CONFIDENTIAL
Pursuant to FERPA – 20 U.S.C. § 1232g;
34 C.F.R. Part 99

SOAH DOCKET NO. 701-22-1804.IDEA
TEA DOCKET NO. 156-SE-0222

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friends *** and *** (Parents or, collectively, Petitioner), brings this action against the College Station 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 issues presented in this case are whether the District denied Student a free, appropriate public education (FAPE) by failing to timely and appropriately evaluate Student under the IDEA and failing to develop an appropriate educational program. The hearing officer concludes the District procedurally and substantively complied with the IDEA and Student's educational program was reasonably calculated to provide educational benefit in light of Student's circumstances.

II. LEGAL REPRESENTATION

Petitioner was represented throughout this litigation by Sonja Kerr of Connell Michael Kerr, LLP. Respondent was represented throughout this litigation by Christina Garcia-Henshaw and Paula Roalson of Walsh Gallegos Treviño Kyle & Robinson, P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted on December 7-9, 2022. The hearing was recorded and transcribed by a certified court reporter.

Petitioner continued to be represented by Sonja Kerr, who was assisted by Dayna Friduss. Student's parents, *** and ***, attended the hearing. Respondent continued to be represented by Christina Garcia-Henshaw and Paula Roalson. Christin Pacher, a law clerk with their firm, also attended. ***, the District's Executive Director of Special Services, attended as the party representative. The parties timely filed written closing arguments. The hearing officer's decision is due on February 13, 2023.

IV. ISSUES PRESENTED

A. Petitioner's Claims

The relevant time period is November 2020 to present, and the Amended Complaint raised the withholding exception to the one-year statute of limitations. The Amended Complaint also raised the following issues for hearing under the IDEA:

1. Whether the District failed to timely and appropriately conduct a Full and Individual Initial Evaluation (FIIE) of Student.

2. Whether the District unreasonably delayed its Child Find obligation by failing to provide a Notice of FIIE and Notice of Procedural Safeguards before January 2022 and failing to complete the evaluation in a timely manner.

3. Whether the Notice of FIIE failed to comply with Texas Education Code § 29.0041 and whether the deficient Notice of FIIE denied Parents the ability to provide informed consent to testing.

4. Whether the District failed to ensure that assessments and other evaluation materials used to assess Student were: (1) selected and administered so as not to be discriminatory on a racial or cultural basis under 34 C.F.R. § 300.304(c)(1)(i); and (2) provided and administered in Student's native language or other mode of communication and in the form most likely to yield accurate information on what Student can do academically, developmentally, and functionally under 34 C.F.R. § 300.304(c)(1)(ii).

5. Whether Parents were denied the ability to give informed consent to testing when the District failed to provide a Notice of Procedural Safeguards in February 2021.

6. Whether the District failed to evaluate Student for and offer Student individual speech and language services and failed to provide a Notice of FIIE that specified the evaluation tests and procedures to be used to assess Student's communicative status.

7. Whether the District refused Student individually tailored Applied Behavioral Analysis (ABA) services for 40 hours a week and failed to offer Student any program of specially designed instruction of 40 hours a week of ABA services to meet Student's unique needs, and whether the District predetermined that Student does not require these services to receive a FAPE.

8. Whether the District failed to offer any legitimate, peer-researched program to meet Student's needs that will do so in a manner like ABA therapy.

9. Whether the District delayed providing Parents all of Student's educational records, including various extensive observations completed by school staff and ABA staff training records, and denied Parents meaningful participation in the educational decision-making process.

10. Whether the District violated Student's rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), as amended, the Texas Constitution, Texas Education Code § 25.087, and Title VI of the Civil Rights Act (claims dismissed on jurisdictional grounds in Order No. 6).

B. Requested Relief

Petitioner seeks the following items of relief:

1. An order directing the District to timely complete its FIIE of Student and, once completed, find Student eligible under the IDEA and provide Petitioner's designated expert with all underlying testing protocols and related materials.

2. An Independent Educational Evaluation (IEE) at public expense given the deficient FIIE notice and delay in completing the FIIE.

3. An order directing the District to offer Student an Individualized Education Program (IEP) that includes sufficient ABA and speech and language services at *** with a primary placement in a regular education classroom setting.

4. An order confirming Petitioner retains the right to accept or reject the IEP.

5. An order directing the District to provide Student with 40 hours a week of one-on-one ABA push-in services by qualified ABA providers and under the supervision of a qualified Board-Certified Behavior Analyst (BCBA) with sufficient time to supervise, observe, collect, and analyze data and modify programming as required and including the same in Student's IEP.

6. An order directing the District to provide Student with speech and language services, assistive technology (AT), and Extended School Year (ESY) services as part of Student's IEP.

7. Alternatively, an order directing the District to pay for Student to continue to attend the unilateral placement ABA program at *** or similar facility at District expense, including transportation.

8. An order directing the District to reimburse Parents for all costs of Student's attendance at the unilateral placement ABA program at *** or similar facility for the timeframe at issue or provide compensatory education in the same amount of time and quality.

9. If the hearing officer refuses to order the District to provide ABA services as part of an IEP, Petitioner requests that the hearing officer order that Petitioner may bring Student's own ABA providers (including BCBA supervisor and Registered Behavior Technicians) to school for at least 32 hours a week (the length of a school week) so that they may work with Student there as a reasonable accommodation under the IDEA.

10. Petitioner requests that the hearing officer find that they have administratively exhausted their claims pursuant to the IDEA for purposes of any ADA or Section 504 action in other forums.

11. Any and all remedies available to Petitioners pursuant to case law, statute, or equity.

12. Parents provided timely notice of their unilateral placement of Student at a qualified ABA Center for the 40 hours a week of services and seek an order that this Center (or a similar one if this one should become unavailable for some reason) is an appropriate placement for Student. Parents are further requesting that any costs not paid by insurance be paid by the District, including transportation costs to and from the facility and co-pays.

13. Parents also seek compensatory hours for days that Student was denied school because Student needed to go to ABA therapy. They also want compensatory hours for the days and hours that Student was "expelled" for non-attendance from both the regular school program and the after-school program.

C. Respondent's Legal Position

The District generally and specifically denies the allegations and denies that Petitioner is entitled to any relief. The District also raised the affirmative defense of the statute of limitations.

IV. FINDINGS OF FACT

Background Information

1. Student is *** years old and in *** grade at *** in the District. Student lives with Parents and *** and enjoys activities with Student's family, puzzles, books, basketball, animals, and playing outside. Parents are ***. Student's mother *** and has a doctorate in *** and Student's father has a doctorate in ***. He is also a ***. Student is ***.[1]

[1] Joint Exhibit (Jt. Ex.) 20 at 1, 6, 21; Respondent's Exhibit (R. Ex.) 5 at 8; R. Ex. 24 at 1; R. Ex. 36 at 5; R. Ex. 190 at 2; Petitioner's Exhibit (P. Ex.) 9 at 1; P. Ex. 46 at 1; Transcript (Tr.) at 390-91, 432-33.

2. Student was diagnosed with a language disorder and autism spectrum disorder of moderate severity in October 2017. Student's developmental pediatrician prescribed ABA therapy 40 hours per week and two hours per week of speech/language therapy as medically necessary. ABA is the application of the science and principles of behavior analysis to socially significant needs, and a significant body of research confirms that ABA therapy is effective in teaching children with autism in the areas of communication, adaptive behavior, academics, and daily living skills. Student received ABA therapy beginning at age *** and attended a private *** with integrated ABA therapy between ages ***.[2]

3. Beginning in March 2020, Student received ABA therapy in a clinical setting from ***, a private provider of comprehensive ABA services to individuals with autism spectrum disorder. In a clinical setting, ABA therapy focuses on acquiring skills for mastering the goals identified in a treatment plan through direct, intensive interventions. *** performed a series of assessments and considered Student's diagnostic evaluation and observations to determine the intensity of services required to make progress on Student's treatment goals. An initial assessment of Student's current functioning included the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP). The VB-MAPP Milestones Assessment evaluates social and verbal skill levels. Student's score reflected the average functioning of a ***-year-old child across social and verbal milestones while Student's score on the VB-MAPP Barriers Assessment indicated numerous barriers to learning in the areas of behavior, listening, and social skills, among others. Based on the results of its assessments, *** recommended 40 direct hours of ABA therapy per week in the treatment plan submitted to Parents' insurance.[3]

4. Student's therapy at *** is provided by registered behavior technicians (RBTs) under the supervision of a BCBA. An RBT receives 40 hours of training and supervision by a BCBA and passes a competency assessment and multiple-choice exam before becoming certified. An RBT must be supervised by a BCBA.[4]

2020-21 School Year

5. Parents did not enroll Student in *** during the fall semester due to COVID-19, and Student continued full-time ABA therapy at ***. In September 2020, Parents and *** discussed *** staff accompanying Student when Student began school. *** indicated it could

[2] P. Ex. 4 at 10; R. Ex. 1 at 3-7, 9; R. Ex. 5 at 4; R. Ex. 8 at 1; R. Ex. 146 at 2; R. Ex. 177 at 1; R. Ex. 190 at 2; Tr. at 435, 473-75.

[3] R. Ex. 8 at 1-3, 13; Tr. at 260, 262-63, 266-68, 272-73, 311, 328, 553, 639-40.

[4] R. Ex. 3 at 6; Tr. at 261, 270-71, 296-97, 493-94.

provide services in a school setting if Parents could secure funding. Insurance generally will not cover ABA therapy in school.[5]

6. On November ***, 2020, Parents contacted the *** principal regarding Student's transition to public school for the spring semester and requested a meeting to discuss Student's needs. During a virtual meeting on November ***, 2020, Parents shared that Student had autism, requested ABA therapy in school, and inquired whether the District allowed private therapists to attend school with students. On November ***, 2020, after consulting with the Executive Director of Special Services, the principal advised Parents that the District does not allow parents to provide private support for a student during the school day and, if a student required that level of support, the District "would look at options and provide what the child needs to be successful in school." She proposed a meeting with the Executive Director of Special Services.[6]

7. The meeting took place on December ***, 2020, and included Parents, their advocate, the principal, the Executive Director of Special Services, and an Assistant Director of Special Services. Parents confirmed an outside diagnosis of autism and discussed Student's need for ABA therapy in school. The District requested a copy of Student's outside evaluation and access to records concerning Student's disability. The District also offered a special education evaluation. Parents declined, indicating they were knowledgeable about special education, and clarified they were requesting services under Section 504, not special education. Staff described the training and services and supports available for students with autism in the District, including its *** (***) program and agreed to schedule a meeting with the District's Section 504 Coordinator.[7]

8. Early in working with the District, Parents became "concerned about ***," and during this meeting, expressed concerns related to disproportionate outcomes for "*** children" in the District who receive special education services.[8]

9. The District convened another meeting on December ***, 2020, to discuss Student's transition to school. This meeting included Parents, their advocate, the principal, an Assistant Director of Special Services (not at the previous meeting), and a special services coordinator. Parents shared information about Student and reiterated Student's need for ABA therapy by an RBT in school. Parents again made clear they were requesting a plan under

[5] R. Ex. 14 at 1; R. Ex. 103 at 3; R. Ex. 268 at 1; Tr. at 317-18, 376-77, 454-55.

[6] Jt. Ex. 1 at 1-4; R. Ex. 17 at 1-2; Tr. at 61-63, 391-92, 741-44, 823-24, 826-28.

[7] P. Ex. 140; Tr. at 672-73, 744-49, 831, 889-90.

[8] R. Ex. 268 at 2; Tr. at 937-38.

Section 504, not special education. The Assistant Director of Special Services advised Parents that a Section 504 Plan provides accommodations in a general education classroom, not specialized supports, and the level of support Parents were requesting was available under special education. She further clarified that all decisions regarding the level of support Student required would be made by a Section 504 or Admission, Review, and Dismissal (ARD) Committee. She confirmed the District would request a special education evaluation at the Section 504 meeting because the available information indicated Student had a disability (autism), and a possible speech and language disorder. She also advised Parents of their right to decline consent for an evaluation and/or services. The District agreed to schedule a Section 504 Committee meeting once Student enrolled and asked to collaborate with Student's private ABA provider to ensure continuity of services across settings.[9]

10. On December ***, 2020, *** granted Parents' request for part-time services beginning in January 2021 and confirmed that it continued to recommend 40 hours a week of ABA therapy and that it could provide these services in the school setting if the District agreed. *** offered to communicate with the District in support of Parents' request for ABA services at school, but Parents did not feel comfortable with this.[10]

11. The District provided a Notice of Rights Under Section 504 on December ***, 2020 and advised Parents it would schedule a Section 504 Committee meeting after winter break. Student started school on January ***, 2021. During the spring semester, Student attended school in the morning and went to ABA therapy in the afternoon for *** hours a week. An absence for therapy is considered a temporary absence and these absences are excused as long as the student is present for part of the school day or returns to school. Student's absences during the spring semester were excused consistent with this policy.[11]

12. On January ***, 2021, Parents provided the District a letter of medical necessity in support of ABA therapy in school from Dr. ***, who had conducted a screening of Student on August ***, 2020, and confirmed a diagnosis of autism spectrum disorder. According to Dr. ***, Student needed "medically necessary optimal specialized services to support Student through Student's development, education, and academics," including ABA therapy 40 hours a week and speech therapy.[12]

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[9] Jt. Ex. 1 at 5-8; P. Ex. 141 (recording at 43:30-47:00, 59:00-1:14:00, 1:45:00-1:56:00, 2:04:00); Tr. at 750-53.

[10] R. Ex. 27 at 1; R. Ex. 31 at 1; Tr. at 275-76, 324-25.

[11] P. Ex. 4 at 1; P. Ex. 71 at 1; R. Ex. 26 at 3; R. Ex. 29 at 1; R. Ex. 232 at 6; R. Ex. 277 at 1-2; Tr. at 277, 773, 863-65, 876-77.

[12] Jt. Ex. 3 at 1-4; R. Ex. 220 at 14; Tr. at 761-63, 918-19.

13. The District provided Notice and Consent for a Section 504 Evaluation on January ***, 2021, and a Notice of Rights under Section 504. Parents consented to a Section 504 evaluation on January ***, 2021.[13]

14. The District convened an initial Section 504 Committee meeting on February ***, 2021. Parents, the campus Section 504 Coordinator, the principal, Student's teacher, and three District representatives, including the District's BCBA, a Licensed Specialist in School Psychology (LSSP), and the Assistant Director of Special Services, attended the meeting. The Committee considered Dr. ***'s letter of medical necessity along with parent and teacher information, including recent classroom observations by the principal, who worked directly with Student for four hours a day the first four weeks of school. Student was accessing prerequisite skills for *** academically. Student needed significant prompting and cueing and responded well to redirection. Student's teacher reported Student was doing well socially and making efforts to ***. Student was not *** apart from ***. Parents reported Student knew *** and had stronger receptive, than expressive, speech skills. Parents reported regression in therapy since beginning school and again requested full-time supports. The District BCBA asked to meet with Student's ABA therapist and requested a copy of Student's VB-MAPP. Parents declined both requests.[14]

15. When the District offered an evaluation to determine whether Student might have a speech and language impairment, Parents alleged that the District's goal was to "funnel Student into [its] special education program" and did not want to discuss the issue further until Student had the medically prescribed full-time ABA services described above. The District again discussed its obligation under the IDEA's Child Find provision to propose an evaluation if it suspects a student has a disability and a corresponding need for special education. The meeting was tabled because the Committee could not agree on how Student's disability impacted major life activities. Parents disagreed that autism impacted Student's learning and writing.[15]

16. The Section 504 Committee reconvened on February ***, 2021. After incorporating parental feedback on eligibility, the Committee proposed numerous accommodations. These accommodations included academic tutoring in reading and math as well as accommodations for adapting classroom instruction, altering assignments or testing, environment/accessibility, and managing behavior. With respect to behavior management,

[13] Jt. Ex. 6 at 1-5.

[14] Jt. Ex. 5 at 3-5; Jt. Ex. 7 at 1; Jt. Ex. 8 at 1-5; R. Ex. 33; Tr. 756-60, 770-72, 774-75, 835.

[15] Jt. Ex. 8 at 3-4; P. Ex. 139 (recording at 38:30-40:00, 1:22:00-126:00); Tr. at 775.

the Committee proposed ABA strategies and interventions throughout the day and supplemental training on these interventions, including direct training and modeling in the classroom. ABA strategies and interventions are not ABA therapy. Parents renewed the request for Student's private ABA providers to come to school. Student was learning classroom routines, and the District's data, including work samples, observations, and anecdotal information, did not support a need for one-on-one ABA therapy at school. Parents disagreed with the proposed Section 504 Plan.[16]

17. The District implemented a Tier 3 Response to Intervention (RTI) Plan on February ***, 2021, and provided the accommodations specified in Student's February ***, 2021 Section 504 Plan, including ABA strategies and interventions. Strategies implemented in the classroom included the Premack principal with first-then visual supports; task analysis; visual schedules; choice boards; preference assessments to identify reinforcers; *** data collection; use of timers; supporting initiation; establishing joint attention; modeling communication; informal training for peers on how to encourage communication and social interaction; prompting hierarchies; hand over hand prompting; errorless learning; prompt fading; and error correction procedures.[17]

18. With training, principles of ABA (including reinforcement, shaping responses, errorless learning, and task analysis) can be implemented by behavior specialists, general and special education teachers, and paraprofessionals in the school setting. ABA can be incorporated in schools by designing instruction and implementing programming and supports that align with the principles of ABA.[18]

19. The District has special education coordinators and behavior specialists who support special education staff and provide professional development, and general and special education teachers and paraprofessionals are trained on ABA strategies and interventions. The District BCBA conducted weekly Student-specific trainings for Student's teacher on the ABA strategies and interventions identified in Student's Section 504 Plan. She also conducted observations and data collection and provided feedback and recommendations.[19]

20. On March ***, 2021 and March ***, 2021, Parents requested a written response from the District to their request for full-time ABA therapy in school. The District responded on April ***, 2021, and referred Parents to the February ***, 2021 Section 504 Committee

[16] Jt. Ex. 9 at 1; Jt. Ex. 10 at 1-8; R. Ex. 42 at 1; R. Ex. 43 at 1; Tr. at 80-81, 638-40, 775-82.

[17] Jt. Ex. 13 at 8; Jt. Ex. 17 at 1-3; Jt. Ex. 20 at 31-40; P. Ex. 42 at 1-9; R. Ex. 47 at 3-4; R. Ex. 56 at 1-4; R. Ex. 63 at 1-2.

[18] Tr. at 548-49, 559-60, 575.

[19] Jt. Ex. 13 at 8, 14; R. Ex. 47; R. Ex. 51; R. Ex. 52; R. Ex. 57; R. Ex. 58; R. Ex. 60; R. Ex. 61; R. Ex. 62; R. Ex. 70; R. Ex. 86; R. Ex. 87; R. Ex. 105; R. Ex. 107; R. Ex. 116; Tr. at 86-87, 89-90, 782-85.

meeting during which the Committee decided (over Parents' objections) that the data did not support a need for 40 hours per week of one-on-one ABA therapy and that Student's educational needs in the classroom could be met through instruction from District personnel trained in ABA techniques and strategies and the other accommodations in Student's Section 504 Plan.[20]

21. Student's Section 504 Committee convened on May ***, 2021, to review Student's progress and plan. Parents were accompanied by an advocate from a law firm. Student made progress on *** but continued to struggle to ***. Grade level expectations for a student at the end of*** is to be ***. In writing, Student knew *** but could not ***. Student had mastered ***. By the end of ***, students are expected to be able to ***. Student could attend to group instruction for a maximum of 20-25 minutes and met classroom behavior expectations.[21]

22. Without presenting additional information, Parents renewed their request for full-time support from an RBT in school and raised concerns about the disconnect between what Student was learning at ABA therapy and in school. Parents, however, declined the District's requests for Dr. ***'s evaluation, to speak with her, and to collaborate with *** to determine the extent to which student's disability affected school performance. The District alternatively proposed an informal assessment of Student's need for an RBT in school. Parents declined. In response to parental inquiries as to whether the District suspected a disability apart from autism, the District clarified it had sought consent for a special education evaluation and renewed this request, which Parents again declined. The Section 504 Committee agreed on summer school, but otherwise did not reach consensus.[22]

23. Parents declined the District's requests to provide Student's treatment information and data from *** due to concerns the District would use it to "mimic the data" and "fashion [its] data after the ABA's data."[23]

24. Student did not meet expectations on the third or fourth nine-week *** assessments. Student mastered approximately one third (8 of 23) of *** work habit

[20] Jt. Ex. 11 at 1-2, 6-7; R. Ex. 48 at 1; Tr. at 786-89.

[21] Jt. Ex. 13 at 1, 3-6; R. Ex. 185 at 1.

[22] Jt. Ex. 13 at 4-6; Tr. at 789-91.

[23] R. Ex. 154 at 2; Tr. at 438.

expectations, with all academic areas needing improvement. Student's overall conduct met expectations, as did performance in ***. The District considered retention because Student had missed a significant amount of instruction but promoted Student to *** grade.[24]

2021-22 School Year

25. The Section 504 Committee reconvened on June ***, 2021. Parents were accompanied by an advocate, and the District's lawyer participated. Parents renewed their request that the District permit *** to provide a one-on-one RBT at school and provided a letter from ***. The letter indicated that—consistent with its assessment that Student required more intensive therapy—*** did not believe it was "ethical" to continue part-time services, and *** would resume 40 hours of ABA therapy on July ***, 2021. Parents declined to provide Student's current *** treatment plan referenced in the letter or allow collaboration with ***, offering instead to provide a summary if the District had specific questions. The District proposed a nine-week trial and assessment period by an RBT to collect data and make recommendations to the Section 504 Committee as to (1) whether ABA services were needed as a related service or an accommodation in Student's Section 504 Plan, and (2) whether Student required full-time ABA therapy to access Student's education. Parents declined because the District's proposal did not entail 40 hours a week of ABA therapy and did not address Student's need to continue full-time therapy at ***.[25]

26. On July ***, 2021, Parents requested a Section 504 Committee meeting concerning their request for full time ABA therapy in the classroom. On August ***, 2021, Parents signed a consent to disclose confidential information with ***. The Section 504 Committee convened on August ***, 2021. Parents attended with an advocate and the District's attorney participated, as did two *** BCBAs. The Section 504 Committee reviewed summer school data showing improved time-on-task for individual seatwork and large group instruction, but not for small group instruction or keeping Student's body in the group. The District agreed to provide Parents this data along with data taken during the school year. The *** BCBA explained that the recommendation for 40 hours a week of direct ABA therapy was based on Student's significant deficits in communication and social interactions. Student used short sentences and had difficulty remaining seated and focused. Student demonstrated *** and did not play and engage appropriately with peers. Student's treatment plan called for many of the same strategies the school was using.[26]

[24] Jt. Ex. 20 at 9-12; P. Ex. 109 at 1; P. Ex. 125 at 3-4; R. Ex. 268 at 4.

[25] Jt. Ex. 13 at 6-13; R. Ex. 80 at 1; R. Ex. 88 at 1; R. Ex. 89 at 1-2; R. Ex. 90 at 1; Tr. at 278-80, 791-97.

[26] Jt. Ex. 13 at 13-21; R. Ex. 84; R. Ex. 85; R. Ex. 96 at 1; R. Ex. 97 at 2; R. Ex. 101 at 1-2; Tr. at 281-83.

27. The District again proposed to assess whether Student required the accommodation of an RBT in the classroom to access Student's education. The District proposed an *** RBT work with Student for two weeks under the supervision of the District BCBA and then without an RBT for two weeks, with Parents suggesting six to nine weeks for data collection. With input from Parents and ***, the parties agreed to a six-week trial. Parents agreed to fund ABA services during the assessment period. The District confirmed its continued willingness to conduct an evaluation to consider Student's need for specially designed instruction.[27]

28. The next day, Parents declined to proceed with the assessment. Parents provided a letter from the *** BCBA. The letter indicated that *** could not recommend a decrease in ABA services—even if Student was receiving full-time educational supports—and that ethical guidelines prevented it from agreeing to withdraw a medical intervention to gather baseline data in the educational environment. An August ***, 2021 letter to Parents confirmed the District's continued willingness to conduct a Section 504 assessment. The District requested medical information, including assessments, relevant to Student's educational programing and consent to speak with Student's physicians, including Dr. ***. The District also offered once again to conduct an FIIE.[28]

29. Student attended school from August ***, 2021. On August ***, 2021, Parents advised the District that Student could not attend school due to its failure to have Student's "medical accommodation" in place. Parents provided a brief statement dated August ***, 2021, from Dr. *** recommending "out of medical necessity that [Student] needs ABA integrated within the school" and referring further inquiries from the District to Student's ABA therapists.[29]

30. On September ***, 2021, the District sent Parents a letter expressing concern Student was not attending school. The District confirmed the Section 504 Committee's determination that Student's private ABA therapy team accompanying Student on campus for the entire school day was not a reasonable and necessary accommodation based on the current data available to the District. In addition to proposing mediation, the District confirmed it was ready to evaluate Student under Section 504 and the IDEA to determine Student's needs and provided a Notice of Rights Under Section 504 and a Notice of Procedural Safeguards. The District also provided the summer school and 2020-21 school year data Parents requested.[30]

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[27] Jt. Ex. 13 at 16-21; Tr. at 282-83, 348-50, 798-99.

[28] Jt. Ex. 18 at 2-3; P. Ex. 28 at 1-2; R. Ex. 104 at 1-2; R. Ex. 106 at 1, 3-4; Tr. at 285-87, 350-51, 799-801.

[29] R. Ex. 113 at 1-2; R. Ex. 193 at 4.

[30] R. Ex. 117 at 1; R. Ex. 119 at 1-28; R. Ex. 120 at 1; Tr. at 802-03.

31. The Executive Director of Special Services contacted Parents about Student's absences on September ***, 2021. Student had attended school *** days and missed *** days of school, and the campus did not have documentation excusing these absences. The District advised Parents it typically withdraws students with 10 consecutive unexcused absences but offered to keep Student enrolled if Parents planned to send Student to school. The District confirmed its offer to fully evaluate Student to determine if Student required additional accommodations or special education, requested consent for an evaluation, and again asked to collaborate with Student's doctors and private service providers.[31]

32. The District notified Parents on September ***, 2021, that Student would be withdrawn on October ***, 2021, for nonattendance. Student could re-enroll at any time. Whether or not Student re- enrolled, the District reiterated its willingness to conduct an FIIE or Section 504 evaluation and again provided a Notice of Rights Under Section 504 and a Notice of Procedural Safeguards. Parents asked if Student's absences from school to attend ABA therapy were excused or unexcused. The District advised that absences after August ***, 2021, were unexcused and did not qualify as temporary absences because Student had not commenced classes or returned to school on the same day as Student's appointment with a health care professional.[32]

33. On January ***, 2022, Parents confirmed Student's re-enrollment in the District and requested a Section 504 Plan that included ABA services throughout Student's school day as a reasonable accommodation. Parents agreed to a special education evaluation and requested "an IEP as soon as possible." On January ***, 2022, the District agreed to obtain consent and implement the August ***, 2021 Section 504 Plan when Student re-enrolled.[33]

34. Student re-enrolled in the District on January ***, 2022. On January ***, 2022, Parents asked to move forward with a special education evaluation "immediately" and continued to disagree with Student's Section 504 Plan. The District provided a Notice of Proposal to evaluate on January ***, 2022. Areas of evaluation included communicative status, health, emotional/behavioral status, sociological status, intellectual/adaptive behavior, and academic performance. Parents met with the District's LSSP and speech language pathologist (SLP) regarding the evaluation and provided consent to an FIIE on January ***, 2022. Based on the date of consent, the FIIE was due April ***, 2022.[34]

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[31] Jt. Ex. 19 at 1; P. Ex. 92 at 1; R. Ex. 121 at 1-2; R. Ex. 193 at 1, 4; Tr. at 805-06, 809.

[32] Jt. Ex. 19 at 2; R. Ex. 122 at 1-28; R. Ex. 123 at 1-3.

[33] R. Ex. 130 at 1-2; R. Ex. 131 at 1-3.

[34] Jt. Ex. 20 at 3; P. Ex. 74 at 1; R. Ex. 132 at 1-2; R. Ex. 134 at 1; R. Ex. 135 at 1-4; R. Ex. 138 at 2; R. Ex. 143 at 1; R. Ex. 154 at 1; Tr. at 809-10.

35. Student attended school for *** weeks in January and *** in February and otherwise went to ABA therapy full-time during the spring semester. Between January ***, 2022 and the end of the 2021-22 school year, Student was absent *** times.[35]

36. The District agreed to Parents' request for *** to observe Student at school, and Parents gave consent for *** staff to contact the District to schedule observations and meetings concerning Student's transition to school. The *** BCBA conducted observations on January ***, 2022 and observed that Student was not successfully participating in the classroom. Behavior concerns included ***. Student ***, including ***. The *** BCBA met with the District BCBA, Student's teacher, and two administrators. She did not have consent to share information specific to Student but reviewed her observations and made recommendations, which included an immediate focus on reducing *** behavior.[36]

37. A January ***, 2022 memo from Parents raised concerns about increased *** across settings since returning to school and the District's inability to meet Student's needs. The memo included a notice of unilateral placement at *** beginning February ***, 2022. Parents offered to make Student available on Fridays for any observations. Parents agreed to provide Student's *** treatment plan, VB-MAPP, and other documents, but only after the District provided its data to Parents. On February ***, 2022, the District confirmed it had provided all educational records as of September ***, 2021, and that certain information requested did not exist. The District advised Parents that absences would delay the evaluation and confirmed it was "eager to collaborate with ***" and again requested consent to do so.[37]

38. The FIIE included a May ***, 2022 Speech-Language Pathology Evaluation by Dr. ******, an SLP and doctoral level BCBA. Dr. ****** considered Student's articulation, receptive, expressive, and pragmatic language skills. On the Goldman-Fristoe Test of Articulation, Third Edition (GFTA-3), Student's intelligibility was similar to a child who is *** years and *** months, and Student did not meet the typical articulation milestones. The GFTA-3 is normed for *** children.[38]

39. On the Peabody Picture Vocabulary Test (PPVT-5), a norm-referenced measure of receptive vocabulary, Student's skills fell in the *** percentile with an age-equivalency of

[35] R. Ex. 190 at 2; R. Ex. 193 at 1-5; Tr. at 811.

[36] R. Ex. 138 at 3; R. Ex. 142 at 1; R. Ex. 145 at 1-2; R. Ex. 151 at 1-5; R. Ex. 152 at 1-4; Tr. at 288-92, 357-60.

[37] R. Ex. 154 at 1-2; R. Ex. 156 at 1-4; Tr. at 810-11, 932.

[38] R. Ex. 177 at 1-4, 18; Tr. at 201.

*** years old. To gain further information about Student's receptive identification skills, Dr. ****** used the Processing Program (Level ***), which is used to assess children who have difficulty processing or learning language, including children with autism. Student could receptively *** Student was familiar with but had difficulty as tasks became more difficult. Student could ***.[39]

40. Dr. ****** administered the Expressive Vocabulary Test (EVT-2), a norm-referenced measure of expressive vocabulary, with scores indicating an age-equivalency of *** and a need to increase vocabulary skills. Assessment of Student's pragmatic language skills showed Student had not developed pragmatic skills typical of same-age peers, with deficits in social communication significantly impacting and preventing interaction with peers in the general education environment.[40]

41. Dr. ****** determined Student had a communication disorder and met eligibility criteria as a student with a Speech Impairment in expressive, receptive, and pragmatic language and articulation. Dr. ****** recommended goals focusing on the needs identified in the evaluation and recommended 30 minutes of pull-out group speech therapy three times a week; special education teacher consult for 45 minutes for the first month of school and 15 minutes a month thereafter; and a behavior interventionist consult for 90 minutes in the first month of school and 30 minutes each month thereafter.[41]

42. Student's FIIE included a May ***, 2022 Psychoeducational Evaluation by Dr. ******. Dr. ****** is a certified special education teacher and has a doctorate in educational psychology focusing on special education and autism research. She is an educational diagnostician, LSSP, and doctorate level BCBA. Sources of data included a records review, parent information, observations, and teacher interview. Dr. ****** also conferred with Dr. ****** regarding Student's communication levels. Instruments included the Wechsler Intelligence Scale for Children (WISC-V); Wechsler Nonverbal Scale of Ability (WNV); Weschler Individual Achievement Test (WIAT-IV); Vineland Adaptive Behavior Scale (VABS-3); Autism Spectrum Rating Scale (ASRS); Social Responsiveness Scale, Second Edition (SRS-2); Autism Diagnostic Observation Schedule, Second Edition (ADOS-2); Childhood Autism Rating Scale, Second Edition (CARS-2); and Developmental Profile, Fourth Edition.[42]

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[39] R. Ex. 177 at 2, 5-6.

[40] R. Ex. 177 at 2, 6, 9-12.

[41] R. Ex. 177 at 13-18; R. Ex. 178 at 1.

[42] R. Ex. 183 at 1-3; R. Ex. 184 at 1-3; R. Ex. 190 at 1; R. Ex. 267; Tr. at 526-28, 561-63.

43. Student's mother described Student as easy going, kind, and happy. Student used *** to communicate requests and needs and required prompting to ***. Student did not engage in conversational exchanges. Student enjoyed being around other children and joined in play when initiated by others. Student had difficulty understanding social cues and initiating play independently. Parental concerns related to speech included Student's ability to interact with others, communicate effectively, and experience success.[43]

44. According to teacher input, Student's academic skills were at an early or pre-academic level in all areas. Student could identify ***, with ***. Student could *** but did not ***. Behavioral strengths identified by Student's teacher included flexibility and ability to tolerate changes in routine and schedule. Challenges included remaining in a designated area, engaging in academic tasks, seeking attention appropriately, and transitioning independently. Student required prompting and cueing to participate and one-on-one adult support and supervision across all settings to engage in tasks and participate in classroom and school routines. Dr. ****** did not observe Student in the classroom setting because Student was not attending school.[44]

45. Dr. ****** attempted to evaluate intellectual ability but discontinued the WISC-V because Student did not have the receptive or expressive language skills necessary to understand and complete the standardized assessment. As a result, a valid measure of Student's intellectual ability was not obtained. Student's mother completed the Vineland Adaptive Behavior Scales. Student's overall level of adaptive functioning ***.[45]

46. The Wechsler Individual Achievement Test, Fourth Edition (WIAT-IV) measures academic achievement based on chronological age. Student's overall reading abilities fell in the ***. Student could ***. Student's overall writing abilities fell in the ***, and Student had difficulty completing this task. Student's overall math abilities fell in the ***. Student could not ***.[46]

47. Dr. *** administered several autism assessments, including two parent assessments. The Autism Spectrum Rating Scales (ASRS) is a norm-referenced assessment tool

[43] R. Ex. 190 at 3.

[44] R. Ex. 190 at 4-5; Tr. at 565-66, 568.

[45] R. Ex. 190 at 7, 12-14; Tr. at 569.

[46] R. Ex. 190 at 7, 14-15; Tr. at 569-70, 622-24.

designed to measure behaviors associated with autism spectrum disorders for children and adolescents. Student's total score fell in the *** in the areas of social/communication and social/emotional reciprocity. On the SRS-2, Student's total score fell in the ***, indicating social deficits typically associated with autism.[47]

48. Dr. *** administered the ADOS-2, a standardized assessment of communication, social interaction, and play or imaginative use of materials. Student's overall score fell in the autism spectrum range, and Student's comparison score indicated a high degree of similarity to individuals diagnosed with autism. Dr. *** reviewed two studies on implicit bias with the ADOS-2 indicating the tool was not biased at a statistically significant level and incorporated a ***.[48]

49. Overall, the evaluation identified Student's strengths to include Student's interest in books and print, Student's interest in engaging with others, and Student's flexibility. Student tolerated changes in routine, was easily redirected, and wanted to interact with peers. The evaluation identified significant deficits in the areas of language and communication; reciprocal social interaction, play, and social skills; and difficulty generalizing skills across settings. These deficits directly impacted Student's skill acquisition and learning, academic achievement, and functional independence. Dr. *** determined Student met eligibility criteria as a student with an Autism Spectrum Disorder and Student demonstrated a need for specially designed instruction. Student was learning school-readiness skills and required structured learning opportunities with a focus on language and social communication in order to acquire more advanced skills.[49]

50. Academic recommendations included direct teaching of reading skills by a certified teacher; the teaching of numeracy skills and the mechanics of writing using a multisensory approach; and presenting tasks using multiple discriminative stimuli to promote generalization. Dr. *** recommended Student's program incorporate behavior analytic strategies (techniques used in ABA) such as prompting and cueing, shaping, proximity control, prompt fading, errorless learning, task analysis, and reinforcement throughout the day. She further recommended an occupational therapy (OT) evaluation to identify educational needs related to fine motor, drawing, and handwriting and a schedule for ongoing consultation and collaboration with Student's private therapy providers.[50]

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[47] R. Ex. 190 at 7-8, 15-18.

[48] R. Ex. 190 at 8-9, 18-19; Tr. at 563-64.

[49] R. Ex. 190 at 9-10; Tr. at 571.

[50] R. Ex. 190 at 10-11; Tr. at 571-74, 578-79.

51. On April ***, 2022, Parents requested all documentation from the LSSP and SLP interviews from January ***, 2022. The District provided these records on April ***, 2022.[51]

52. During the 2021-22 school year, Student attended*** full days in August 2021, *** full days in January 2022, and *** in February 2022.[52]

2022-23 School Year

53. The District provided Parents the speech and language and psychoeducational evaluations on May ***, 2022, and offered to coordinate time to meet with the evaluators before the initial ARD Committee meeting on June ***, 2022. The June ***, 2022 meeting included Parents and their attorney, two *** BCBAs, the District's attorney, the principal, the Executive Director of Special Services, the Assistant Director of Special Services, *** instructional coordinator, Dr. ***, Dr. ***, Student's general education teacher, a special education teacher, and an ARD facilitator.[53]

54. Dr. *** and Dr. *** reviewed the psychoeducational and speech evaluations and responded to Parents' questions about the cultural responsiveness and administration of the testing instruments and efforts to ensure the assessments used were culturally and otherwise appropriate. Based on the FIIE, Student met criteria as a student with Autism and Speech Impairment and the District recommended specially designed instruction. Parents elected to listen to the District's proposal and did not provide input on eligibility, Student's present levels of academic achievement and functional performance (PLAAFPs), or the proposed goals and accommodations. Parents did not allow *** to provide input on the PLAAFPs or share information from the clinical setting. Parents renewed the request for the District to allow Student's ABA providers into the classroom.[54]

55. Student's draft IEP included 26 goals for the 2022-23 school year, including four reading goals; one writing goal; four math goals; two*** goals; two *** goals; four speech therapy goals; two behavior/social skills goals; three adaptive behavior goals; a social skills goal; and three *** goals targeting areas identified in Student's PLAAFPs. The draft IEP included a BIP targeting *** and inattention to task (ignoring non-preferred tasks for preferred tasks) and

[51] R. Ex. 181 at 1, 5, 7-22.

[52] R. Ex. 232 at 6.

[53] R. Ex. 191 at 1-41; R. Ex. 201 at 1; R. Ex. 207 at 1, 38-39, 51-52.

[54] R. Ex. 207 at 52-59; Tr. at 577, 579-81, 812-16.

strategies to address these behaviors. Parents did not agree that a BIP was needed, did not provide input, or allow *** to do so.[55]

56. The ARD Committee considered Student's need for AT, and the IEP called for *** pending completion of an AT Independent Educational Evaluation (IEE).[56]

57. The proposed IEP included an Autism Supplement. The supplement considered Student's need for extended educational programming and proposed ESY to prevent regression in academic and social skills for three hours per day, four days a week for five weeks in June and July 2022. The supplement considered in-home and community-based training and called for an in-home/parent training evaluation, which Parents declined. The supplement considered the staff-to-student ratio Student required, to include 1:1 for learning new skills; 1:2 for guided practice (fluency); and a 1:5 ratio for maintenance/generalization of skills. The supplement addressed communication interventions, social skills supports and strategies, and called for professional education/staff supports, including training on autism and ABA strategies. The supplement called for specific teaching strategies including direct instruction, modeling, reinforcement, shaping, and antecedent interventions; ABA principles; proximity control; prompt fading; errorless learning, task analysis, and reinforcement. The proposed IEP called for student-specific training by the District BCBA and included behavior analytic procedures such as positive behavior supports, positive reinforcement, and a token economy.[57]

58. General education placement was considered and rejected because the state standards for Student's grade level exceeded Student's competencies at the time. In addition, the modifications required for Student to achieve Student's IEP goals and objectives could not be implemented in the general education classroom without eliminating essential components of the curriculum/activity. The proposed schedule of services called for a combination of general education and special education time, with *** in the general education classroom and fundamental instruction in math, reading, and writing in the special education classroom. The IEP also called for social skills instruction in a special education classroom and in class support in all classes, ***. The IEP called for 30 minutes of speech and language therapy three times a week and consultation with

[55] R. Ex. 207 at 7, 9-25, 29, 57; Tr. at 582-83.

[56] R. Ex. 207 at 8.

[57] R. Ex. 207 at 34, 42-45; Tr. at 438-39, 587-88, 598-99.

the behavior intervention specialist for the first month of the school year for 90 minutes and 30 minutes a month thereafter to support small group instruction.[58]

59. The District discussed the continuum of placements and recommended that Student receive instruction in the *** program, which provides a highly structured learning environment designed to provide specialized instruction for students who have significant communication and social learning needs and focuses on teaching students to use language and engage in appropriate social interactions. The program provides supports and services, including consistent routines, "lots of opportunities for generalization of skills," and use of ABA strategies such as errorless teaching, positive reinforcement, and the Premack principle. The *** classroom is not self-contained and participating students receive any combination of general and special education services. The District recommended the *** program over a resource or other setting due to Student's academic, social, and behavioral needs. The *** program is centralized and available on *** campuses in the District. The program is not available on Student's home campus.[59]

60. Parents disagreed with the proposed placement in the *** program and instead proposed full time ABA therapy by *** in the general education classroom. The District asserted, however, that the data did not support the need for one-on-one ABA therapy during school hours and reiterated its offer to provide ABA strategies and supports.[60]

61. The District provided Parents access to the FIIE testing protocols on June ***, 2022.[61]

62. Student's proposed educational program is an eclectic program. An eclectic program is one that uses multiple approaches to educate the student.[62]

63. Dr. ***, a professor of counseling psychology and an expert in implicit bias and education, conducted a review of records in August 2022 to address the role implicit bias may have played in the District's treatment and response to Student. He identified several areas where implicit bias may have impacted the District's response to Student and Student's family. Dr. ***, however, did not evaluate Student or interview anyone on Student's evaluation team, and did not make specific recommendations for Student's educational program.[63]

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[58] R. Ex. 207 at 32, 34-35.

[59] R. Ex. 207 at 35, 58-59; R. Ex. 278 at 1; Tr. at 589, 673-74, 679-80, 684-85, 687-88.

[60] R. Ex. 207 at 59.

[61] R. Ex. 211 at 1.

[62] Tr. at 474-75, 594-95.

[63] P. Ex. 8; P. Ex. 9; Tr. at 132, 165-66.

64. ***, an educational diagnostician and experienced special education administrator, conducted a review of records relevant to Student's educational performance, including the May 2022 FIIE. She recommended "wrap around" services from special education and related service providers focusing on communication and behavior regulation. She also recommended allowing collaboration between the private ABA therapist and classroom and related service staff; AT and OT evaluations; in-home parent training; and cultural diversity training for campus staff and administrators. Ms. *** opined that differentiated instruction, which is providing multiple ways for students to participate in the curriculum and demonstrate mastery of or progress on instructional content, could be used to help Student be successful in a *** classroom. She did not evaluate Student or seek input from the District.[64]

65. ***, an SLP, conducted an observation of Student and reviewed the FIIE. His August 2022 report noted that the GFTA-3 was the only measure of a speech sound disorder and a few errors noted may be considered dialectical in nature, especially considering Student was raised in a home where multiple languages are spoken (***). Mr. *** recommended a comprehensive independent evaluation and "team approach" to assessment practices across a variety of areas, and an evaluation that takes into consideration culturally responsive practices and does not focus only on standardized assessments. He recommended an AT evaluation and that Student's program include speech and language therapy, access to a variety of communicators, inclusion support, and in-home parent training. Mr. *** also recommended staff training on cultural responsiveness.[65]

66. Dr. *** is a published researcher and professor in the Department of Educational Psychology at ***. She is a doctoral level BCBA and directs the university's masters and doctorate level BCBA training program. Dr. *** evaluated Student's need for ABA therapy in school, reviewing documents and conducting observations at school and ***. Her August 2022 report recommended a comprehensive ABA program in school in the general education classroom to maximize opportunities to interact with typically developing peers and further develop communication, social, and play skills.[66]

67. Student's ARD Committee reconvened on August ***, 2022. In light of parental concerns raised in the prior meeting, the lead SLP reviewed the speech portion of the FIIE and, though the discrepancies identified did not yield a significant clinical difference in the scores, the District offered to conduct another speech evaluation or IEE. Parent agreed.

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[64] P. Ex. 11; P. Ex. 12 at 1, 3-4; Tr. at 416-20, 422-24, 429, 591-92, 682-83.

[65] P. Ex. 13; P. Ex. 14 at 1-5; Tr. at 189-192, 203-04, 209, 213, 237-38.

[66] P. Ex. 3; P. Ex. 4 at 1, 15-21; Tr. at 461-70, 489-90.

The Committee revised Student's math PLAAFP and goal with Parent input and reviewed the Autism Supplement. Parent inquired why Student's ABA therapist could not come to school, and the District clarified the proposed IEP did not call for ABA therapy. Nor did the data show that Student required full time ABA services to receive a FAPE. Instead, the proposed IEP offered specially designed instruction, including ABA strategies and interventions. The Committee did not reach agreement, and the meeting was tabled.[67]

68. Student's ARD Committee reconvened on August ***, 2022. In lieu of the recommended ESY and to address Parents' concerns with the delay in completing the evaluation, the District offered compensatory education (10 hours for ***, 12 hours for speech, and 120 hours for academics). Parents generally disagreed with the proposed goals, indicating Student had already mastered many of the goals, and described the IEP as "incomplete." Parents again requested ABA therapy in the general education classroom. The meeting ended in disagreement.[68]

69. Parents requested an IEE, and the District agreed to provide one in the following areas: speech and language, OT, behavioral/emotional, cognitive, achievement, and AT. The District provided its IEE criteria and a list of potential providers on August ***, 2022. On September ***, 2022, the District provided a Notice of Proposal to Evaluate in the areas of fine motor skills, sensory and communication concerns, and generalization of skills between home and school, including OT, AT, and in-home parent training evaluations.[69]

70. Student's ARD Committee reconvened on September ***, 2022. The Committee considered four independent evaluations provided by Parents (the *** reports) and updated Student's PLAAFPS to include information from the reports. PLAAFPS were also updated to include information from Student's *** treatment plan. Parents toured *** programs on three campuses and continued to assert that Student's needs could be met in the general education classroom with ABA therapy. Parents disagreed that Student needed a BIP and again disagreed with the goals and proposed IEP. The District confirmed its offer of additional evaluations in the areas of in-home/parent training, OT, AT, and speech. The ARD Committee did not reach consensus.[70]

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[67] R. Ex. 207 at 60-64.

[68] R. Ex. 207 at 64-70.

[69] Jt. Ex. 24 at 1-17; Jt. Ex. 26 at 1-4; R. Ex. 235 at 2-5.

[70] R. Ex. 232 at 1-12, 16; Tr. at 397-401, 585.

71. The District provided Parents the proposed IEP and Prior Written Notice on September ***, 2022, and indicated it was ready to implement the IEP if Parents reconsidered and consented to services.[71]

72. On September ***, 2022, Parents provided a notice of agreement that Student qualifies for special education and has autism. Parents did not agree with placement in the *** program "as it is not LRE and its [sic] clearly mostly for *** children." Nor did they agree that Student needed a BIP or the proposed IEP. Parents asserted Student needed ABA therapy at school or *** "consistent with medical recommendations."[72]

73. On September ***, 2022, the District advised Parents it could not implement Student's IEP without consent. The District offered Parents an opportunity to consent to services and expressed concern that Student's Section 504 Plan was insufficient to ensure Student's success. On September ***, 2022, the District provided Student's updated Section 504 Plan and requested consent for initiation of special education services.[73]

74. In early October 2022, Student was below level in all academic areas and Student's teacher had concerns about the rigors and expectations of ***. Reading concerns included ***. Math concerns included ***. Student's strengths included completing work on time and being prepared for class. Concerns included organizing materials, following instructions/directions, solving problems independently, and asking questions to clarify understanding. Behavioral strengths included treating others with respect and accepting responsibility for Student's actions. Concerns included staying on task during independent work, working well/staying on task in groups, using time wisely, and paying attention and participating in class discussions. Student's teacher noted Student was kind to Student's classmates.[74]

75. As of October ***, 2022, Student's grades were below *** in all academic subjects. Grade level expectation by *** is to be able to ***. Student is working on ***. Student's current level of support is not sufficient to make academic progress at the *** level. Student, however, is making progress

[71] R. Ex. 235 at 1.

[72] Jt. Ex. 27 at 1; Tr. at 396-97, 400-01.

[73] R. Ex. 239 at 1; R. Ex. 240 at 1.

[74] R. Ex. 243 at 1-2.

with behavior and socialization. Student follows school routines, ***, and interacts with peers.[75]

76. Dr. *** conducted observations at school on November ***, 2022. Student was engaged significantly less than peers and difficulty with engagement was impacting Student's access to the curriculum. According to Dr. ***, Student's lessons in their current form were not "well designed" for Student and Student requires revisions to the curriculum to improve access.[76]

77. Students' Section 504 Committee convened on November ***, 2022. The Committee revised Student's Section 504 Plan to include one-on-one class support by an RBT-trained provider for acquisition of new skills in the general education setting for the entire instructional day. The District agreed to allow Student's private RBT to attend school with Student for six weeks or until Student's RBT-trained paraprofessional received certification, whichever is later. Student's grades and current academic performance did not reflect mastery of *** expectations.[77]

78. Parents have not consented to special education services.[78]

79. Student responded well to ABA therapy and made progress on Student's treatment goals at ***. On Student's most recent VB-MAPP, Student scored consistent with a ***-old based on verbal milestones. *** recommends that Student continue ABA therapy to prevent regression and resurgence of maladaptive behaviors.[79]

[75] P. Ex. 128 at 1; R. Ex. 245 at 1; Tr. at 698-99, 703, 819-20.

[76] P. Ex. 6 at 1-3, 5; Tr. at 504.

[77] Jt. Ex. 30 at 1-3, 7; R. Ex. 248 at 1; Tr. at 87-88, 96-97.

[78] Jt. Ex. 30 at 5; Tr. at 820-21.

[79] P. Ex. 4 at 17-18; Tr. at 281, 299-300, 510-11.

VI. DISCUSSION

As a preliminary matter, the hearing officer clarifies the scope of the decision to include only claims arising under the IDEA set out in Order No. 6 (*see* Section IV.A., above).[80] During the relevant time period, Student received services under Section 504 and certain evidence related to these services is relevant to resolving Petitioner's IDEA claims. However, whether the District provided Student a FAPE under Section 504 and the District's obligation, if any, to allow Student's private ABA providers to accompany Student to school as a reasonable accommodation under Section 504 or the ADA are outside the hearing officer's jurisdiction and beyond the scope of the decision. 34 C.F.R. §§ 300.503(a)(1)-(2), 300.507(a)(1); 19 Tex. Admin. Code § 89.1151(a).

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). A school 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.

A school district is responsible for providing a student with specially designed personalized instruction with sufficient support services to meet the student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). The central inquiry is whether a school

[80] Order No. 6 further dismissed Petitioner's claims that the District violated Student's rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, as amended, the Texas Constitution, Texas Education Code § 25.087, and Title VI of the Civil Rights Act on jurisdictional grounds.

district provided an educational program that "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.[81] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE and offer a program that was reasonably calculated to provide Student with the requisite educational benefit. *Id.*

C. 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 child with a disability or the provision of FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint unless the State adopts an alternate limitations period. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1)-(2). Under state regulations applicable to due process hearings filed before September 1, 2022, a parent must request a due process hearing within one year of the date the parent knew or should have known about the alleged action that serves as the basis for 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).

[81] There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n.4 (5th Cir. 2009).

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.

20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); 19 Tex. Admin. Code § 89.1151(d). Parents bear the burden of establishing an exception to the one-year limitations period. *G.I. v. Lewisville Indep. Sch. Dist.*, Case No. 4:12cv385, 2013 WL 4523581, *8 (E.D. Tex. Aug. 23, 2013).

Petitioner requested a hearing on February 18, 2022, and raised the withholding exception to the statute of limitations in an amended petition filed on March 25, 2022. The District raised the statute of limitations as an affirmative defense and contends that any claims arising prior to February 18, 2021, are time-barred.

The evidence showed Petitioner knew or should have known about the alleged actions forming the basis of the complaint in early March 2021, at which time the District had begun implementing Student's Section 504 Plan and Parents renewed their request for full-time ABA therapy at school. Petitioner filed Petitioner's due process hearing request on February 18, 2021, within one year of the accrual date.

The evidence, however, did not support the contention that the District's failure to provide a Notice of Procedural Safeguards until September 2021 prevented Parents from requesting a hearing earlier. Parents, with an advocate present, made clear in discussions with the District in December 2020 that they had professional knowledge and expertise concerning the education of students with disabilities and what special education offered and entailed, and it is reasonable to

infer this included knowledge of their rights. Petitioner failed to offer sufficient evidence that the initial provision of a Notice of Procedural Safeguards in September 2021 prevented Parents from requesting a hearing earlier, and the hearing officer concludes the withholding exception does not apply. Accordingly, the relevant time period for Petitioner's claims began on February 18, 2021. Nonetheless, facts outside the limitations period may be considered when determining whether the District had reason to suspect that Student had a disability under the IDEA and a corresponding need for special education services upon commencement of the relevant timeframe on February 18, 2021. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 793 n.11 (5th Cir. 2020).

D. Child Find Under the IDEA

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). A school district, like Respondent, has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its jurisdiction, including children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a), (c)(1); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 949-50 (W.D. Tex. 2008).

The Child Find obligation is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect special education services may be needed to address the disability. *Richard R.*, 567 F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001). When these suspicions arise, the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability. *Richard R.*, 567 F. Supp. 2d at 950. A two-part inquiry is required to resolve a Child Find claim. The first inquiry is whether the school district had reason to suspect the student has a disability. The second inquiry is whether the school district had reason to suspect

the student may need special education and related services as a result of the disability. *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 467 (N.D. Tex. 2016), *aff'd in part and rev'd in part*, 865 F. 3d. 303, 320 (5th Cir. 2017).

A school district must "identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability." *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790-91 (5th Cir. 2020). A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period or ceases to take such steps. *O.W.*, 961 F.3d at 793.

The evidence showed the District had reason to suspect Student had a disability and may need specially designed instruction in December 2020 when Parents indicated Student had autism and requested full-time support by private ABA providers in the classroom. During the December ***, 2020 meeting, the Assistant Director of Special Services explained that the level of support Parents were requesting may only be available through specially designed instruction and, while acknowledging Parents were requesting services under Section 504, explained the District's obligation under Child Find to refer Student for an evaluation.

In this case, after being put on notice of facts likely to indicate a disability in December 2020, the District took the proactive step of promptly referring Student for a special education evaluation. The District continued to propose an evaluation at numerous junctures throughout the 2020-21 school year based on the continuing belief that Student may need specially designed instruction. In response, Parents continued to make clear they were not interested in a special education evaluation and wanted Student to receive services under Section 504. The District

respected that decision, implementing a Section 504 Plan in February 2021. In this case, there was no delay in the District's referral for special education and, to the extent that there was a delay in obtaining consent for an FIIE, the delay is attributable to Parents. Indeed, it is difficult to reconcile Petitioner's claim the District failed in its Child Find obligation given Parents' position they were not interested in special education for more than a year after Student enrolled.

The hearing officer concludes the District complied with its Child Find obligation.

E. Evaluation Under the IDEA

In conducting an evaluation under the IDEA, a school district must (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b). The student must also be assessed in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4).

The evidence showed that Student's FIIE met these requirements. Based on available information indicating Student had autism and a possible speech and language impairment, the District comprehensively assessed Student in these areas. The District assembled a multidisciplinary team to consider Student's educational performance and needs, including Dr. ***, an educational diagnostician, LSSP, and doctorate level BCBA; Dr. ***, an SLP and doctoral level BCBA; Student's teacher; and Parents. Dr. *** and Dr. *** also conferred regarding Student's communication levels and Dr. *** had this relevant information when conducting her evaluation. Each evaluator used a variety of assessment tools and strategies, rather than a single

measure or assessment including parent and teacher input; testing observations; and standardized assessments and other technically sound instruments to assess Student's abilities and needs.

Each evaluator considered the assessment results and whether Student met eligibility criteria as defined under the IDEA and made comprehensive recommendations for services and supports for the ARD Committee to consider when developing Student's IEP. In addition to making eligibility and programmatic recommendations, Dr. *** identified fine motor skills as an area for further exploration given Student's difficulties with *** and recommended an OT evaluation, which is pending.

Petitioner challenges Student's FIIE on additional grounds. A school district must ensure that assessments and other evaluation materials are: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; and (2) provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student can do academically, developmentally, and functionally. 34 C.F.R. § 300.304(c)(1)(i)-(ii).

Parents raised concerns about racial bias in the evaluation. During the June 2022 ARD Committee meeting when the evaluations were reviewed, Dr. *** and Dr. *** provided information concerning how different assessment instruments were selected and administered. For example, to ensure the evaluation materials and assessment were not discriminatory on a racial or cultural basis, Dr. *** reviewed literature on implicit bias in the use of the ADOS-2 and confirmed its appropriateness as an assessment instrument and incorporated culturally appropriate materials. Petitioner's expert, ***, raised concerns that the GFTA was the only articulation measure used and there was no indication that Dr. *** considered dialectical differences or influences. However, the GFTA is a standardized assessment that is normed for *** children, and Petitioner did not offer sufficient evidence to establish that this or other components of

the speech evaluation failed to yield accurate information on what Student knows and can do academically, developmentally, and functionally. Petitioner's expert, Dr. ***, identified several areas where implicit bias may have impacted the District's response to Student and Student's family. However, Dr. *** did not evaluate Student or speak with District staff. Moreover, his report and testimony failed to identify how the FIIE instruments were discriminatory on a racial or cultural basis or otherwise substantiate this claim.

Finally, to address parental concerns regarding the speech portion of the FIIE, the District appropriately offered Parents a new speech evaluation by the District or an independent evaluator. However, the District first identified that any discrepancies in scoring protocols did not cause a significant clinical difference in the score that would indicate a change in eligibility.

The hearing officer thus concludes that Petitioner did not meet Petitioner's burden of showing that the District failed to comply with the IDEA's evaluation requirements.

F. FAPE

The Four Factors Test

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Those 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).[82]

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 FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the 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, 300.323(a). 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 inquiry in this case is whether the IEP proposed by the school district was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Endrew F. ex rel. Joseph F.*
v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

[82] Even after the *Endrew F.* decision, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018). *See also Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

The District's obligation when developing Student's IEP is to consider Student's strengths, Parents' concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(1). The IEP must consider the student's communication needs. 34 C.F.R. § 300.324(a)(2)(iv). The IEP must also consider whether the student needs assistive technology and services. 34 C.F.R. § 300.324(a)(2)(v).

Assessment and performance, including achievement testing, other District assessments, and teacher input indicate that Student is performing well below grade level expectations. The proposed IEP includes goals informed by Student's PLAAFPs in all academic areas and calls for direct instruction in fundamental reading and math skills.

The proposed IEP included a BIP addressing *** and attention to task. Parents dispute Student's need for a BIP. The evidence showed Student does not have disciplinary issues and Student has numerous behavioral strengths at school. Student responds well to re-direction; is flexible and adapts to changes with routine and schedule; and Student is kind to Student's classmates and treats others with respect. While Student's behavioral needs are largely well-managed with classroom behavior management strategies, inattention to task was consistently identified as an area where student needs additional support. Student also engages in *** behavior at school and *** was identified as a target behavior in Student's *** BIP as recently as July 2022. Indeed, the District's inability to handle *** behavior was a reason cited by Parents for placing Student at *** in the spring of 2022.

Dr. ***'s position that a BIP should be reserved for "very severe problem behavior" misstates the standard and the District's obligations with respect to Student's behavioral needs. For a student whose behavior impedes Student's learning and that of others, schools must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). The BIP included positive behavioral interventions and supports,

including redirection, praise, and reinforcement, and no disciplinary consequences. Based on Student's documented behavioral concerns with *** and attention to task at school, it was not inappropriate for the proposed IEP to include a BIP.

Assessment and performance demonstrate Student has a speech and language impairment, with deficits in expressive, receptive, and pragmatic language. The proposed IEP addressed these needs, calling for 90 minutes of speech therapy each week. Student's speech therapy services also call for the speech therapist to receive Student-specific training by the BCBA. These services were consistent with the level of services recommended by in the FIIE. The District's proposal also includes a combination of pull out and inclusive speech services as recommended by Mr. ***.

Student has identified deficits in social communication and pragmatic language skills. The proposed IEP called for direct social skills instruction, including behavior/social skills goals focusing on answering and responding to questions from peers and a social skills specific goal focusing on initiating play with peers. The proposed IEP also addressed Student's need for AT pending completion of an AT IEE.

Finally, consistent with its obligation under the IDEA, the September ***, 2022 ARD Committee considered four private evaluations provided by Parents and incorporated relevant information in Student's PLAAFPs. 34 C.F.R. 300.502(c)(1).

Student's Autism Program

Petitioner alleges the District denied Student a FAPE by (1) refusing to provide Student individually tailored ABA services for 40 hours a week, (2) failing to offer Student any program of specially designed instruction that includes 40 hours a week of ABA services to meet Student's unique

needs, and (3) predetermining that Student does not require 40 hours of ABA services a week to receive a FAPE.

"Predetermination occurs when the school district makes educational decisions too early in the planning process, in a way that deprives parents of a meaningful opportunity to fully participate as equal members of the IEP team." *E. R. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 769 (5th Cir. 2018) (*quoting R.L. ex rel. O.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014)). "To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *Id*.

Petitioner alleges the District predetermined in November 2020 that it would not provide ABA therapy and would not allow *** into the school to provide the therapy. The evidence does not support this contention. In November 2020, in response to Parents' initial request to allow Student's ABA providers to accompany Student to school, the District advised Parents it did not allow parents to provide private support for a student during the school day but could "look at options and provide what the child needs to be successful in school" if the student needed that level of support. While Petitioner casts this communication as predetermination, the evidence showed this communication more accurately reflected the District was open to exploring the level of support Student needed at school. In December 2020, Parents were advised that these options were Section 504 and special education and that any decisions about Student's educational program would be made by these committees. Parents chose to proceed under Section 504. Over numerous Section 504 Committee meetings, the District made repeated requests for additional information to inform Student's programming, repeatedly yet unsuccessfully offered to assess the scope of Student's needs and whether Student required full-time ABA therapy in the educational setting, and solicited input from *** in August 2021 as to what an ABA therapist in the

classroom setting would look like. These efforts indicate the District continued to have an open mind concerning Parents' request for full-time ABA therapy in school.

Petitioner also argues the District engaged in predetermination by disenrolling Student in the fall of 2021. The evidence showed that Student was administratively withdrawn for failure to attend school in early October 2021 and communications to that effect came from the Executive Director of Special Services on behalf of the District. While it is true that Student's absences were excused as temporary absences during the spring semester of 2021, Student was attending partial days of school at that time. In August 2021, Student ceased attending altogether and Parents did not notify the District if Student would be returning to school. Parents were advised of the District's policy on temporary absences requiring Student to begin or end school on a given day to be considered an excused absence. Student was administratively withdrawn consistent with this policy and welcomed to re-enroll at any time. In short, the weight of the credible evidence did not substantiate Petitioner's predetermination claim.

Student's ARD Committee determined Student qualified for special education and related services as a student with an Autism Spectrum Disorder. District members of the ARD Committee, however, did not agree with Parents that Student needed one-on-one private ABA therapy for 40 hours a week in order to receive a FAPE and developed an IEP that included the provision of ABA strategies and techniques to be implemented by trained District personnel.

In this case, there is no genuine dispute Student has autism and Student's neurologist and ABA therapists have recommended 40 hours of weekly ABA therapy, an evidence-based intervention supported by considerable research, and that Student has benefitted from intensive ABA therapy. From Parents' perspective, the District's inquiry into the appropriate method of delivering student a FAPE should begin and end here, and the District's programming decisions should yield to Student's medical prescription for these services. However, while Petitioner established these

services were medically necessary, Student's positive response to an evidence-based intervention in a clinical setting is not determinative of the District's obligations to Student under the IDEA and whether Student requires those services to receive a FAPE. In this case, the weight of the credible evidence did not establish these services were necessary for Student to receive a FAPE under the IDEA. The evidence further established that the District's proposed program, which includes ABA strategies and interventions to be implemented throughout the day by appropriately trained staff, met the IDEA's requirements.

The IDEA requires that special education and related services be provided by "qualified personnel" who are appropriately and adequately prepared and trained, and who possess the content knowledge and skills to serve children with disabilities. 34 C.F.R. § 300.156(a). Dr. *** raised concerns that District personnel lacked the experience and training necessary to deliver appropriate behavior analytic strategies to Student. However, Dr. *** credibly explained how general and special education teachers and other personnel can be successfully trained in using these strategies. The District provided Student-specific trainings on the ABA strategies and interventions called for in Student's Section 504 Plan and, while the IDEA does not require that personnel be trained or qualified to instruct a student using a particular methodology, Student's proposed IEP calls for ongoing professional education and staff support, including training specific to Student's autism-specific needs and the ABA strategies and positive behavior interventions and supports identified in Student's IEP.

For students with autism in Texas, the ARD Committee must also consider whether the student's IEP should include the following: extended educational programming; daily schedules reflecting minimal unstructured time and active engagement in learning activities; in-home and community-based training; positive behavior support strategies based on relevant information; futures planning for post-secondary environments; parent/family training and support; suitable staff-to-student ratios; communication interventions; social skills supports; professional

educator/staff support; and teaching strategies based on peer-reviewed, research-based practices for students with autism. 19 Tex. Admin. Code § 89.1055(e). This regulation is commonly referred to as "the Autism Supplement." Student's proposed IEP included an Autism Supplement that thoroughly addressed each of the required areas, calling for ESY and specific teaching strategies including direct instruction, modeling, and reinforcement.

Petitioner alleges the District failed to offer any legitimate, peer-researched program to meet Student's needs that will do so in a manner like ABA therapy. An IEP must contain a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research *to the extent practicable*, to be provided to the child. 34 C.F.R. § 300.320(a)(4) (emphasis added). This qualifying language "in and of itself suggests that peer-reviewed research is not always required." *E.M. v. Lewisville Indep. Sch. Dist.*, No. 4:15-CV-00564, 2018 WL 1510668, at *10 (E.D. Tex. Mar. 27, 2018), *aff'd sub nom. E.M. by S.M. v. Lewisville Indep. Sch. Dist.*, 763 Fed. Appx. 361 (5th Cir. 2019). Nor does the IDEA obligate the District to select "the program supported by the optimal level of peer-reviewed research" if the method used is reasonably calculated to provide a FAPE. *Downingtown Area Sch. Dist. v. D.S. by & through C.S.*, No. CV 20-0892, 2022 WL 523563, at *7 (E.D. Pa. Feb. 22, 2022). The question is not whether the program is ideal, but rather whether it is reasonable. *Id*. (citing *Endrew F.*, 137 S. Ct. at 999).

The U.S. Department of Education clarified this provision, finding that, "[t]his does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services and supplementary aids and services that are to be provided to a child must be made by the child's [ARD Committee] based on the child's individual needs." 71 Fed. Reg. 46,665 (2006).

The District acknowledges its proposed eclectic program is not itself scientifically based or peer-reviewed. However, most courts and hearing officers have found that the IDEA's preference for peer-reviewed research does not preclude a school district from using eclectic or other untested teaching methodologies. *See, e.g.*, *Joshua A. v. Rocklin Unified Sch. Dist.*, 52 IDELR 64 (9th Cir. 2009, unpublished) (finding that the eclectic methodology a school district used for children with autism was "based on peer-reviewed research to the extent practicable"); *Souderton Area Sch. Dist. v. J.H.*, 53 IDELR 179 (3rd Cir. 2009, unpublished) (finding that the school district's rubric-based writing methodology was appropriate); and *Ridley Sch. Dist. v. M.R. and J.R.*, 58 IDELR 271 (3rd Cir. 2012) (finding that the IDEA does not require a district to choose the program supported by the optimum level of peer-reviewed research).

The choice of educational methodology falls within the discretion of the school district. *See Board of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-08 (1982) (holding that once a court determines that the requirements of the act have been met, questions of methodology are for resolution by the states); *Fairfax Cnty. Sch. Dist. v. Knight*, 261 Fed. Appx. 606 (4th Cir. 2008) (unpublished) (finding that a student with learning disabilities did not require a specific program to obtain a meaningful educational benefit). Even if a parent prefers a specific methodology, a district is not obligated to carry out that program. *Matthews v. Douglas County Sch. Dist. RE*, 2018 WL 4790715 (D. Colo. 2018) (finding that a district did not violate the IDEA when it used the Wilson program to provide instruction to a student with dyslexia and other disabilities since some educational methodologies share the same core instructional approach).

ABA therapy "is just one methodology" that may be appropriate for a student with autism. *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015). While not Parents' preferred methodology of ABA therapy, the evidence showed the District thoroughly considered this request and that the methodology selected by the District—ABA strategies and interventions—was appropriate to address Student's individualized needs. The methodology selected by the District is consistent

with Dr. ***' recommendation of behavior analytic strategies, and Student's IEP was developed consistent with the District's ability, through staff training and support by a District BCBA, to deliver these strategies in Student's educational setting.

Overall, the weight of the credible evidence showed Student's proposed program was individualized on the basis of assessment and performance.

b. Least Restrictive Environment

The IDEA requires a student with a disability to be educated with non-disabled peers to the maximum extent appropriate. Special classes, separate schooling, and other removal from the regular education environment may occur 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. 34 C.F.R. § 300.114(a)(2). This provision is known as the "least restrictive environment" requirement. 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 Educ., 874 F. 2d 1036, 1048 (5th Cir. 1989).

The determination of whether a student with a disability can be educated in a general education setting requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id*. The following factors are relevant to this determination:

- the school district's efforts to modify the general education curriculum and provide accommodations to meet the student's individual needs and whether the school district's efforts to do so are more than "mere token gestures";
- the educational benefit a student is receiving while placed in the general education setting; and
- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

Id. at 1050.

The evidence showed that the ARD Committee considered various instructional arrangements before recommending the *** program, including continued placement in the general education classroom. In this case, there is no evidence suggesting that Student's presence in the general education classroom impacted either Student's teacher's ability to deliver instruction or the education of other students. Student is part of the classroom community and benefits socially from Student's current placement, which also provides exposure to typically developing peers as communication and language models. Nonetheless, the record reflects that Student is performing significantly below grade-level expectations and receiving limited academic benefit from Student's current placement despite the District's well-beyond token efforts to provide sufficient supports in the general education classroom. The District's efforts in this regard include providing modified curriculum, implementing the accommodations provided in Student's Section 504 Plan, Tier 3 reading and math interventions, and one-on-one support in all academic classes.

Dr. *** testified that Student's need for "foundational" instruction could be furthered in the general education classroom through differentiated instruction. However, Dr. ***, who assessed Student's current achievement levels, credibly explained why she did not recommend differentiated instruction as a strategy to access the general education curriculum, stating that Student's academic skills are at prerequisite levels, and Student requires a setting where Student can receive intensive interventions and direct instruction on reading and other foundational skills.

Student's proposed placement meets these requirements and offers necessary opportunities to generalize these skills.

A school district must ensure a student with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116(e). As discussed, while the *** program meets Student's need for intensive academic interventions and direct and fundamental level instruction in reading and math, Student's need for modified curriculum was just one consideration in Student's placement decision. The evidence further showed that Student's proposed placement offers the targeted supports and services Student requires to address Student's identified communication and social learning needs. The placement is also consistent with Dr. ***'s recommendation for a placement focusing on communication and behavior regulation delivered by special education and related service personnel.

The ARD Committee also appropriately considered the extent to which Student could continue receiving services and supports in the general education setting and have continued exposure to typically developing peers. Consistent with this, Student's proposed program includes continued placement in a general education setting with supports for ***.

Parents dispute, in part, the District's proposed placement because it is not at Student's home campus. The IDEA requires a student to be educated in the school that he or she would attend if nondisabled *unless the student's IEP requires some other arrangement*. 34 C.F.R. § 300.116(c) (emphasis added). As this language confirms, this provision does not confer an absolute right to placement in Student's neighborhood school. The ARD Committee in this case also considered whether a resource setting on Student's home campus could meet Student's needs and determined this setting did not provide the staff-to-student ratio Student required for learning new skills and gaining

fluency in them. The District's *** program is centralized and only available on certain District *** campuses, not Student's current campus. Centralized programming "is a permissible policy choice under the IDEA. Schools have significant authority to determine the school site for providing IDEA services." *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). The IDEA permits schools to provide special education services in a centralized location (as opposed to in each student's neighborhood school). *See id*. at 381. Given the appropriateness of the proposed placement to meet Student's needs, the District did not violate the IDEA by proposing a placement in a centralized program even though it is not located at Student's neighborhood school.

Student's proposed placement is in the least restrictive environment appropriate to Student's needs and offers an inclusive education to the maximum extent appropriate.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. bnf S.R. v. Spring Branch Indep. Sch. Dist.*, Civil Action No. 4:16-CV-0058, 2017 WL 3017282, at *27 (S.D. Tex. June 15, 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (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*, 343 F.3d at 380. Absent bad faith exclusion of a student's 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*.

The record evidenced significant efforts by the District during the relevant time period to gain a full picture of Student's needs to assist in developing an appropriate program, both under Section 504 and the IDEA. The record further evidenced these efforts were hindered by parental restrictions on the ability to obtain and share information necessary to determine the scope of Student's educational needs. The starkest example is Parents' assertion that Student's ability to access Student's education could only be met through full-time services by *** at school while simultaneously declining to share information regarding Student's treatment and services at ***.

For much of the relevant time period, Parents' reluctance to provide the District additional documentation supporting the request for full-time ABA therapy at school and allow collaboration and information sharing between *** and the District deprived the District of key information relevant to determining Student's educational needs and program. Parents explained they did not want to share information from *** due to a concern the District would "mimic the data," but it was not unreasonable for the District to request this data. While Parents were within their rights to decline to consent to the District's requests for documents and collaboration with ***, this position fell short of the IDEA's expectation of meaningful collaboration between the parties.

Parents remained steadfast in requesting ABA therapy at school consistent with Student's medical necessity for these services and in maintaining their disagreement with various District proposals that included ABA strategies and interventions, rather than ABA therapy, including the proposed IEP. The evidence also showed Parents were not open to alternative proposals from the District for meeting Student's needs short of full-time ABA therapy. In this case, Parents' singular focus on a particular method of supporting Student at school perhaps hindered a more collaborative approach to developing Student's educational program.

While the District did not agree Student required full-time ABA therapy at school and these services were not included in Student's IEP over Parents' objection, the District made efforts to consider

and incorporate Parents' parental concerns and feedback into the draft IEP over the course of four ARD Committee meetings. Parents actively participated in these meetings, were given an opportunity to raise questions and concerns, and the District made every effort to get parental input on the various elements of Student's program before making its final offer of FAPE in September 2022. Parents do not have "veto power" over a school District's decisions. While Student's proposed IEP fell short of Parents' expectations, the District's failure to accede to their demand for full-time ABA therapy did not deny Parents the right to meaningful input into the proposed program.

A preponderance of the evidence demonstrated that Student's services were provided in a coordinated, collaborative manner by key stakeholders. To the extent there was lack of coordination, it was attributable to Parents for the reasons discussed. Petitioner failed to show that the District excluded 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).

A school district responsible for making FAPE available to a child with a disability must obtain informed consent from the parent before the initial provision of special education and related services and make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services. 34 C.F.R. § 300.300(b)(1)-(2). In this case, Parents have not yet consented to special education services despite reasonable efforts by the District to obtain consent after the draft IEP was finalized. Because the District has been unable to implement the proposed IEP, Student's receipt of academic and non-academic benefit

cannot be determined. However, a school district will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent. 34 C.F.R. § 300.300(b)(3)(ii). Consistent with the above, the District's obligation to offer Student a FAPE under the IDEA was satisfied.

e. Conclusion as to the Four Factors

The weight of the credible evidence showed that Student's proposed educational program is individualized on the basis of assessment and performance, offers an educational placement in the least restrictive environment, and was coordinated in a collaborative manner by key stakeholders. Petitioner did not meet Petitioner's burden of proving Student requires full-time ABA therapy at school to receive a FAPE under the IDEA. A preponderance of the evidence showed that Student's proposed IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188-89, 203-04; *Endrew F.*, 137 S. Ct. at 999.

G. Procedural Violations

Petitioner alleges various procedural violations of the IDEA. Liability for a procedural violation only arises if the procedural deficiency impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). *See also Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

a. Evaluation Timeliness

Petitioner alleges the District failed to complete Student's FIIE in a timely manner. In Texas, the report must be completed not later than the 45th school day following the date on which the school district receives written consent for the evaluation from the child's parent, except that if a student has been absent from school during that period on three or more school days, that period must be extended by a number of school days equal to the number of school days during that period on which the student was absent. 19 Tex. Admin. Code §89.1011(c)(1). Parents consented to an evaluation on January ***, 2022, at which time the evaluation was due on April ***, 2022. Between January ***, 2022 and April ***, 2022, Student missed approximately *** days of school. Even under the most conservative application of the rule, which would not consider that Student missed an additional *** days between April ***, 2022 and the end of the school year, the District had an additional *** school days to complete the evaluation, making it due on or about May ***, 2022. The evaluation was completed on May ***, 2022. Even if late by a few days, there was no evidence of substantive harm, particularly in light of the District's offer of compensatory services in social skills, speech, and academics to address Parents' concerns about the delay in completing the evaluation.

b. Informed Consent

Petitioner contends Parents were denied the ability to give informed consent to testing when the District failed to provide a Notice of Procedural Safeguards in February 2021. At that time, the District had referred Student for a special education evaluation, and Parents knowingly elected to proceed under Section 504. Consistent with its ongoing Child Find obligation, the District, while continuing to offer an FIIE at numerous junctures, respected Parents' decision to proceed under Section 504. Petitioner presented no evidence to support the contention that

Parents' initial receipt of a Notice of Procedural Safeguards in September 2021 instead of February 2021 delayed their consideration of or consent for an FIIE.

Petitioner also alleges the District failed to comply with Texas Education Code §29.0041 and the deficient Notice of FIIE denied Parents the ability to provide informed consent to testing. A school district proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability must, after providing notice consistent with the requirements of 34 C.F.R. § 300.503 and 34 C.F.R. § 300.504, obtain informed consent from the parent of the child before conducting the evaluation. 34 C.F.R. § 300.300(a)(1)(i). *At the request of a child's parent*, before obtaining consent under the IDEA for the administration of any psychological examination or test that is included as part of the evaluation of the child's need for special education, a school district shall provide to the parent (1) the name and type of the examination or test; and (2) an explanation of how the examination or test will be used to develop an appropriate individualized education program for the child. Texas Educ. Code § 29.0041(a) (emphasis added).

The evidence showed the District provided Parents a Notice of Proposal to Evaluate and Notice of Procedural Safeguards on January ***, 2022. The Notice of Proposal to Evaluate was reviewed with Parents by the District's LSSP and SLP the same day. Petitioner offered no evidence that Parents requested further information from the District on the components of the evaluation.

c. Access to Records

Petitioner alleges the District delayed providing Parents all of Student's educational records and, in doing so, denied Parents meaningful participation in the IEP development process. A school district must 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(a). Petitioner presented no evidence that the District improperly withheld educational records or failed to honor a records request. Indeed, the record evidenced the District provided educational records, including data, requested by Parents at several junctures, and provided Parents access upon request to the FIIE testing protocols.

In summary, the weight of the credible evidence did not establish the District violated the procedural requirements of the IDEA as alleged. To the extent the District delayed completing the FIIE, any such delay did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

VII. CONCLUSIONS OF LAW

1. As the challenging party, Petitioner has the burden of proof to establish a violation of the IDEA. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

2. Petitioner did not meet Petitioner's burden of proving the withholding exception to the statute of limitations applies in this case. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); 19 Tex. Admin. Code § 89.1151(d).

3. The District complied with its Child Find obligation. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).

4. The District appropriately evaluated Student for special education and related services and Student's FIIE complied with the IDEA. 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304.

5. Student's proposed educational program was reasonably calculated to confer educational benefit in light of Student's circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 188-89, 203-04 (1982); *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

6. The District complied with the IDEA's procedural requirements. 19 Tex. Admin. Code §89.1011(c)(1); 34 C.F.R. §§ 300.300(a)(1)(i), 300.613(a), 300.513(a)(2).

7. Petitioner did not meet Petitioner's burden of proving the District denied Student a FAPE under the IDEA. *Schaffer*, 546 U.S. at 62.

VIII. ORDERS

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

SIGNED February 13, 2023.

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).