of IEP where school mitigated harm with subsequent actions). The court concluded that the lower court and the hearing officer both erred by considering the failures, which occurred during the fall 2018 semester, without giving weight to remedial measures, which occurred during the spring 2019 semester. *Id.* The court agreed with Lamar CISD’s analysis that for proper application of the *Michael F.* standard, the hearing officer, and ultimately the court, must not view the events “in a vacuum.” *Id.*

⁷ *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608. (explaining J.T.’s disability which allowed him to qualify for an IEP). J.T.’s various learning disabilities caused him to “experience limited strength, heightened alertness to stimuli, subaverage general intellectual functioning, deficits in adaptive behavior, impaired articulation, and mood changes (including temper outbursts and anxiety), among other symptoms.” *Id.* at 602. J.T.’s disabilities could cause him to become agitated, and yell or throw items. *Id.*; see *Rubinstein-Taybi Syndrome*, GENETIC AND RARE DISEASES INFO. CENTER, <https://perma.cc/88KU-SPNS> (last visited Mar. 17, 2023) (outlining symptoms of Rubenstein-Taybi syndrome, including subnormal intellectual functioning, irritability, and attention deficit hyperactivity disorder).

⁸ *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 602 (explaining correlation between J.T.’s disability and designated BIP). Certain appropriate instructive responses to J.T.’s behavior included his mother, April S., picking him up early from school, or when his behavior warranted a more extreme instructive response, restraining J.T. to prevent him from causing harm to himself or others. *Id.*

⁹ See *id.* at 603 (outlining Thurston’s inappropriate responses to J.T.’s behavior in opposition to designated responses in his BIP). For example, Thurston threw J.T.’s shoes across the room on one occasion, threw items from his desk to the floor on another occasion, and pushed J.T. off a chair and onto the floor. *Id.* The hearing officer in J.T.’s case determined the claims articulated in this action were subject to a one-year statute of limitations, limiting this dispute to offenses after November 20, 2018. *Id.* However, the Summary of Facts Per the Hearing Officer’s Decision provided in J.T.’s response to Lamar CISD’s Motion for Partial Summary Judgment provides a timeline of the events preceding the November 20, 2018, cutoff. Def. [s] Resp. to LCISD’s Mot. for Partial Summ. J., at 4-7, *Lamar Consol. Indep. Sch. Dist. v. J.T.*, 577 F. Supp. 3d 599 (S.D. Tex. 2021) (NO. 4:20-cv-02353) (S.D. Tex.); see also Pl.’s Mot. for Partial Summ. J., at 6-7, *Lamar Consol. Indep. Sch. Dist. v. J.T.*, 577 F. Supp. 3d 599 (S.D. Tex. 2021) (NO. 4:20-CV-02353) (S.D. Tex.) (providing a timeline of events agreeable to both parties). Prior to November 20, J.T. had been suspended three times. Def. [s] Resp. to LCISD’s Mot. for Partial Summ. J., at 4, *Lamar Consol. Indep. Sch. Dist. v. J.T.*, 577 F. Supp. 3d 599 (S.D. Tex. 2021) (NO. 4:20-cv-02353) (S.D.

the spring 2019 term, J.T.'s mother, requested the Admission, Review, and Dismissal ("ARD") Committee allow J.T. to receive temporary homebound instruction following an outburst which resulted in J.T. receiving a half-day suspension.¹⁰ April S. allowed J.T. to return to school after several days, but changed her mind on January 30, 2019, after being shown video footage of the December 19, 2018, altercation between J.T. and Thurston; ultimately, April S. decided to keep J.T. in homebound instruction for the remainder of the school year.¹¹

Tex.). April S. was not allowed to view video evidence of the supposed behaviors which caused J.T.'s second suspension because "abuse or neglect was not suspected." *Id.* On October 26, Thurston reported "daily sudden behavior changes" by J.T. in an ARD meeting. *Id.* Later that day, a behavior specialist observed J.T. and reported that J.T.'s BIP had been properly implemented, despite not having personally observed J.T. and Thurston's interactions. *Id.* The events occurring on and after November 20 were subject to the outcome of a new FBA, which was reviewed at an ARD meeting just prior to that on November 2, where April S. reported that she was not receiving progress reports. *Id.* On November 5, April S. reiterated that she had not been receiving updates as to J.T.'s progress. *Id.* at 5. As requested by April S., on November 2, the ARD Committee reviewed the FBA and proposed new academic goals, along with a new BIP that contained two new behavioral goals. See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 603. However, the ARD did not review any "discipline reports, attendance records, or grade reports ... as sources of data to gather information for the FBA." Def. [s] Resp. to LCISD's Mot. for Partial Summ. J., at 5, *Lamar Consol. Indep. Sch. Dist. v. J.T.*, 577 F. Supp. 3d 599 (S.D. Tex. 2021) (NO. 4:20-cv-02353). (S.D. Tex.). Without a review of Thurston and J.T.'s interactions, the ARD reported that "[t]he frequency and intensity of disruptive of [sic] activity was documented as 25 times, severe noncompliance 20 times, and severe physical aggression 15 times." *Id.* Just over three weeks later, video footage showed Thurston's obvious failure to comply with J.T.'s IEP and BIP. See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 603. Instances between J.T. and Thurston during Fall 2018—which fell within the statute of limitations period—noted by the school district include:

On November 29th, in frustration with one of J.T.'s outbursts, Thurston forcefully grabbed him while he was on the ground and threw his shoes across the room;
 On December 14th, while students waited to get on the bus, Thurston told J.T. "if you want to kick me then walk over here and kick me"—but after doing what he was told, Thurston kicked J.T. in the shin;
 On December 18th, after J.T. had become upset in response to a loud video and turned over his desk, she dumped additional items on the floor and yelled at him to "pick it up";
 On December 19th, after J.T. had become physically aggressive, Thurston grabbed him by the arm and shoved him to the ground, with another physical interaction causing them both to fall to the ground; and
 On December 20th, again without any apparent provocation, Thurston pushed J.T. from a ball chair onto the floor.

Id. Though the school began investigating the December 14 incident immediately, April S. was not notified of that specific incident until December 20. *Id.*

¹⁰ *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 603 (following proper and timely IEP protocol for allowing brief homebound instruction).

¹¹ See *id.* (implying April S. had not seen video of December 20, 2018, altercation until spring 2019). The video was shown to April S. at this time as part of the school's investigation into Thurston, as well as its "monitoring of its special education practices." *Id.* George Ranch increased homebound services to J.T. following April S.'s decision. *Id.*

The ARD Committee met to review J.T.'s Full Individual Evaluation ("FIE") for the 2019-2020 academic year.¹² Although April S. agreed with the ARD Committee's transitory plan for the upcoming school year, she nonetheless filed an administrative complaint with the Texas Education Agency, asserting that Lamar CISD violated IDEA by denying J.T. a FAPE during the previous school year.¹³ A hearing conducted by a Texas Education Agency special education hearing officer determined that J.T. was denied a FAPE for fall 2018.¹⁴ In July 2020, Lamar CISD filed a complaint in the United States District Court for the Southern District of Texas to appeal the decision, claiming the hearing officer's determination of a faulty FAPE

Homebound instruction was increased from 4 hours/week to 10 hours/ week. The ARD committee agreed to provide occupational therapy, personal care services, and ABA therapy. It also agreed that adaptive PE would be provided and that compensatory speech therapy services would be made up before the end of the school year . . . The district agreed to pay for six months of private counseling sessions for [J.T.] and [April S.]. [April S.] stopped attending following the May 15, 2019 session.

Id. at 603-04.

¹² *See id.* at 604 (indicating George Ranch did not re-evaluate J.T.'s in-person status before the 2019-2020 school year). April S. and the ARD Committee attempted to outline new educational goals for J.T., and ultimately agreed to a plan where J.T. would transition back into the school setting through a combination of homebound and on-campus instruction. *Id.* An FIE is a mandated, comprehensive evaluation which must occur no more than once a year, but at least once every three years, in accordance with §§ 300.304– 300.311, unless provisions are otherwise agreed to by the parent and school district. *See* 34 C.F.R. § 300.303(b). The evaluation uses various assessment tools to gauge relevant functional, developmental, and academic information to decide whether the student qualifies as having a disability under the IDEA, and if so, aids in the creation—and upon reevaluation, the adaption—of the IEP. *See id.*; 34 C.F.R. § 300.304-300.311.

¹³ *See Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 604 (discussing remedial action for prior issues with J.T.'s FIE).

¹⁴ *See id.* (finding specifically J.T. was not conferred educational benefits during fall 2018). As a result, the special education hearing officer ordered J.T. be provided one semester of compensatory services and other miscellaneous benefits by Lamar CISD. *See id.* On March 1, 2019, a Dispositional Staffing Memo for Special Investigator Cesar Beltran of (Child Protective Services ("CPS")) was published. *See* Def.'s Resp. to LCISD's Mot. for Partial Summ. J., *Lamar Consol. Indep. Sch. Dist. v. J.T.*, 577 F. Supp. 3d. 599 (2021) (No. 4:20-cv-02353), 2021 WL 6111840, at *12 (S.D. Tex., Jan. 25, 2021). The special hearing officer referenced the CPS memo in his decision:

[I]t was reasonable to conclude that physical abuse occurred because: (1) J.T. was subjected to repeated physical abuse by Thurston; (2) J.T. suffers from intellectual disabilities and cannot defend himself; (3) video footage shows Thurston throwing items, knocking over desks, and yelling at J.T. to pick up the items; (4) Thurston pushed J.T. to the floor which caused him to strike his head against a bookshelf; and (5) Thurston pushed J.T. down into a chair, forcing J.T. to sit in the chair. (AR 0013-0023).

Id.

under IDEA failed to give credit to the remedial measures taken by Lamar CISD in August 2019 by considering Fall 2018 “in a vacuum.”¹⁵

Congress passed IDEA in 1975 to ensure children with disabilities have an equal opportunity to access free education, regardless of the type or severity of their disability.¹⁶ A student is IDEA eligible when (1) the child has a qualifying disability, and (2) by reason of that disability, that child needs IDEA services.¹⁷ Students can suffer irreparable injury when denied an adequate FAPE or IEP.¹⁸ In 1982, the United States Supreme Court held that the IDEA establishes a substantive right to FAPE for children with qualifying disabilities, yet declined to endorse any one standard for determining

¹⁵ See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 604, 606 (noting Lamar CISD requested in partial summary judgment finding remedial efforts ensured J.T. received FAPE). Lamar CISD filed a complaint in 2020 appealing the administrative decision. See *id.* J.T.’s answer counterclaimed that Lamar CISD violated the Americans with Disabilities Act, the Rehabilitation Act, and Equal Protection guaranteed by the Fourteenth Amendment and sought recovery pursuant to 42 U.S.C. § 1983. See *id.* Lamar CISD moved for partial summary judgement on the basis that the hearing officer’s decision did not comply with IDEA, stating J.T.’s educational progress up until the due process hearing should have been considered as well. *Id.* Lamar CISD also moved to dismiss the Fourteenth Amendment equal protection counterclaim. *Id.*

¹⁶ See 20 U.S.C. § 1400(d)(1)(A) (outlining policy reasons behind IDEA); 20 U.S.C. § 1412(a)(1)(A) (“A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”); 20 U.S.C. 1412(a)(3)(A) (“All children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.”). IDEA requires all state school districts that receive federal funding to comply with IDEA by providing a FAPE to all qualifying students. See 20 USC § 1412(a)(1)(A); see also 20 U.S.C. § 1412 (a)(3)(A) (describing states’ responsibility to identify eligible children with disabilities); Antonis Katsiyannis et al., *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL EDUC., 324, 324-25 (2001) (showing millions of students with disabilities received no education or inadequate education prior to IDEA).

¹⁷ See 20 U.S.C. §§ 1401(3) (establishing two factor determination of IDEA eligibility); see also 20 U.S.C. §§ 1414(a), (c)(1) (describing procedure for initial IDEA evaluation); 34 C.F.R. § 300.306(c)(2)(1)(i) (2021) (“If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child . . .”).

¹⁸ See *DL v. District of Columbia*, 194 F. Supp. 3d 30, 97-98 (D.D.C. 2016) (“Without access to and timely receipt of special education and related services, preschool-age children in the District suffer substantial harm by being denied educational opportunities that are essential to their development.”); see also *LIH v. New York City Bd. of Educ.*, 103 F. Supp. 2d 658, 665 (E.D.N.Y. 2000) (noting that if “disabled students be erroneously excluded from summer school and forced to repeat their prior grade, the harm they will suffer will be irreparable”); *Cosgrove v. Bd. of Educ. of the Niskayuna Cent. Sch. Dist.*, 175 F. Supp. 2d 375, 393 (N.D.N.Y. 2001) (“The make-whole approach of compensatory education cannot replace that which a student was entitled to receive in earlier life . . .”); *Addressing Compensatory Services: CASE Review of U.S. Department of Education IEP Guidance (September 2021)*, COUNS. OF ADM’RS OF SPECIAL EDUC., <https://perma.cc/PJ9N-EBA7>, (last visited Nov. 15, 2022) (listing one example of “educational harm” as a denial of FAPE).

“when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act.”¹⁹

Challenging the substantive appropriateness of an IEP, the Fifth Circuit directs district courts to follow the four-factor test set forth in *Cypress-Fairbanks ISD v. Michael F.*²⁰ Under this standard, all that is merely required is to confer meaningful educational benefits.²¹ Even if an IDEA-qualifying student experiences brief periods of limited progress or regression in their education, the student’s rights have not necessarily been violated if, from a holistic perspective, the student was receiving a meaningful educational benefit from the services provided during the entirety of the designed IEP period.²² According to the Court, an IEP need not maximize a child’s potential to comply with IDEA, but merely be reasonably calculated so the child receives educational benefits.²³ The Court’s most recent unanimous

¹⁹ See Board. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 202 (1982) (illustrating educational needs differ amongst all IDEA-qualifying students). The Court articulates that because the IDEA provides services for children with such varying needs, each child’s benefits will vary. *Id.*

²⁰ See *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997) (establishing four factors which serve as indicators of an IEP’s reasonable calculation under IDEA). The Fifth Circuit, in its initial examination of the facts and application of the four-factor standard of review, concluded that there was little doubt that the first three factors were met for Michael’s IEP:

[T]he October 1993 IEP (a) was designed with his specific behavioral and academic problems in mind, (b) placed him in educational settings with non-disabled students for at least half of every school day, and (c) involved both Michael’s individual teachers and Cy-Fair ISD administrators and counselors familiar with his needs in a highly coordinated and collaborate effort.

Id.; see *E.R. v. Spring Branch ISD*, 909 F.3d 754, 765 (5th Cir. 2018) (analyzing potential shift in use of *Michael F.* four-factor test under *Andrew F.*).

²¹ See *Michael F.*, 118 F.3d at 247 (articulating that an IEP “need not be the best possible one, nor one that will maximize the child’s educational potential[.]”). A substantial or material failure exists when there is more than a minor discrepancy between the services provided and the services required by an IEP. See *Van Duyn ex rel Van Duyn v. Baker Sch. Dist.*, 5J, 502 F. 3d 811, 822 (9th Cir. 2007) (clarifying “materiality standard does not require a child suffer demonstrable educational harm in order to prevail”). Not implementing elements of a child’s IEP designed to assist a child with behavioral issues is a material failure. See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1030 (8th Cir. 2003) (failing to devise and implement behavior management plan).

²² See *Houston Indep. Sch. Dist. v. VP*, 582 F.3d 576, 583 (5th Cir. 2009) (quoting *Michael F.*, 118 F.3d at 248) (holding “an IEP must be likely to produce progress, not regression or trivial educational advancement.”). The educational benefit to which an IEP must be geared cannot be *de minimis*, but rather it must be meaningful. See *id.* at 583. Factors such as passing grades and advancement from year to year indicate a child is receiving a meaningful educational benefit. See *id.* at 590.

²³ See 20 U.S.C. § 1414(d) (describing how child should progress under implemented procedure for creating and using IEPs); see also Board. of Educ. of Hendrick Hudson Cent. Sch. Dist. Westchester City v. Rowley, 458 U.S. 176, 198, 202 (1982) (holding “no additional requirement that the services so provided be sufficient to maximize each child’s potential ‘commensurate with

opinion in *Endrew F. v. Douglas County School District RE-1*²⁴ overturned a lower court's decision that allowed an IEP to confer "merely more than *de minimis*" educational benefit and prompted redressing the review of sufficient IDEA standards.²⁵

the opportunity provided other children."'). The Court reasoned that the phrase "free appropriate public education" is too complex to be diluted down to "equal" because:

[t]he educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to non-handicapped children would in all probability fall short of the statutory requirement of 'free appropriate public education'; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus, to speak in terms of 'equal' services in one instance gives less than what is required by the Act and in another instance more.

Rowley, 458 U.S. at 198-99. Further, the Court elaborates on its reasoning by outlining the policy reasons behind overturning lower courts' decisions which would have instructed schools to maximize each student's educational potential benefits based upon their individualized needs; Congress did not want to create equality between handicapped and non-handicapped students, but rather wanted States to identify handicapped students and ensure they had access to provide them with a free public education. *See id.* at 198-200.

²⁴ 580 U.S. 386, 403 (2017) (raising the standard for sufficient amount of educational benefit conferred).

²⁵ *See id.* at 402-03 ("[A] student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. . . The IDEA demands more."); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ("Whether advancement is so trivial or minor as to qualify as *de minimis* must be evaluated in light of the child's circumstances."). Therefore, "*Endrew F.* provides more clarity for what constitutes an appropriate IEP, but it does not render the *Michael F.* factors inapplicable." *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (emphasizing both standards coincide rather than conflict). The IEP standard is not without fault, as IEPs only need to be reasonable, rather than ideal. *See Endrew F.*, 580 U.S. at 399, (quoting *Rowley*, 458 U.S. at 206-07 (1982)) ("Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal."). An IEP "must aim to enable the child to make progress." *Id.*; *Houston Indep. Sch. Dist. v. VP*, 582 F.3d 576, 588 (5th Cir. 2009) (clarifying progress made must be more than minimal). For children relying on IDEA, "receiving instruction that aims so low would be tantamount to "sitting idly . . . awaiting the time when they were old enough to 'drop out.'" *Endrew F.*, 580 U.S. at 403 (quoting *Rowley*, 458 U.S. at 176, 179 (1982)). *See Holly T. Howell, Comment, Endrew F. v. Douglas County School District: How Much Benefit Is Enough When Evaluating the Educational Needs of Disabled Students in Federally-Funded Public Schools?*, 40 AM. J. TRIAL ADVOC. 347, 391-93 (2016) (reviewing how FAPE requirement has shifted between *Rowley* and *Endrew F.*). The majority of courts follow the "some educational benefit" standard requiring that school systems have a legal responsibility to provide special education services that are nontrivial and confer upon each child through their IEP some educational benefit. *See id.* at 391 (providing majority standard followed). Nevertheless, the court in *Endrew F.* Court still declined to define "appropriate" progress under an IEP. *See Endrew F.*, 580 U.S. at 404 (noting "deference is based on the application of expertise and the exercise of judgment by school authorities."). The standard generally recognized by the majority as the "more than *de*

According to 20 U.S.C. § 1415(f)(3)(E)(ii), a special hearing officer may find that a student's FAPE has been denied under certain procedural inadequacies.²⁶ Within the Fifth Circuit, a procedural breach of a FAPE occurs when "(1) a procedural violation of the IDEA produced substantive harm, or (2) [the] IEPs were not reasonably calculated to provide an educational benefit."²⁷ However, for there to be a determination of a breach of the student's FAPE, the student or their parents must show that the procedural defect resulted in a loss of educational opportunity or infringed on the parent's opportunity to participate in the process.²⁸

minimis" was raised by the Court's decision, but their unwillingness to define "appropriate progress" under the IDEA allows lower courts significant deference when applying the standard. See Elizabeth Rose Allen, Comment, *More Than More Than: Measuring Progress in Texas Special Education Post—Endrew F. v. Douglas County School District*, 74 BAYLOR L. REV. 472, 474 (2022) (highlighting issues in application of *Endrew F.* standard). For students receiving their FAPE fully integrated in a typical classroom setting, reasonably calculated instruction typically equates to advancement through the general age-appropriate curriculum. See *Endrew F.*, 580 U.S. at 401-03 quoting *Rowley*, 458 U.S. 176, at 203-04 (1982)) (establishing original low educational benefit standard as any form of specialized education). Under *Endrew F.*, the IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 403; Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester City. v. *Rowley*, 458 U.S. 176, 203-04 (1982) (stating "if the child is being educated in the regular classrooms of the public education system, [personalized instruction] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."). *Endrew F.* further highlights the versatility and specificity of an IEP as a tool which should be "constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." See *Endrew F.*, 580 U.S. at 400; see also 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) (providing development expectations for a student's personal IEP and IEP team).

²⁶ 20 U.S.C. § 1415(f)(3)(E)(ii) (asserting hearing officer has authority to enforce procedural requirements). To address procedural issues with the implementation of a FAPE under IDEA, the United States Code states:

- [A] hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
- (I) impeded the child's right to a free appropriate public education;
 - (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
 - (III) caused a deprivation of educational benefits.

Id.; see also *B.B. v. Catahoula Par. Sch. Dist.*, No. 11-1451, 2013 U.S. Dist. LEXIS 144164, at *20-21 (W.D. La. Oct. 2, 2013) (holding failure to have special education teacher present at IEP meetings results in FAPE denial); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 813 (5th Cir. 2003) (adopting approach which states procedural deficiency alone insufficient to constitute violation of FAPE).

²⁷ See *Adam J.*, 328 F.3d at 813 (describing procedural breach). "[A] school's failure to meet the IDEA's procedural requirements may alone warrant a finding that, as a matter of law, the school has failed to provide a free appropriate public education." *Id.* at 811 (quoting *Buser v. Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995) (emphasis in original)).

²⁸ See *B.B.*, No. 11-1451, U.S. Dist. 2013 LEXIS 144164, at *20 (W.D. La. 2013) (citing *Adam J.*, 328 F.3d at 812) ("Procedural effects alone do not constitute a violation of the right to a FAPE

In *Lamar Consolidated Independent School District v. J.T.*, the United States District Court for the Southern District of Texas determined J.T.'s IEP was properly implemented.²⁹ Noting that the first and second factors of the *Michael F.* standard of review were not generally at issue in this case, the court divided its analysis into three separate sections: (a) provision of educational services in a coordinated and collaborative manner; (b) positive academic and non-academic benefits; and (c) the balance of the factors.³⁰ Specifically regarding section (b), the court highlighted the weight and centrality of the temporal scope of the analysis – “whether academic and non-academic benefits are to be weighed by considering only the events during the Fall 2018 semester, or by considering the entire 2018-2019 academic year.”³¹ The court asserted the temporal scope of the analysis proved to be salient in determining the validity of the implementation of J.T.'s IEP, due

unless they result in the loss of an educational opportunity. . . .”). Such procedural requirements guarantee, among other things, “[a]n opportunity for the parents of a child with a disability to examine all records relating to such child . . . and to obtain an independent educational evaluation of the child.” 20 U.S.C. § 1415(b)(1); see *Buser by Buser*, 51 F.3d at 493 (quoting *Honig v. Doe*, 484 U.S. 305, 311-12 (1987)) (guaranteeing parents “an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decision they think inappropriate.”); Dennis Fan, Note, *No Idea What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1525 (2014) (describing hindsight bias regarding remedial actions); Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL’Y 483, 486 (1991) (“[P]arents are to be invited to participate in the development of their child’s IEP, including the formulation of educational goals and objectives and the criteria for evaluations of progress.”).

²⁹ See 577 F. Supp. 3d at 605 (quoting *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997) (“[T]he party challenging the IEP bears the burden to show that the IEP and resulting placement was inappropriate.”); see also *Amanda P. v. Copperas Cove Indep. Sch. Dist.*, 838 F. App’x 104, 106 n.1 (5th Cir. 2021) (affirming the validity of the *Michael F.* standard under *Andrew F.*).

³⁰ *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 605-09 (explaining four *Michael F.* factors at issue). While the court held the first two factors were not at issue for the sake of the analysis, “[t]o the extent they do pertain, they weigh in favor of Lamar CISD, as they tend to show that J.T.’s IEP was individualized and administered in the least restrictive environment.” *Id.* at 609; see also *Spring Branch ISD v. O.W.*, 961 F.3d 781, 795-96 (5th Cir. 2020) (“[W]hen a plaintiff brings a claim based on a failure to implement an IEP, the first factor (whether the program is individualized) and second factor (whether the program is administered in the least restrictive environment) are generally ‘not at issue.’); *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 (5th Cir. 2000) (holding where student was mainstreamed to the extent possible, LRE element was not violated).

³¹ See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 607 (explaining Lamar CISD argues court should look at school year in its entirety). When the hearing officer limited his analysis to the Fall 2018 semester, he found in favor of J.T. *Id.* In his academic benefits analysis, the officer determined that Thurston’s failure to recognize and utilize the established and approved communication techniques when interacting with J.T. was violation of J.T.’s IEP. *Id.* The hearing officer held that this violation denied J.T. meaningful academic progress. *Id.* Further, the officer could not identify any meaningful non-academic benefits conferred upon J.T. during this time, stating that J.T.’s behavioral problems “may have even worsened during this time.” *Id.*

to the crux of J.T.'s claim being based in the Fall 2018 semester, wherein Lamar CISD's remedial action took place during Spring 2019.³²

The court articulated that while the failures of Lamar CISD are serious, the school district took Thurston's failure to follow J.T.'s IEP seriously, and promptly mitigated these failures with its subsequent actions.³³ Doubling down on the court's holding on the temporal scope of the analysis, the court held that because J.T. was conferred academic and non-academic benefits under section (a) during the Spring 2019 semester, "failures identified ... didn't ultimately detract from Lamar CISD fulfilling its obligation to provide J.T. with a FAPE."³⁴ Conferring statutory and regulatory provisions, the court agreed with Lamar CISD's argument that the special hearing officer's failure to consider Lamar CISD's remedial efforts during Spring 2019 neglects the temporal scope analysis.³⁵ In the court's balancing of the

³² *Id.* (highlighting Spring 2019 as prompt response to events which occurred during Fall 2018).

³³ *Id.* at 605-06 (acknowledging tardiness of Lamar CISD's communication with April S.). The court concurs with the special hearing officer in that the evidence under consideration for this factor does not substantially favor either party's argument:

Lamar CISD argues that this factor weighs in its favor, stressing that the failures of the Fall 2018 semester mustn't be viewed in a vacuum, but instead that its services given to J.T. must be viewed in their entirety. It highlights the hearing officer's finding that, in the Spring 2019 semester, its "prompt response [to the Fall 2018 semester] brought compliance with [J.T.'s] IEP to ensure [J.T.] received a FAPE after January 2019." And Lamar CISD argues that its efforts to accommodate April S. and remedy any damage show ample coordination and collaboration.

J.T. raises two arguments in response—first, that Lamar CISD failed to collect and record meaningful data with respect to J.T.'s development and to deliver progress reports to April S.; and second, that Lamar CISD hid information related to J.T.'s education from April S., especially the incidents involving Thurston.

Id. (citations omitted).

³⁴ See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 606 (laying out each party's arguments as to why this factor weighs in its favor). The court ultimately held in favor of Lamar CISD because the school district had made "genuine efforts to accommodate April S. and maintain J.T.'s education when she held him out of school, including providing specialized instruction and offering other placement." *Id.* The court then cited to *Cypress-Fairbanks v. Michael F.* to remind that the third and fourth prongs are easily conflated, so as to highlight the importance of coordination and collaboration as a tool which ensures educational benefits are conferred upon the student. *Id.*

³⁵ See *id.* at 608 (considering relevant time-period to be entirety of 2018-2019 academic year). Lamar CISD placed emphasis on the ARD Committee's finding that J.T.'s IEP goals for English, math, social studies, science, and behavior were all met over the course of the 2018-2019 academic year. See *id.* Additionally, J.T. showed advancement on Texas standardized tests, the STAAR exams. *Id.* To further emphasize J.T.'s progress, Lamar CISD asserts April S. "never expressed any concerns or disagreement [with J.T.'s progress]," going so far as to say J.T.'s homebound services teacher "has gone above and beyond to make sure [J.T.] progresses." *Id.* To the contrary, J.T. contends the ARD Committee documented J.T. failed to make academic progress during Fall 2018, as well as having continual behavioral problems, stressing Thurston's numerous breaches of his IEP. *Id.* Most significantly, J.T. maintains the argument that "the presence of some educational

factors, the court explained that because the first and second factors are not at issue, and the third factor favors neither, the determination is made on the basis of the fourth factor, which favors Lamar CISD.³⁶

The court's holding in *Lamar Consol. Indep. Sch. Dist. v. J.T.* erred by failing to recognize a significant procedural defect and dismissing the second prong of the *Michael F.* test without sufficient review.³⁷ The court's decision is a gratuitous effort to disregard the hearing officer's evaluation "in a vacuum."³⁸ This decision, which would unjustly accept mitigating efforts identified by the school district, condones the identified and

progress doesn't necessarily mean that Lamar CISD has fully complied with the IDEA. For instance, J.T. contends that he might have made even more progress if Lamar CISD had properly and consistently implemented the IEP." *Id.* However, in response to this argument, the court asserts that "even if more progress was possible, more progress isn't required." *Id.* at 608 (emphasis in original).

³⁶ *Id.* at 609 (balancing four factors as they apply to J.T.'s IEP). Overall, the court holds firm to the precedent that they are given the discretion to apply these factors with the weight they deem suitable:

With respect to the weight of each factor, the Fifth Circuit has said that district courts needn't apply them "in any particular way." That is so because the factors are only indicators of an IEP's appropriateness. This means that a district court doesn't "legally err by affording more or less weight to particular Michael F. factors." Still, the Fifth Circuit "has found that the fourth factor is "one of the most critical factors in this analysis."

Id. (citations omitted).

Both the special hearing officer and the court found it to be undisputable that J.T. was conferred academic benefit, meeting many of the goals established in his IEP by the end of the 2018-2019 academic term:

With respect to academics, J.T. exceeded mastery of English Goal 1 and mastered Math Goal 1, Science Goal 1, and Social Studies Goal 1. And the hearing officer specifically noted, "Student did exceptionally well on the Biology STAAR, passed the Algebra I STAAR, and was only a few questions away from passing the English/Language Arts STAAR. It is clear Student was successful academically."

Id. at 608 (citation omitted).

Because the IEP period was the 2018-2019 academic year, the court determined that in Lamar CISD's design and implementation of his IEP conferred upon J.T. a "meaningful floor set for the public education of disabled children by the IDEA." *Id.* at 609.

³⁷ See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608 (citing *Spring Branch ISD v. O.W.*, 961 F.3d 781, 796 (5th Cir. 2020)). When a student challenges the implementation of an IEP, the court automatically presumes the first and second *Michael F.* factors are not at issue; notably, the second prong addresses "whether the program is administered in the restrictive environment." *Id.* (emphasis in original).

³⁸ See *id.* at 606 ("[A]nalysis of the third factor shows that the failures identified above didn't ultimately detract from Lamar CISD fulfilling its obligation to provide J.T. with a FAPE as measured over the whole of the 2018-2019 academic year"). The court held that the hearing officer's analysis should consider the full 2018-2019 school year, and that academic benefits conferred during Spring 2019 were sufficient to overturn the ruling which concluded J.T. suffered educational harm during Fall 2018. *Id.*

indisputable educational harm experienced by J.T. during Fall 2018, and improperly declines to acknowledge that Lamar CISD's lack of communication with April S. during that semester caused J.T. to be removed from his LRE for Spring 2019.³⁹ Thus, even when evaluating the implementation of J.T.'s IEP over the course of the full 2018-2019 school year, the court should affirm the hearing officer's conclusion of educational harm.⁴⁰

³⁹ See *id.* at 606 (citing Lamar CISD's acknowledgment of failures and breach of IEP in Fall 2018). This decision invites a mentality which would allow schools to neglect students' IEPs, even when a student struggles with academic and non-academic regression for any amount of time, so long as the school can articulate mitigating efforts. See *Houston ISD v. V.P.*, 582 F.3d 576, 591 (5th Cir. 2009). While educational benefits may have been conferred by the end of the 2018-2019 school year, J.T. should have been able to remain in school as his LRE. See *e.g. Avaras v. Clarks-town Cent. Sch. Dist.*, No. 18-CV-6964 (NSR), U.S. Dist. LEXIS 162087 (S.D.N.Y. 2019) (considering various placement options as LRE for proper IEP implementation); *St. Louis Dev. Disabilities Treatment Ctr. Parents Ass'n. v. Mallory*, 591 F. Supp. 1416 (W.D. Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985) (showing failure of LRE requirement where children with disabilities were placed in segregated, institutional settings); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1009 (5th Cir. 2010) (asserting students should be "mainstreamed . . . to the maximum extent appropriate" to meet LRE requirement). Lamar CISD asserted in their Motion for Partial Summary Judgment that, as of December 18, 2018, J.T. was behaviorally in a school setting 75 percent of the day. See Pl. [s] Mot. For Partial Summ. J., 6, *Lamar Consol. Indep. Sch. Dist. v. J.T.* No. 4:20-CV-02353 (S.D. Tex. 2021) (maintaining J.T.'s proper LRE was in a mainstreamed environment). See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608 (describing non-academic failures of IEP plan). Because the non-academic failures were a result of a breach in J.T.'s IEP by Thurston, and not by a shifting need to review his LRE, it is clear that a different classroom environment, apart from Thurston, remained J.T.'s proper LRE under his IEP. *Id.* Because Thurston violated J.T.'s IEP during Fall of 2018, and Lamar CISD neglected to communicate with April S. in a timely manner following that violation, declined to share video evidence of J.T.'s prior behaviors, and failed to share progress reports, J.T. was improperly removed from his LRE for Spring 2019 due to the lack of proactive action taken by Lamar CISD that could have prevented further violation. *Id.* at 606. Upon review before the court in 2021, it is possible that mitigating factors created hindsight bias as to the failures of Lamar CISD, minimizing the significance of the IEP. See *Fan, supra* note 28, at 1503 ("subsequent IEPs involve some degree of hindsight bias"). Simply, had April S. been properly communicated with during the entirety of the Fall 2018 semester, the drastic remedial measures by Lamar CISD—many of which were conducted only following April S.'s discovery of IEP breaches during Fall 2018, leading to the LRE violation—may not have been necessary. See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 606 (highlighting failures of Lamar CISD regarding LRE violation); see also *Huefner, supra* note 28, at 486 (advocating use of IEP goals to assess appropriateness of child's education in court).

⁴⁰ See *Allen, supra* note 25, at 483 (arguing Fifth Circuit's analysis either "misinterpret[s] Endrew or mischaracterize[s] its own test"). Not only did J.T. not receive any academic benefits because of Thurston's violation of his IEP, but the hearing officer concluded it was likely that J.T.'s behavior worsened during the Fall 2018 semester. *Id.* at 607 ("[T]hurston's failure to implement J.T.'s IEP (especially with respect to communication techniques) denied him meaningful academic progress"). Further, by being removed from school due to —J.T.'s LRE, —J.T. was denied the opportunity for non-academic advancement through socialization with his peers that he would normally receive in a classroom setting group. See *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1015 (5th Cir. 2010) (showing peer socialization and behaviors toward other students are key considerations of non-academic benefits).

In the balance of the factors analysis, the court explained that because J.T. only challenged the implementation of his IEP, the first and second factors were not generally at issue, and were therefore not considered.⁴¹ However, this decision invites an unequal and inequitable balancing of the factors, placing insufficient weight on the second factor and dismissing it without substantive review and analysis.⁴² The court should consistently evaluate all four factors when assessing whether an IEP was properly implemented.⁴³ If this factor had been given proper consideration, the court would have found that J.T.'s LRE should have remained a mainstreamed environment during Spring 2019.⁴⁴

⁴¹ See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608-09 (citing *Spring Branch ISD v. O.W.*, 961 F.3d 781, 796 (5th Cir. 2020)) (stating claim relating to IEP implementation does not require first or second factor prong analysis).

⁴² See *id.* (restating because J.T. challenges *implementation* of the IEP, review of second factor is unnecessary). The court not only declines to analyze the first and second factors in making its substantive determination on J.T.'s IEP claims, but also fails to provide any explanation as to why they deem it to be "not at issue." *Id.* Upon review, there is an existing trend of courts providing insufficient to no reasoning for failure to analyze the first and second *Michael F.* factors, citing to precedent which states simply these factors are "not at issue." See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 605 (omitting analysis of first two *Michael F.* factors for inadequate IEP implementation claim); *Spring Branch Indep. Sch. Dist.*, 961 F.3d at 796 (declining to analyze first two *Michael F.* factors under claim for improper implementation of IEP); *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 (5th Cir. 2000) (establishing initial *Michael F.* factors not disputed in IEP implementation claim). *Lamar Consol. Indep. Sch. Dist.* cites to *Spring Branch ISD v. O.W.*, which in turn cites *Hous. Indep. Sch. Dist. v. Bobby R.*, which is the first to provide even a cursory analysis of the second factor, stating simply because the student was "mainstreamed" the second factor was not at issue. See *Bobby R.*, 200 F.3d at 348 (citing *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 181 n.4 (1982)) ("the 'least-restrictive-environment' factor should be viewed in light of the IDEA's 'preference for 'mainstreaming' handicapped children—educating them with nonhandicapped children.'"). Like the student in *Bobby R.*, J.T.'s IEP stated he was capable of success in a mainstreamed environment, yet the court's failure to analyze the second factor clearly demonstrates a violation to his IEP, as he was removed from mainstreamed instruction for Spring 2019. See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 605, 608 (attenuating J.T.'s growth within a proper LRE).

⁴³ See *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997) ("[these] four factors are derived from and track the federal regulations which implement the IDEA"); see also 34 C.F.R. §§ 300.346(a) (outlining regulations governing implementation of IDEA). These four factors established in *Michael F.* are intended to be weighed together as indicators to determine whether an IEP is reasonably calculated to provide a meaningful education benefit. See *Michael F.*, 118 F.3d 245 at 208. The proper implementation of an IEP falls under that category, and as such should be afforded full analysis under the four *Michael F.* factors. *Id.*

⁴⁴ See *B.B. v. Catahoula Par. Sch. Dist.*, No. 11-1451, 2013 U.S. Dist. LEXIS 144164, 20-21 (W.D. La. Oct. 3, 2013) (finding impact on educational benefits when student could have been mainstreamed under different teacher's instruction). The issue with J.T. being taught through homebound instruction was not with the quality of education conferred, but, instead, the fact that J.T. could have successfully stayed in a mainstreamed environment under a different teacher's instruction. *Id.*; *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608 (describing J.T.'s academic success during homebound instruction); Pl. [']s Mot. For Partial Summ. J., 6, *Lamar Consol. Indep. Sch. Dist. v. J.T.*, No. 4:20-CV-02353 (S.D. Tex. Dec. 18, 2020) (asserting J.T. was behaviorally successful approximately seventy-five percent of day through mainstreamed instruction). Although

Due to the lack of proper communication with April S.—which contributed to the hearing officer’s conclusion that J.T.’s FAPE was denied—her opportunity to participate in the decision-making process was significantly impeded.⁴⁵ When Lamar CISD failed to show April S. video footage of J.T.’s behaviors or communicate behavioral issues and educational concerns in a timely manner, any participation April S. was allowed had not been properly informed.⁴⁶ April S.’s inability to actively and knowledgeably

the ARD Committee agreed to homebound instruction for the Spring 2019 semester, the request and perceived necessity for such an accommodation was a result of significant delays in communication regarding the physical harm done to J.T. by Thurston. *See Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 603 (illustrating J.T.’s need, or lack thereof, for homebound instruction). April S. was not told about or shown video of the December 19, 2018 altercation until January 30, 2019, over a month later. *Id.* Before this information was revealed to April S., she permitted J.T. to return to school, which is always deemed preferable when appropriate. *Id.*

⁴⁵ *See Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 603 (delineating April S.’s fluctuating opinions on J.T.’s IEP implementation as new information was disclosed). This procedural failure on the part of Lamar CISD is the direct cause of J.T.’s LRE being violated. *Id.*; *B.B. v. Catahoula Par. Sch. Dist.*, No. 11-1451, U.S. Dist. LEXIS 144164, 20 (W.D. La. Oct. 3, 2013) (noting impact on parents’ IEP accommodation requests where parents notified of behavioral issues abruptly). Due to the numerous denials for updates throughout the Fall 2018 semester, April S. did not express specific concerns or disagreements with J.T.’s education. *See Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608. Even if April S. had concerns, the lack of communication left her no opportunity or foundation on which to express these concerns. *Id.* at 603. Further, any comments or decisions made in ARD Committee meetings by April S. were made without having the full extent of knowledge relating to J.T.’s academic and non-academic progress, as well as the extent of educational harm imposed by Thurston. *Id.* at 608. By the time April S. had the opportunity to express her informed concerns, physical harm had occurred; this revelation spurred April S. to request J.T. receive homebound instruction because she could no longer trust Lamar CISD to enforce J.T.’s IEP or BIP and keep him from being physically harmed by Thurston. *Id.*

⁴⁶ *See* 20 U.S.C. § 1415(b)(1) (requiring “[a]n opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child. . .”). Because parents bear the burden to prove IEP calculations and implementations are proper, there is a reasonable expectation that April S. be updated of J.T.’s academic and non-academic progress in a timely manner. *See Buser by Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995) (quoting *Honig v. Doe*, 484 U.S. 305, 311-12 (1987)) (“The IDEA also imposes extensive procedural requirements designed to ‘guarantee parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decision they think appropriate.’”). J.T.’s first of five suspensions occurred on September 4, 2018. *Def. [’s] Resp. to LCISD’s Mot. for Partial Summ. J.*, 4, *Lamar Consol. Indep. Sch. Dist. v. J.T.*, No. 4:20-cv-02353 (S.D. Tex. Jan. 25, 2021). On October 8, 2018 and October 19, 2018, J.T. received his second and third suspensions. *Id.* At this time, April S. requested to review video documentation of the behaviors that contributed to J.T.’s suspension, and her request was denied. *Id.* On November 2, 2018, the ARD Committee met and April S. informed the committee that she had not been receiving any progress reports during the Fall 2018 semester, and a reminder is made issued on November 5, 2018. *Id.* Lamar CISD consistently points to April S.’s lack of complaint as to J.T.’s progress. *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 608. However, it should be noted that if she was more promptly made aware of J.T.’s behavioral issues, April S. could have addressed the issues prior to the spring semester and would not have been compelled to request J.T. be removed from his LRE, a mainstreamed environment. *Id.*

participate not only resulted in J.T.'s academic and non-academic regression during Fall 2018, but also caused J.T. to be removed from his IEP appointed LRE during the Spring of 2019.⁴⁷

The Fifth Circuit's interpretation of the *Michael F.* analysis was flawed. An analysis of the second factor would have lent itself to the conclusion that J.T.'s IEP was continuously being violated during Spring 2019 for failure to maintain J.T.'s LRE. Disregarding the full *Michael F.* analysis will cause disparate impacts on qualifying students in the future, creating a much more lenient standard for breaches of IEPs moving forward. The court's holding in *Lamar Consol. Indep. Sch. Dist. v. J.T.* will give a disproportionate amount of leniency to schools playing catch-up after breaching a student's IEP.

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⁴⁷ See *Lamar Consol. Indep. Sch. Dist.*, 577 F. Supp. 3d at 603 (identifying April S.'s lack of knowledge as reason for J.T.'s removal from mainstreamed instruction). April S. removed J.T. from in-person, mainstreamed educational instruction after a significant delay in communications of Thurston's propensity for physical abuse, specifically the December 19, 2018 instance, where Thurston grabbed J.T. by the arm and shoved him to the ground. *Id.*