

SOAH DOCKET NO. 701-21-2467.IDEA
TEA DOCKET NO. 197-SE-0521

STUDENT, B/N/F PARENT, Petitioner	§ § § § § § § § §	BEFORE A SPECIAL EDUCATION
v.		HEARING OFFICER FOR
LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, Respondent		THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend Parent (collectively, Petitioner), brings this action against the Lamar Consolidated Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations. The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) during the 2020-21 school year.

The hearing officer concludes the District provided Student a FAPE during the relevant time period but Student’s dismissal from services was inappropriate. The hearing officer also concludes the District did not violate any procedural requirements.

II. LEGAL REPRESENTATION

Petitioner was represented throughout this litigation by Student’s non-attorney representative, Karen Mayer Cunningham. The District was represented throughout this litigation by its legal counsel, Amy Tucker, from the law firm of Rogers, Morris & Grover.

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on October 6, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner requested an open hearing and observers were present.

Petitioner continued to be represented by Karen Mayer Cunningham. *** and ***, Student's parents, attended the hearing. The District continued to be represented by Amy Tucker. ***, the District's Executive Director of Special Education, attended the hearing as the party representative. The parties timely filed written closing arguments. The hearing officer's decision is due on December 3, 2021.

IV. ISSUES PRESENTED

A. Petitioner's Claims

The relevant time period for the claims raised is the 2020-21 school year.¹ Petitioner raised the following legal issues for decision:

FAPE: Whether the District denied Student a FAPE during the relevant time period.

FAPE: Whether the District failed to develop and implement an Individualized Education Program (IEP) that included appropriate goals, accommodations, and necessary supplementary services and supports.

FAPE: Whether the District denied Student a FAPE by predetermining Student's program.

FAPE: Whether the District failed to allow the parent to inspect and review educational records within the timeframe prescribed by the IDEA.

¹ Initial Prehearing Conference Transcript at 10 (June 16, 2021).

FAPE: Whether the District delayed providing Student an appropriate program by requiring an evaluation when Student resumed services.

FAPE: Whether the District failed to provide Student *** services.

PROCEDURAL: Whether the District failed to provide the parents a meaningful opportunity to participate in the educational decision-making process.

PROCEDURAL: Whether the District denied the parents' procedural rights under the IDEA.

Petitioner raised for the first time in Student's written closing argument allegations that the District failed to provide Student an appropriate program throughout ***, failed to provide Student services through its *** program after Student ***, and failed to timely re-evaluate Student. Because Petitioner did not raise these claims, or an exception to the statute of limitations, in advance of the due process hearing, they are not considered here. The application of the statute of limitations in this matter is discussed below.

B. Petitioner's Requested Relief

1. An Order requiring the District to provide training for staff working with Student on responsibilities under the IDEA and implementation of Student's IEP.
2. Any other relief deemed appropriate by the hearing officer.

C. The District's Legal Position

The District generally denies the allegations and maintains it provided Student a FAPE consistent with the IDEA and the rights of a student who *** for additional services.

V. FINDINGS OF FACT

Background Information

1. Student is *** years old and lives with Student's parents ***, Texas. Student enjoys attending ***, watching ***, and spending time outdoors with Student's family.²
2. Student attended *** in the District and *** at the end of the 2018-19 school year after successfully completing Student's IEP. Student was eligible for special education and related services as a student with an intellectual disability, ***, Other Health Impairment, and speech impairment and received instruction in a *** program. Student's medical diagnoses include ***. Student requires supervision, support, and assistance across settings with communication and activities of ***, and requires extensive supports with *** skills due to an *** and ***.³
3. Student received *** services prior to ***. Student's Admission, Review, and Dismissal (ARD) Committee discussed *** goals over the course of Student's *** and Student's parents consistently indicated Student would *** and may attend a particular *** program, ***. *** serves *** with disabilities through residential and *** services, including a *** program. *** program participants may do ***.⁴
4. Student's April 2018 ARD Committee discussed Student's plans after *** and Student's eligibility for continued services in the District's ***, which focuses on *** training and is offered to special education students after completing ***. Student's parents declined continuing services from the District at that time.⁵
5. Student's parents again advised Student's ARD Committee in April 2019 that Student would receive *** programming at *** after ***. Student has been unable to attend any type of *** program due to the pandemic.⁶
6. Student's last Full and Individual Evaluation (FIE) was completed in September 2011. The District conducted a Review of Existing Evaluations and Data (REED) in April 2017. If Student had continued receiving services from the District, Student's next FIE would have been due in April 2020.⁷

Student's January 2021 FIE

² Joint Exhibit (JE) 5 at 14-15.

³ JE 4 at 1-3, 5, 14; JE 5 at 13, 15; Petitioner's Exhibit (PE) 17 at 1-2, 5.

⁴ JE 4 at 13-14, 23-24, 34; PE 17 at 17; Tr. at 198, 205-06.

⁵ PE 17 at 18; Tr. at 139.

⁶ JE 4 at 13-14; JE 5 at 22-23.

⁷ JE 4 at 1; PE 3 at 1; PE 17 at 1.

7. In October 2020, Student’s parents requested Student resume services in the District. The District provided a Notice of Evaluation on October ***, 2020. A new FIE was needed to determine Student’s current level of functioning and educational needs and plan an appropriate program because Student’s 2017 REED was out-of-date, Student’s last FIE was in 2011, and Student had not attended school since 2019.⁸
8. Student’s parent provided consent for the evaluation on October ***, 2020, and received a Notice of Procedural Safeguards. On October ***, 2020, the District provided Prior Written Notice of its decision to complete an FIE to establish eligibility and determine current levels of performance.⁹
9. The FIE was completed on January ***, 2021. Areas of evaluation included: Speech and Language; Physical; Sociological; Emotional/Behavioral; Cognitive/Intellectual; Adaptive Behavior; Educational/Developmental Performance; Assistive Technology (AT); and Present Levels of Academic Achievement and Functional Performance (PLAAFPs).¹⁰
10. In addition to informal articulation, voice, and fluency assessments, the Speech Language Pathologist administered the Functional Communication Profile-Revised (FCP-R), which assesses and rates communication skills in persons with developmental delays across major skill categories to provide an overview of communication abilities, communication mode, and degree of independence. Student demonstrated impairment across domains tested.¹¹
11. In the area of Sensory/Motor, the FCP-R showed a moderate level of impairment. Student has functional vision and a history of *** and can “fairly” localize sounds within Student’s environment.¹²
12. In the area of Attentiveness, Student showed a mild to moderate level of impairment with fair to poor attention span depending on the activity and Student’s mood. Student is moderately to frequently distracted but alert and aware of Student’s environment and others.¹³
13. In the area of Receptive Language, the FCP-R showed a mild to moderate level of impairment. Student understood ***. Student responded to environmental attention

⁸ PE 3 at 1-2; Respondent’s Exhibit (RE) 2 at 1; Tr. at 204, 228-231, 288.

⁹ PE 3 at 3-4.

¹⁰ JE 5 at 1, 9.

¹¹ JE 5 at 1, 9-13; Tr. at 274-76.

¹² JE 5 at 10.

¹³ JE 5 at 10-11.

commands ***, etc.) and routine requests and understood ***. Student understood basic functional concepts; could follow routine commands with verbal prompts; and recognized ***. ¹⁴

14. In the area of Expressive Language, the FCP-R showed a moderate level of impairment. Student is a “total communicator” and uses *** to communicate. Student uses a *** for communication at the *** level. Student’s vocabulary is limited to Student’s environment, such as ***. Student uses ***. ¹⁵
15. In the area of Speech, the FCP-R showed a moderate to severe level of impairment. Student showed weakness in Student’s oral mechanism which impacts Student’s ability to produce sounds. Student is understood by familiar listeners and uses non-verbal language such as ***. ¹⁶
16. Overall, the speech and language assessment found that Student had below average proficiency in receptive and expressive language skills and that Student expresses ***self best using total communication. Student met eligibility criteria as student with a speech impairment in the areas of articulation and expressive and receptive language. ¹⁷
17. The FIE considered Student’s physical needs, including Student’s health history, and *** and *** assessments by two private providers. A November 2020 *** evaluation found that Student has a ***. Student does not *** device. Without ***, Student has some *** awareness. Recommendations included ***), preferential seating, and use of an *** device. A November 2020 *** examination found *** were ***. Recommendations included ***. Student met eligibility criteria as a student who is ***. ¹⁸
18. A physical therapy (PT) evaluation assessed Student’s functional status in the areas of muscle tone, range of motion, posture, transitions, mobility, *** skills, and activities of *** through observations and parent consult. Overall, Student showed weakness in the area of mobility. PT services were recommended to monitor mobility in the educational setting. ¹⁹
19. The FIE assessed Student’s emotional/behavioral status. At home, Student misbehaves by getting agitated and upset. Student responds to rewards. Student relates well with Student’s

¹⁴ JE 5 at 10-11.

¹⁵ JE 5 at 10-11; Tr. at 288-89.

¹⁶ JE 5 at 10-11.

¹⁷ JE 5 at 9-10, 13, 25.

¹⁸ JE 5 at 13-14, 25; Tr. at 32.

¹⁹ JE 5 at 14, 24-25, 27, 32-33.

- ***. Communication challenges were an area of concern. The evaluation included an 86-item symptom questionnaire using a four-point scale of frequency. Student's mother identified numerous symptoms of inattentiveness and issues with socialization. Student's former teacher reported Student generally had a happy disposition, responded well to praise, and cooperated in completing preferred tasks. Student may resist non-preferred or new tasks and may become irritable, ***.²⁰
20. Student's cognitive/intellectual functioning was assessed by an educational diagnostician. The Stanford-Binet Intelligence Scales, Fifth Edition (SB5) includes ten subtests across five areas of cognition in the verbal and non-verbal domains with scores forming a composite score, with an average composite score of 100. Student achieved a Non-verbal IQ score of *** and a Verbal IQ score of ***. Both scores fell in the moderately impaired range and below the ***percentile. A Full-Scale IQ is derived from the sum of all the tasks on the SB5 and provides a global summary of general level of intellectual functioning. Student achieved a Full-Scale IQ of ***, which fell in the moderately impaired range.²¹
21. The Adaptive Behavior Assessment System-III (ABAS-III) evaluates various functional skills needed to complete activities of ***. Rating scales were completed by a former teacher and Student's mother. Student's cognitive functioning is consistent with Student's adaptive behavior, which overall fell in the extremely low range. Student demonstrated a personal strength in the Social Domain, but overall showed weaknesses in all areas, including Communication, Community, Functional Academics, School/Home Living, Health and Safety, Leisure, Self-Care, Self-Direction, and Social.²²
22. Student's Full-Scale IQ score of *** fell two standard deviations below the mean and Student showed deficits in at least two areas of adaptive behavior based on the ABAS-III. Student continued to meet eligibility criteria for special education as a student with an intellectual disability. Student's physician completed an Other Health Impairment form. Student met criteria due to ***, which adversely affect educational performance.²³
23. The *** Coordinator attempted to assess Student's *** interests and ***. Student was given a computer-based *** inventory assessment structured around different *** and could not complete it. Student's mother reported Student can do certain tasks with reminders and prompting such as ***.²⁴

²⁰ JE 5 at 15.

²¹ JE 5 at 1, 15-18.

²² JE 5 at 18-22.

²³ JE 5 at 25, 30.

²⁴ JE 5 at 1, 22-23.

24. Student's mother completed a parent survey and indicated Student's *** goal was to attend a *** program for socialization once the pandemic is over. Student's parents did not have plans for *** because Student requires constant supervision and ***. The current goal was for Student to return to *** to socialize with Student's peers and have a daily routine.²⁵
25. The AT Specialist explored appropriate devices and tools for Student to access the curriculum. Student was evaluated in the areas of seating, positioning, mobility, computer access, communication, writing, reading/math/organization, recreation/leisure, and ***. In the area of communication, it was noted Student previously used a ***. Continued access to a ***** skills was recommended.²⁶
26. The FIE considered Student's PLAAFPs, including current strengths and needs. Physical needs included using a ***. Behavioral needs included responding to correction appropriately, need for frequent prompting to complete tasks, and tantrums when denied a request or preferred activity. Functional needs in receptive and expressive language included expressing wants and needs, making comments, utterance length, and articulation/intelligibility. Adaptive behavior skill needs included Communication, Community, Functional Academics, School/Home Living, Health and Safety, Leisure, Self-Care, and Social. Academic needs included following directives to complete tasks.²⁷

January 2021 ARD Committee Meeting

27. Student's ARD Committee, including Student's parents, convened on January ***, 2021. Student's parents were provided a Notice of Procedural Safeguards. Student had met the *** requirements for *** and continued to have a need for an IEP. The ARD Committee found Student continued to be eligible for special education and related services as a student with an intellectual disability, ***, ***, Other Health Impairment, and speech impairment.²⁸
28. The ARD Committee reviewed Student's PLAAFPs in the areas of Physical (***, ***, and physical therapy), Behavioral, Functional (speech), ***, and Academic. Student's parents responded "no" to ***-related inquiries about whether they planned for Student to be ***.²⁹
29. Recommended accommodations included one to two step directions, preferential seating, reminders to stay on task, and visual cues. In addition to speech therapy and PT services,

²⁵ JE 5 at 23; Tr. at 204-05.

²⁶ JE 5 at 23-24.

²⁷ JE 5 at 25-26.

²⁸ JE 3 at 1-2, 10-13.

²⁹ JE 3 at 4-5.

the District proposed a schedule for the spring 2021 semester that included 100 minutes of instruction in the *** program two days a week during ***, which is when *** is offered on campus. The *** program focuses on teaching ***, self-help, and *** skills to students with disabilities.³⁰

30. The ARD Committee considered whether the *** instructional setting was Student's least restrictive environment. Given the level of support Student requires, Student cannot achieve Student's IEP goals in the general education classroom even with supplementary aids and services. Benefits of the *** program included a small student/teacher ratio and increased time to master goals and complete tasks. The *** program met Student's need for a specialized instructional setting to receive services.³¹
31. The ARD Committee did not propose academic goals because Student completed all academic requirements before ***.³²
32. The IEP included a *** Supplement. Due to Student's level of disability, Student's parents, rather than Student, participated in *** discussions. The *** Supplement addressed *** education options (*** in a *** program); *** and *** goals; and an age-appropriate instructional environment, noting the severity of Student's disabilities required a self-contained setting to receive specialized instruction. Student's parents were provided information about and referrals to governmental agencies for additional *** services.³³
33. Student's parents agreed with the recommendation that Student return to school and with the proposed goals (speech and functional) but questioned whether Student needed additional goals. Student's mother expressed they believe Student may be ***, and she agreed to gather information on expectations at *** to assist with identifying additional goals. Student's parents disagreed with the amount of programming offered, indicating Student needs more frequency than two days a week and should attend three or four days a week, and disagreed with the time of day programming was offered because Student performs better in the morning. The ARD Committee agreed to reconvene to further discuss areas of disagreement.³⁴
34. On February ***, 2021, the parents' advocate communicated with the educational diagnostician and modified the parents' previous responses to the ***-related inquiries about whether they planned for Student to be ***. Citing a lack of understanding of the

³⁰ JE 3 at 7, 13; Tr. at 165-66.

³¹ JE 3 at 9.

³² PE 1 at 35.

³³ JE 3 at 17-18.

³⁴ JE 3 at 11-14, 29.

options, the parents, through their advocate, identified revised *** plans for supported *** and supported living. The advocate also requested additional evaluations and proposed numerous goals.³⁵

February and March 2021 ARD Committee Meetings

35. The ARD Committee reconvened on February ***, 2021, and again on March ***, 2021, to continue discussions about Student’s program. Student’s parents participated and were accompanied by a special education advocate. The District was prevented from speaking to and obtaining input directly from Student’s parents by the advocate. The advocate also criticized what she perceived to be District personnel’s lack of knowledge of the IDEA.³⁶
36. The District revised its *** proposal so Student would attend five days a week to address parental concerns regarding consistency. Student’s parents agreed to a revised instructional schedule that included ninety minutes of daily direct instruction in the *** program during ***. At parental request, an additional accommodation of a *** for use at school and at home was added. At parental request, the District also offered transportation to and from school.³⁷
37. The ARD Committee considered parental requests for additional evaluations, including an ***evaluation and possible *** evaluation, and AT evaluations in communication and written expression. A medical doctor must complete a *** study, but the District agreed the speech therapist would conduct an informal *** evaluation. The AT Specialist reviewed when additional trials of a new communication device or applications may be warranted and agreed to review Student’s device to ensure the features were appropriate. The District agreed to provide a device for communication purposes at school.³⁸
38. If appropriate and recommended, a student who uses ***may use an ***to assist in accessing classroom sounds and language. Student’s parents were pursuing ***and the District agreed to provide ***when this happened. The District considered whether Student may currently benefit from another ***device, such as a ***, and determined neither option was appropriate in a small group instructional setting given the *** Student does have and given Student’s *** goal of ***. Neither option is workable in an *** setting. The District provided Student a ***e. Student is able to use it but prefers verbal or total communication which allow Student to communicate more quickly than when using the device.³⁹

³⁵ PE 20 at 1-2.

³⁶ JE 2; JE 2 at 9, 11-12; PE 1 at 10-11; PE 2 at 24, 38; Tr. at 64-66.

³⁷ JE 2 at 7, 12; PE 2 at 13-14, 30-33.

³⁸ JE 2 at 11; PE 1 at 17-25.

³⁹ JE 2 at 11; PE 1 at 5-6; Tr. at 33-39, 105-08, 261-63, 289-90.

39. Student’s parents and their advocate were provided the proposed goals in advance of the March 2021 meeting. The ARD Committee agreed to a speech goal targeting *** through different communication functions. The proposed *** goals focused on functional skills to further the *** goal articulated by Student’s mother in interviews during the FIE— participation in a *** program. The goals developed at the March 2021 ARD Committee also considered the parents’ revised *** aims of supported *** and supported living.⁴⁰
40. The ARD Committee discussed Student’s *** goals at length and considered the goals provided by the parents’ advocate, incorporating a goal related to *** tasks and incorporating input on a ***goal. The ARD Committee agreed to four goals to be implemented in the *** program that were acceptable to Student’s parents and incorporated their feedback. Two goals targeted ***, one related to ***. Two goals targeted *** skills, one related to putting on and removing items needed for *** or ***. The amount of *** instruction proposed was sufficient for Student to make progress on and master these goals.⁴¹
41. The ARD Committee considered and extensively discussed parental requests for direct services from a *** teacher. The District considers a variety of factors in considering the needs of a student with a ***, including parent input, teacher recommendations, a rubric for students with cognitive impairments, the student’s FIE, and the student’s ability to access communication and language in the classroom. Student’s expressive and receptive language deficits are not solely related to Student’s ***. Student has access to ***, effectively using the residual *** Student does have. Staff working with Student did not express concerns about their ability to communicate with Student in the educational environment due to Student’s ***.⁴²
42. The District is part of an eleven school district area cooperative served by the ***. Student is on “monitoring status” with the ***, which includes consultation with classroom teachers, attending ARD Committee meetings, and reviewing ***-related evaluations.⁴³
43. Regional Educational Service Center guidance provides for three service delivery levels, including two levels of indirect services and one level of direct services, for students with *** and cognitive impairments. Among other considerations, the *** teacher uses a rubric developed by the regional Educational Service Center to evaluate skill areas to assist in assessing the level of support a student needs from a *** teacher. She completed the rubric

⁴⁰ JE 6 at 1; PE 2 at 4; PE 1 at 44-46; Tr. at 240.

⁴¹ JE 2 at 12; JE 6 at 1-6; PE 1 at 38-39; PE 2 at 4-12; PE 20 at 2; Tr. at 170, 188-89.

⁴² JE 2 at 11-12; PE 1 at 6-17; PE 2 at 14-30; Tr. at 37-38, 46, 56-57, 114-15, 129, 138-39.

⁴³ Tr. at 29, 82-83.

after the January 2021 ARD Committee meeting with input from the Speech Language Pathologist. Student's score (***) indicated indirect services are appropriate to meet Student's needs. Student also does not have an identified educational need for direct instruction stemming from either a teacher concern about how Student's *** impacts Student's education or an evaluation.⁴⁴

44. During the 2020-21 school year, the *** teacher met with campus staff, including Student's teacher, prior to each ARD Committee meeting and served as resource during and after meetings. She met Student when Student returned to school in the spring and observed Student in class to see how Student interacted with teachers and peers. At the start of the 2021-22 school year, the *** teacher provided Student's lead teacher training on Student's level of *** and instructional strategies. The indirect/monitoring services provided by the *** teacher met Student's identified educational needs.⁴⁵
45. The District, at parents' request, added *** indirect/monitoring services to Student's schedule of services so it specified that *** staff would meet with Student's teachers to provide consultation for fifteen minutes every *** weeks. The parents disagreed that the IEP did not provide for direct services and did not have a goal specific to Student's *** needs.⁴⁶
46. Apart from *** services, the ARD Committee reached agreement regarding Student's program. The District issued Prior Written Notice confirming the decision that Student return to school, the services to be provided, and rejecting the request for direct *** services. Student's parents consented to the provision of special education services on March ***, 2021. Student returned to school on March ***, 2021.⁴⁷

May 2021 ARD Committee Meeting

47. Prior to the May 2021 ARD Committee meeting, Student's special education teacher advised Student's mother that Student had mastered Student's goals and sought input on any additional needs. Student's mother did not provide any input upon request.⁴⁸
48. Student's ARD Committee convened on May ***, 2021. Student continued to meet eligibility criteria for special education and related services under the same classifications.

⁴⁴ PE 1 at 11-12; PE 4 at 8-9; Tr. at 46-48, 56-58, 95-98.

⁴⁵ JE 3 at 13; PE 1 at 7; Tr. at 59-60, 84-91, 94-95, 176-77.

⁴⁶ JE 2 at 7, 12; PE 2 at 25-29.

⁴⁷ JE 2 at 9-12, 22, 27.

⁴⁸ RE 2 at 1; Tr. at 185.

The ARD Committee reviewed Student's progress towards meeting Student's goals and Student had mastered the speech and *** goals developed in March 2021.⁴⁹

49. District members of the ARD Committee recommended to dismiss Student from services because Student had mastered the goals agreed upon at the meeting in March 2021 and had the necessary skills to access Student's *** goal. Student's March 2021 IEP addressed only some of the areas of need identified in the FIE. Student's parents disagreed and requested continued programming to help increase Student's level of *** and *** readiness. The ARD Committee agreed to reconvene to consider additional areas of need, but did not do so after litigation commenced.⁵⁰
50. The District provided Prior Written Notice on May ***, 2021 confirming the recommendation to dismiss Student from special education due to mastery of the goals set out in Student's March 2021 IEP. Options considered included continued eligibility, new IEP goals and updated *** information, and a revised schedule of services. These options were rejected because Student mastered the goals established to develop skilled needed to reach Student's *** goal of attending ***. The District considered the January 2021 FIE, previous programming data, medical history, parent input, previous assessments, teacher input, related service provider input, and progress on IEP goals.⁵¹
51. During the resolution process, the District offered to continue Student's *** program services for the 2021-22 school year. Student's parents, through their advocate, did not accept this offer and instead sought services for five full days a week.⁵²
52. Student ***, 2021 and remains *** eligible for special education and related services for the 2021-2022 school year.⁵³

VI. DISCUSSION

Petitioner contends the District denied Student a FAPE during the 2020-21 school year by failing to propose and implement an appropriate program, to include direct *** services. Petitioner further contends the District denied Student a FAPE by delaying services to conduct an evaluation

⁴⁹ JE 1 at 1-2, 4, 9; JE 6 at 1-6; Tr. at 170, 285.

⁵⁰ JE 1 at 7-9; JE 5 at 26; Tr. at 240-41, 244-45, 264, 290.

⁵¹ JE 1 at 13.

⁵² Tr. at 248-49, 298.

⁵³ JE 1 at 2.

when Student sought to re-enroll in school and inappropriately proposed to dismiss Student from services. Petitioner also raises several procedural allegations.

A. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Accordingly, Petitioner bears the burden of proving that the District failed to provide Student a FAPE.

B. Statute of Limitations

Under the IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a student with a disability or the provision of FAPE to the student within two years of the date the parent knew or should have known of the alleged action(s) forming the basis of the complaint. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1)-(2).

The two-year limitations period may be more or less than two years if the state has an explicit time limitation for requesting a due process hearing under the IDEA. 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2). Texas has adopted an alternative limitation period, and state regulations require a parent to request a hearing within one year of the date he or she knew or should have known of the alleged action(s) forming the basis of the complaint. 19 Tex. Admin. Code § 89.1151(c). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

There are two exceptions to this rule. The timeline does not apply if the parent was prevented from filing a due process complaint due to:

- (1) specific misrepresentations by the public education agency that it had resolved the problem forming the basis of the due process complaint; or
- (2) the public education agency's withholding of information from the parent that was required by 34 C.F.R. § 300.1, *et seq.* to be provided to the parent.

19 Tex. Admin. Code § 89.1151(d).

Petitioner filed Student's due process hearing request on May 26, 2021, and raised neither exception to the statute of limitations. Petitioner also confirmed during the initial prehearing conference that the relevant time period was the 2020-21 school year. Student's closing brief, however, appears to argue that the District denied Student a FAPE in various ways throughout ***. Because Petitioner neither pled nor proved an exception to the one-year statute of limitations applies, any claims arising prior to May 26, 2020, are time-barred and will not be considered.

C. Duty to Provide FAPE

The District has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001. Once a student is determined to be eligible for special education, an IEP must be developed. The District's mandate to design and deliver an IEP falls under its broader statutory obligation to furnish a FAPE that emphasizes special education and related services designed to meet Student's unique needs and prepare Student for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209 (5th Cir. 2019). The District is responsible for providing, at public expense, the specially designed instruction and support services necessary to meet Student's unique needs and confer an educational benefit. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

D. FAPE

1. The Four-Factor Test

The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program meets IDEA requirements. These factors are:

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

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017)). These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

a. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide a student with a disability a FAPE, his or her IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will

be provided. 34 C.F.R. § 300.22. While the IEP need not be the best possible one nor must it be designed to maximize Student’s potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP proposed and implemented by the school district was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

As an initial matter, the hearing officer addresses Petitioner’s claim the District delayed providing an appropriate program by evaluating Student when Student sought continued services. A school district must re-evaluate a student with a disability every three years unless the school district and parent agree otherwise. 34 C.F.R. § 300.303(b)(2). In developing a student’s IEP, the ARD Committee must consider the initial and most recent evaluations of the student and the student’s academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(iii)-(iv).

Petitioner, without presenting supporting evidence, argues the District intentionally delayed Student’s receipt of services by evaluating Student, hoping Student’s parents would abandon their request to resume services. However, the evidence showed Student’s last FIE was in 2011 and Student’s most recent evaluation, a REED, was conducted in April 2017. Thus, while there is little doubt Student continued to meet eligibility requirements, Student did not have an evaluation showing Student’s current functional needs when Student sought to resume services in the fall of 2020. The hearing officer concludes the District complied with the IDEA by evaluating Student to determine Student’s current educational and functional needs before developing a new IEP. 34 C.F.R. § 300.303(b)(2); 34 C.F.R. § 300.324(a)(iii)-(iv).

i. Needed Educational Services

Petitioner alleges the District failed to develop an IEP that included appropriate goals, accommodations, and necessary supplementary services and supports. Student ***after completing Student’s IEP. Students *** pursuant to completion of an IEP, as opposed to mastery of state standards applicable to students in general education and passage of end-of-course exams, have the right to resume services if the student meets age eligibility requirements. 19 Tex. Admin. Code § 89.1070(j). For these students, the ARD Committee “must determine needed educational services.” *Id.*

The evidence showed Student’s 2021 IEP was individualized on the basis of assessment and performance. Because Student completed all academic requirements before ***, the ARD Committee appropriately focused on Student’s *** *** goals when determining Student’s needed educational services and developed an IEP to meet those needs as well as other identified needs. The District conducted a comprehensive FIE and based Student’s program on the information gathered in the FIE. The FIE included an evaluation of Student’s PT needs, which identified a weakness in the area of mobility. Student’s IEP included PT as a related service to address this need. The FIE included an evaluation by a Speech Language Pathologist and the FCP-R revealed mild to severe deficits across communication domains, including a moderate to severe impairment in the area of speech. To address Student’s identified communication needs, the District provided a device for communication purposes as was recommended in the FIE. The ARD Committee also adopted an augmentative or alternative communication speech goal targeting different communication functions and District provided direct speech services.

In developing a student’s IEP, the ARD Committee must consider whether the student needs AT devices and services. 34 C.F.R. § 300.324(a)(2)(v). Student’s FIE included an AT evaluation, which recommended a speech generating device. Consistent with this recommendation, the District provided Student a *** for use at school and home. The *** and *** evaluations

recommended *** and an ***. Because Student did not have ***, an *** were not presently appropriate, but the District agreed to provide one when Student obtained *** as Student’s parents planned. While neither option was workable in a small group instructional or *** setting, the District appropriately considered whether other *** were suitable in the interim.

Beginning at age ***, the IDEA requires an IEP to include appropriate measurable *** goals based upon age-appropriate *** assessments related to ***. 34 C.F.R. § 300.320(b)(1). The IEP must also include “the *** services ... needed to assist the child in reaching those goals.” 34 C.F.R. § 300.320(b)(2). In Texas, *** planning begins at ***. Tex. Educ. Code § 29.0111; 19 Tex. Admin. Code § 89.1055(h). Under state law, the ARD Committee must consider, and where appropriate, address the following in the student’s IEP:

- ***

Tex. Educ. Code § 29.011; 19 Tex. Admin. Code § 89.1055(h).

Here, the *** services provided in Student’s IEP were developed with parental involvement and were based on a recent *** assessment and parent survey conducted as a part of the FIE. The District proposed and implemented the *** services called for in Student’s IEP in an age-appropriate instructional environment—the *** program—a District program dedicated to preparing student with disabilities for *** life with sufficient staff and support to meet Student’s complex needs. In addition, whether the ultimate objective was participation in a *** program or supported *** or living, the *** goals developed by the ARD Committee appropriately focused on Student’s self-help, ***, and functional *** skills, and the amount of *** program instruction Student received was sufficient to make progress on those goals. The District also provided Student’s parents referrals to governmental agencies for additional *** services.

Finally, while not dispositive on the issue of whether Student’s IEP was appropriate, Petitioner complains about the appropriateness of the very program the ARD Committee, including

Student's parents, agreed to in March 2021 and that Student's hearing request characterized as "effective". Complaint, at 3 (Issue 1). Here, the weight of the credible evidence showed that Student's IEP, including Student's goals and accommodations, were individualized on the basis of assessment and performance and the ARD Committee developed a program that included needed educational services when Student resumed services in the District. 19 Tex. Admin. Code § 89.1070(j).

ii. * Services**

In developing an IEP for a student who ***, the ARD Committee must consider the student's language and communication needs, opportunities for communication with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for instruction in the student's language and communication mode. 34 C.F.R. § 300.324(a)(2)(iv).

Petitioner argues the District denied Student a FAPE by not providing Student direct services from a *** teacher and appears to contend that Student should have received direct, versus indirect, services by virtue of Student's *** eligibility alone. There is no such requirement under the IDEA. Indeed, the indirect/monitoring services recommended in Student's IEP were consistent with the service delivery rubric administered by the *** teacher and supported by Educational Service Center guidance.

Moreover, Petitioner failed to show that the indirect services Student received did not meet Student's needs. The *** teacher served as a resource to District personnel in developing Student's IEP, attended ARD Committee meetings, and provided training on Student's *** and instructional strategies. The evidence also showed that Student has access to *** and effectively uses Student's *** to benefit from instruction. Student's language and communication needs were met in Student's specialized instructional setting. District personnel working with Student effectively

communicated with Student in the educational environment using Student’s preferred methods of communication (verbal or total communication) and other means, including the communication device provided by the District. As such, Student’s *** was not a barrier to receiving or benefitting from instruction.

Here, not only were the indirect *** services provided appropriate to meet Student’s identified needs, the ARD Committee met its obligation to consider Student’s language and communication needs, and opportunities to communicate and receive instruction in Student’s mode of communication in developing Student’s IEP. 34 C.F.R. § 300.324(a)(2)(iv). Petitioner did not meet Student’s burden on this claim.

b. Least Restrictive Environment

The IDEA requires that a student with a disability must be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R. § 300.114(a)(2)(i)-(ii).

To determine whether a school district is educating a student with a disability in the least restrictive environment, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State Bd. of Ed., 874 F.2d 1036, 1048 (5th Cir. 1989).

The *** program is a program for students with disabilities and, as such, Student's participation involved instruction with other students with disabilities. However, due to the nature and extent of Student's disabilities, Student requires significant support with most activities of *** and communication. Student also requires constant supervision at school and thus requires a setting with a low student to teacher ratio. Student's ARD Committee appropriately determined that the goals and objectives in Student's IEP could not be achieved in the general education classroom even with supplementary aids and services. Student's placement was Student's least restrictive environment. 34 C.F.R. § 300.114(a)(2)(i)-(ii); *Daniel R.R.*, 874 F.2d at 1048.

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

The IDEA contemplates a collaborative process between a school district and the parents of a student with a disability. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). As key stakeholders, parents, school administrators, and teachers familiar with the student's needs should all be involved in the "highly coordinated and collaborat[ive] effort" of developing a student's IEP. *Michael F.*, 118 F.3d at 253. The IDEA, however, does not require a school district, in collaborating with a parent, to accede to all of the parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of the parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

Petitioner argues that the District predetermined that Student was "****" when Student was in ***. Predetermination occurs when a school district makes educational decisions so early in the planning process that it deprives the parents of a meaningful opportunity to fully participate as equal members of the ARD Committee. *E.R.*, 909 F.3d at 769. Not only did the evidence not

support Petitioner’s assertion, Student did not offer evidence of predetermination during the relevant time period. Petitioner therefore did not meet Student’s burden on this claim.

Petitioner also contends the District failed to provide Student’s parents a meaningful opportunity to participate in the educational decision-making process. However, the evidence showed the District was responsive to Student’s parents’ requests and extensively considered their input—provided almost exclusively through their advocate—in developing Student’s program. Following the January 2021 ARD Committee meeting that ended in disagreement as to the number of days of programming, the District modified its recommendation to include five days of *** participation to address the parental concern about consistency.

The District convened three ARD Committee meetings between January and March 2021 to develop Student’s program and the goals ultimately agreed upon considered and incorporated input provided by the parents’ advocate. In addition, the District considered and incorporated several parental proposals, including an informal *** evaluation, adding the *** as an accommodation, and transportation as a related service. While agreement was not reached regarding direct versus indirect/monitoring *** services, there was a comprehensive discussion of this issue and efforts by District personnel to understand the request.

Finally, while the District made significant efforts to incorporate and address parental concerns, these concerns were almost exclusively conveyed through the special education advocate. The evidence showed the advocate prevented direct communication between District members of the ARD Committee and the parents such that their role in the IEP development process was hindered, rather than enhanced, by her presence.

A preponderance of the evidence demonstrates that services were provided in a coordinated, collaborative manner by key stakeholders during the relevant timeframe. Petitioner failed to show that the District excluded Student’s parents in bad faith or refused to listen to them.

d. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012). In this case, whether Student received academic benefit is not the proper measure of whether Student was provided a FAPE. Student's IEP appropriately did not include academic goals because Student met all academic requirements prior to ***. When Student resumed services, the District placed Student in a program specifically focused on *** skills and ***. Student made progress on the goals set forth in Student's March 2021 IEP such that Student mastered all goals by the end of the school year. As such, the hearing officer concludes Student received non-academic benefit from Student's educational program.

2. IEP Implementation

In addition to alleging the District failed to develop an appropriate IEP, Petitioner alleges the District failed to implement Student's IEP. In determining whether a school district failed to adequately implement a student's IEP, a hearing officer considers whether there was a significant or substantial failure to implement the IEP under the third *Michael F.* factor and whether there were demonstrable academic and nonacademic benefits from the IEP under the fourth factor. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). That is, Petitioner must show more than a *de minimis* failure to implement all elements of an IEP. Petitioner must demonstrate that the school district failed to implement substantial or significant portions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Petitioner did not present any evidence the District failed to implement Student's IEP during the relevant time period. Student therefore did not meet Student's burden on this claim.

3. Dismissal from Services

A state receiving federal funds under the IDEA must provide a FAPE to children with disabilities “between the ages of 3 and 21, inclusive.” *See* 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a); Tex. Educ. Code § 29.001. When an IDEA eligible student ***, he or she no longer has a right to a FAPE. 34 C.F.R. § 300.102(a)(3)(i). However, a school district's obligation to provide a FAPE continues if a student ***. 34 C.F.R. § 300.102(a)(3)(ii). Here, Student *** pursuant to completion of an IEP and was thus eligible for continued services. 19 Tex. Admin. Code 89.1070(j). In Texas, “[a]n eligible student receiving special education services who ***, whichever comes first.” 19 Tex. Admin. Code 89.1035(a) (emphasis added).

Here, Student’s eligibility for special education and related services was most recently confirmed in January 2021. Because Student *** of the 2021-22 school year, Student remains *** eligible for services through the end of the current school year. Student’s FIE yielded numerous areas of potential focus for additional goals and skill building to increase Student’s *** readiness. Moreover, Student continues to be eligible for services under state regulations, which tie continued receipt of services to eligibility and age, not mastery of IEP goals. The District argues Petitioner’s rejection of continuing services during the resolution process should estop Student’s parents from arguing anything more was needed. However, Petitioner’s rejection of continuing services does not merit contravention of Student’s right to a FAPE until the end of the 2021-22 school year. 19 Tex. Admin. Code 89.1035(a).

E. Procedural Violations

Petitioner alleges the District violated Student’s procedural rights under the IDEA. Liability for a procedural violation only arises if the procedural deficiency impeded the student’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R.

§ 300.513(a)(2); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

Petitioner alleges that the District failed to allow Student's parents to inspect and review Student's educational records within the timeframe prescribed by the IDEA. The IDEA requires school districts to permit parents to inspect and review their child's education records without unnecessary delay and before an ARD Committee meeting, a due process hearing, a resolution session, and in no case more than 45 days after the request was made. 34 C.F.R. § 300.613. Petitioner presented no evidence that Student's parents sought access to Student's educational records or that the District failed to honor a records request. Petitioner therefore did not meet Student's burden on this claim.

Petitioner also alleges the District violated Petitioner's procedural rights under the IDEA. The evidence showed, however, that the District provided both Prior Written Notice and Notice of Procedural Safeguards to Student's parents on all occasions required by the IDEA during the relevant time period. 34 C.F.R. §§ 300.503(a), 300.504(a). As such, the hearing officer concludes the District did not commit a procedural violation of the IDEA's notice requirements.

VII. CONCLUSIONS OF LAW

1. The District appropriately re-evaluated Student to determine Student's current academic, developmental, and functional needs before developing Student's IEP. 34 C.F.R. § 300.303(b)(2); 34 C.F.R. § 300.324(a)(iii)-(iv).
2. Student's ARD Committee appropriately determined Student's needed educational services after Student returned for additional services ***. 19 Tex. Admin. Code § 89.1070(j).
3. Student was provided a FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188, 203-04; *Endrew F.*, 137 S. Ct. at 999.

4. Petitioner did not meet Student's burden of proving the District either failed to include Student's parents as a key stakeholder or predetermined Student's program. *Schaffer*, 546 U.S. at 62; *E.R.*, 909 F.3d at 769; 34 C.F.R. §§ 300.321(a), 300.322.
5. Petitioner did not meet Student's burden of proving the District failed to implement Student's IEP. *Schaffer*, 546 U.S. at 62; *Bobby R.*, 200 F.3d at 349.
6. Student continues to be eligible for special education and related services until the end of the 2021-22 school year. 19 Tex. Admin. Code 89.1035(a).
7. Petitioner did not meet Student's burden of proving the District denied Student's parents' right to inspect and review Student's educational records. *Schaffer*, 546 U.S. at 62; 34 C.F.R. § 300.613.
8. Petitioner did not meet Student's burden of proving the District failed to comply with parental procedural rights under the IDEA related to the provision of Prior Written Notice or Notice of Procedural Safeguards. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a), 300.504(a).


VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requested relief is **GRANTED IN PART AND DENIED IN PART**.

The District is **ORDERED** to continue Student's eligibility for special education and related services until the end of the 2021-22 school year. The District is further **ORDERED** to convene an ARD Committee meeting within 10 school days of this decision to consider what additional educational services Student needs to further Student's *** readiness in the *** program.

All other relief not specifically stated herein is **DENIED**.

SIGNED December 3, 2021.



Kathryn Lewis
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO PARTIES

The Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).