

SOAH Docket No. 701-23-13222      Suffix: IDEA  
TEA Docket No. 195-SE-0223

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# **Before the State Office of Administrative Hearings**

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**STUDENT bnf PARENT v. Austin Independent School  
District**

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## **DECISION AND ORDER**

\*\*\* (Student), by next friend \*\*\* (Parent, and, collectively, Petitioner) brings this action against the Austin Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The issues in this case are whether the District failed to provide Student a free, appropriate public education (FAPE) under the IDEA, whether the District appropriately implemented Student’s individualized education program (IEP), whether the District failed to timely identify Student as eligible for special education, and whether the District procedurally violated the IDEA in various ways.

The Hearing Officer concludes that the District complied with its Child Find obligation but procedurally violated the IDEA and denied Student a FAPE by failing to timely complete Student's evaluation and failing to implement an IEP for Student in the Spring 2022 semester. The Hearing Officer further concludes that the District provided Student with a FAPE reasonably calculated to allow Student to make progress in light of Student's unique circumstances and appropriately implemented Student's IEPs in the 2022-2023 school year. Finally, the Hearing Officer concludes that the District remedied the FAPE violation from the Spring 2022 semester through compensatory services already offered and provided to Student.

## **I. DUE PROCESS HEARING**

The due process hearing was conducted on July 25-26, 2023 through the Zoom videoconferencing platform. Student was represented in this litigation by Parent. The District was represented by its legal counsel, Andrew Tatgenhorst and Amber King of Thompson & Horton, LLP. In addition, Dr. \*\*\*, the Executive Director of Special Education for the District, and \*\*\*, a Senior Staff Attorney for the District, attended the hearing as party representatives. Petitioner requested that the hearing be closed to the public.

Petitioner did not comply with the disclosure deadline. After considering briefing from the parties, Order No. 8 granted Respondent's motion to prevent Petitioner from offering exhibits or calling witnesses.<sup>1</sup> However, Parent was

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<sup>1</sup> Petitioner's Closing Brief asserts that Petitioner was denied a continuance to permit Petitioner to timely comply with the disclosure deadline. In fact, Petitioner never filed a motion for continuance. To the extent that Petitioner raised the possibility of a continuance in Petitioner's response to Respondent's motion to exclude Petitioner's evidence and witnesses, Petitioner did not state good cause under the relevant regulatory factors for a continuance. 19 Tex. Admin. Code § 89.1186.

permitted to testify for Petitioner and cross-examine Respondent's witnesses. Respondent offered exhibits, as well as testimony from Student's campus principal, a District-level administrator, Student's \*\*\*, a District-level special education administrator as an expert on dyslexia, one of Student's teachers, and Dr. \*\*\*. Parent was also permitted to testify on rebuttal. The hearing was recorded and transcribed by a certified court reporter. Presentation time was divided equally between the parties. Both parties filed timely written closing briefs. The decision in this case is due on September 19, 2023.

## **II. ISSUES**

### **A. PETITIONER'S ISSUES**

Petitioner alleged the following IDEA issues for decision in this case:

- Whether the District denied Student a FAPE.
- Whether the District failed to appropriately implement Student's IEP.
- Whether the District failed to timely evaluate Student in all areas of suspected disability.
- Whether the District failed to provide agreed independent educational evaluations (IEEs).
- Whether the District procedurally violated the IDEA by changing Student's IEP outside of an admission review and dismissal (ARD) Committee meeting and/or failing to issue required prior written notice.
- Whether the District denied Parent meaningful participation in the development of Student's IEP.
- Whether the District denied Student a FAPE by failing to address a bullying incident.

**B. PETITIONER’S REQUESTED RELIEF**

Petitioner requested the following items of relief:

- Order the District to provide Student compensatory services for dyslexia, reading, spelling, and math.
- Order the District to reinstate Student in \*\*\*.
- Order the District to train staff working with Student on Student’s IEP.
- Order the District to provide Student an IEE in the area of speech.
- Order the District to conduct a functional \*\*\* evaluation of Student.

**C. RESPONDENT’S LEGAL POSITION**

Respondent generally and specifically denied Petitioner’s factual allegations and legal claims. Respondent filed a plea to the jurisdiction regarding claims and requested relief asserted under laws other than the IDEA, which was granted in Order No. 2.

**III. FINDINGS OF FACT**

1. Student is \*\*\* years old and in the \*\*\* grade. Student \*\*\*. Student is eligible for special education based on specific learning disabilities (SLDs) in the areas of basic reading, math calculation, reading comprehension, and written expression, and other health impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD). Student is also identified as meeting Texas Education Agency (TEA) criteria for dyslexia and dyscalculia.<sup>2</sup>

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<sup>2</sup> Respondent’s Exhibit (RE) 1 at 7; RE 10 at 4.

2. Student was in \*\*\* grade in the 2020-2021 school year. Due to the COVID-19 pandemic, instruction was primarily remote during that school year. Student's grades were in the \*\*\* except for \*\*\*, which Student failed.<sup>3</sup>
3. Student has participated in \*\*\*, which is an extracurricular activity and a class at Student's \*\*\* campus. The campus utilizes \*\*\*. \*\*\*.<sup>4</sup>
4. On December \*\*\*, 2021, during \*\*\* grade, Student reported to campus administration that \*\*\*. The campus conducted a bullying investigation and determined that the reported behavior did not meet the definitions of bullying or harassment. However, a stay away agreement was implemented between the two.<sup>5</sup>
5. At some point during the 2021-2022 school year, an assistant principal was appointed to consolidate communications with Parent due to the volume and intensity of Parent's emails to teachers. However, Parent was not prohibited from communicating with Student's teachers.<sup>6</sup>
6. Student had a Section 504 Plan, which included accommodations for ADHD, \*\*\*.<sup>7</sup>
7. Parent requested a special education evaluation of Student in the Fall 2021 semester, at the beginning of \*\*\* grade. Parent emailed a campus staff member on August \*\*\*, 2021 requesting a special education evaluation. Parent testified that Parent signed consent for the evaluation on September \*\*\*, 2021.

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<sup>3</sup> RE 20; Transcript (Tr.) 137.

<sup>4</sup> RE 12 at 45; Tr. 209.

<sup>5</sup> RE 25.

<sup>6</sup> Tr. 139-41, 165-66.

<sup>7</sup> RE 9.

District records show consent for evaluation was signed on October \*\*\*, 2021. The full individual evaluation (FIE) report was completed March \*\*\*, 2022.<sup>8</sup>

8. The FIE consisted of cognitive and achievement testing, as well as collecting information from Parent, Student, and teachers on Student's adaptive, emotional, and behavioral functioning. Student received a full-scale IQ score of \*\*\*, in the average range. Student's scores across areas of cognitive processing were all in the average range, except for some variation in the auditory processing subtests.<sup>9</sup>
9. The standardized academic achievement testing in the FIE revealed weaknesses in reading and math. Student had below average sub-scores in letter and word recognition, reading comprehension, and math computation. Student had not passed \*\*\* grade state \*\*. Student was failing \*\*. <sup>10</sup>
10. The FIE conducted a pattern of strengths and weaknesses analysis to determine that Student exhibited specific learning disabilities in math calculation, including dyscalculia, reading comprehension, and basic reading, including dyslexia.<sup>11</sup>
11. The emotional/behavioral portion of the FIE acknowledged that Student has longstanding medical diagnoses of ADHD, \*\*. Parent and Student completed behavior rating scales. Parent endorsed clinically significant concerns with hyperactivity, \*\*, somatization, attention problems, atypicality, and functional communication. Parent endorsed at risk levels on \*\*, withdrawal, adaptability, leadership, and activities of daily living. Student endorsed clinically significant concerns with a sense of inadequacy, attention problems, and hyperactivity. Student endorsed at risk levels on \*\*. <sup>12</sup>

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<sup>8</sup> RE 1 at 1; RE 15; RE 39; Tr. 26.

<sup>9</sup> RE 1 at 26-27.

<sup>10</sup> RE 1 at 30-31, 33-35.

<sup>11</sup> RE 1 at 38.

<sup>12</sup> RE 1 at 7, 9-24.

12. The FIE analyzed the emotional/behavioral data collected and recommended that Student be eligible for special education with an OHI of ADHD, as well as emotional disturbance (ED) based on \*\*\* and inappropriate types of behavior or feelings under normal circumstances.<sup>13</sup>
13. An initial ARD Committee meeting was held on March \*\*\*, 2022 and continued on April \*\*\*, 2022. Both of Student's parents participated. The ARD Committee reviewed the FIE and determined Student met IDEA eligibility under OHI for ADHD and SLDs in basic reading (including dyslexia), math calculation (including dyscalculia), reading comprehension, and written expression. Student's parents requested that Student not be considered eligible under the ED category and the ARD Committee agreed.<sup>14</sup>
14. The ARD Committee developed an IEP for the remainder of Student's \*\*\*-grade year and Student's \*\*\*-grade year. Annual goals were developed targeting math processes, math calculation, reading comprehension, writing processes, \*\*\*, and organizational skills. An extensive set of accommodations was agreed upon. The schedule of services reflected inclusion support in the general education setting for core subjects, direct dyslexia intervention, weekly check-ins with special education staff, and direct and indirect counseling services once a month.<sup>15</sup>
15. The ARD Committee discussed completing a functional behavior assessment (FBA) to create a behavior intervention plan (BIP). Parent, however, declined to consent to an FBA.<sup>16</sup>
16. The ARD Committee discussed compensatory services because the FIE had not been completed within the required statutory timeframe. The District initially offered 20-30 hours of compensatory services. Student's parents disagreed with this offer and requested 80 hours. The ARD Committee agreed

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<sup>13</sup> RE 1 at 38-40.

<sup>14</sup> RE 10 at 1, 3-4, 41; Tr. 181-82.

<sup>15</sup> RE 10 at 10-18, 21-24.

<sup>16</sup> RE 10 at 42.

to 80 hours of dyslexia and math intervention to be provided before the end of the 2022-2023 school year.<sup>17</sup>

17. Parent requested an accommodation that Student's grades and behavior not impact Student's participation in sports/school activities. The ARD Committee did not agree to add this as an accommodation. Parent disagreed with the IEP. A reconvene meeting was held on April \*\*\*, 2022. The ARD Committee still did not agree to the requested accommodation but offered a different accommodation to support Student and Student's participation in extracurriculars. The reconvene meeting also ended in disagreement. However, Parent signed consent to initiate special education services. Prior written notice was within the IEP. The deliberations indicate this was provided to Parent on April \*\*\*, 2022. Two more prior written notices were generated regarding this same IEP, dated June \*\*\*, 2022 and July \*\*\*, 2022. The evidence does not explain why these additional prior written notices were generated.<sup>18</sup>
18. Student's IEP was not implemented for the remainder of the 2021-2022 school year. The campus received legal advice from the District not to implement it because Parent had not agreed with the IEP.<sup>19</sup>
19. On May \*\*\*, 2022, Student reported to campus administration that Student had been treated unfairly \*\*\* in that one of Student's teachers treated \*\*\* differently, including targeting them for redirection. An investigation was conducted and determined that prohibited discrimination did not occur.<sup>20</sup>
20. Student's grades during the 2021-2022 school year were typically in the \*\*\* except for \*\*\*, which Student failed.<sup>21</sup>

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<sup>17</sup> RE 10 at 31, 45.

<sup>18</sup> RE 10 at 31-33, 43-45; RE 13; Tr. 198-99.

<sup>19</sup> RE 12 at 49; Tr. 196.

<sup>20</sup> RE 25.

<sup>21</sup> RE 19.



21. Parent met with District staff on June \*\*\*, 2022 and the District agreed to start providing special education services to Student.<sup>22</sup>
22. Student received compensatory services during summer 2022 in dyslexia and math. Dyslexia services were provided using the Rewards dyslexia curriculum. Student attended 35.5 hours of compensatory services during the summer.<sup>23</sup>
23. Student also attended \*\*\* during the summer. On July \*\*\*, 2022, Parent reported concerns that Student was being bullied \*\*\*. Student alleged that \*\*\*. An investigation was conducted which concluded that bullying had not occurred. The investigation substantiated that Student's \*\*\*, but the investigation findings did not support the other allegations.<sup>24</sup>

### **2022-2023 School Year**

24. Early in the Fall 2022 semester, an allegation of bullying was made \*\*\*. \*\*\*. An investigation was conducted, revealing ongoing interpersonal issues between these students. The investigation concluded that Student had not bullied Student's classmate, but the stay away agreement between the two students was reinitiated for that school year.<sup>25</sup>
25. In August 2022, the campus administered IXL diagnostic testing on students. IXL is a computer-based instructional and assessment platform utilized without IEP accommodations. On the IXL diagnostic test, Student showed an overall reading score at an early \*\*\* grade level and reading vocabulary

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<sup>22</sup> Tr. 35-38.

<sup>23</sup> RE 12 at 41; RE 46; Tr. 239-40.

<sup>24</sup> RE 25; Tr. 81.

<sup>25</sup> RE 25

<sup>29</sup> RE 12 at 41-43.

and grammar at a \*\*\* grade level. The IXL reading score is a reading comprehension measure.<sup>26</sup>

26. Student completed the Rewards dyslexia curriculum in August 2022. On August \*\*\*, 2022, Student's dyslexia teacher gave Student a pre-assessment to determine where to start in the Reading by Design dyslexia program. Thereafter, Student was instructed and assessed in Volume 5 of the Reading by Design curriculum.<sup>27</sup>
27. A series of ARD Committee meetings were held in the Fall 2022 semester. The first meeting was on August \*\*\* 2022 to discuss Parent's concerns about the IEP developed in the previous semester and discuss Student's schedule for the 2022-2023 school year. Student's parents and attorneys for both sides participated. The ARD Committee discussed Student's present levels, IEP goals, accommodations, progress in the dyslexia intervention, state testing requirements, and \*\*\* planning. The ARD Committee agreed to continue the discussion on another date while the District gathered additional information in response to Parent's questions.<sup>28</sup>
28. The ARD Committee continued the meeting on August \*\*\*, 2022. The Committee discussed Parent's requests for certain line edits of the IEP, Student's present levels and conflicting performance information from different sources, and Student's progress in dyslexia instruction. Student's IXL data showed Student was at a \*\*\* grade level in some areas, but Rewards curriculum data collection showed that Student's fluency was on grade level. The ARD committee discussed the differences between these data points. The ARD committee agreed to make draft revisions to the IEP and meet again the following week.<sup>29</sup>
29. The ARD Committee continued the meeting on August \*\*\*, 2022. The District retained a third party ARD facilitator to assist the ARD Committee. Student, Parent, and their attorney participated. Parent requested an independent

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<sup>26</sup> RE 12 at 6; Tr. 241-45.

<sup>27</sup> RE 12 at 41, 43; RE 38.

<sup>28</sup> RE 12 at 38-41.

<sup>29</sup> RE 12 at 41-43.

education evaluation (IEE) and for the District to complete a speech evaluation. The ARD Committee discussed Student's \*\*\* plan, present levels, goals, accommodations, class schedule, and schedule for providing targeted dyslexia instruction. The ARD Committee agreed to schedule another meeting to discuss outstanding areas of concern after gathering more information.<sup>30</sup>

30. On September \*\*\*, 2022, the District sent Parent a letter approving Parent's request for an IEE in the following areas: communication/language, intellectual abilities, academic achievement, emotional/behavioral, sociological, health/motor abilities, and assistive technology needs. In the following weeks, Parent exchanged emails with District staff requesting an IEE for a \*\*\* assessment from \*\*\*. District staff informed Parent that the District would first conduct a \*\*\* assessment with its own staff. The FIE had not included specific \*\*\* information. The consent for the FIE did not address any \*\*\* assessment.<sup>31</sup>
31. Another ARD Committee meeting was scheduled for October \*\*\*, 2022. However, the meeting did not proceed because Parent was not present, only their lawyer. Parent had stated in advance that Parent was not available on that date.<sup>32</sup>
32. On October \*\*\*, 2022, Parent reported to campus administration that Student's \*\*\* told Parent that Student \*\*\*. An investigation was conducted and did not substantiate that any comments of that nature were made.<sup>33</sup>
33. In October 2022, Student took the \*\*\*examination, that was administered at Student's \*\*\*campus. The \*\*\* is not a District program. Students and families may request accommodations on the \*\*\*

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<sup>30</sup> RE 12 at 43-46; Tr. 186.

<sup>31</sup> RE 1; RE 15; RE 36; RE 37.

<sup>32</sup> RE 12 at 46-47; Tr. 44.

<sup>33</sup> RE 25.

\*\*\*. School staff may assist in the process of seeking testing accommodations and help administer the exam. An error by a campus staff member resulted in Student taking the \*\*\* with an incomplete set of accommodations.<sup>34</sup>

34. On November \*\*\*, 2022, Student was removed from \*\*\*. Student was already receiving accommodations in \*\*\* that resulted in Student not receiving \*\*\* in all the instances that Student's behavior would have warranted it under the \*\*\*. \*\*\*. Two days later, the \*\*\* were informed by District administration that Student would be back \*\*\*.<sup>35</sup>
35. The ARD Committee continued the ongoing meeting on November \*\*\*, 2022. Student, Student's parents, and their lawyer participated. The ARD Committee discussed \*\*\*, new proposed goals, increasing counseling services, continued discussion on the schedule for providing dyslexia intervention, and ideas to streamline communications and reminders for Student. The ARD Committee discussed using a Google document to streamline communications and agreed that Student and Student's case manager would trial technology options for collating information. Neither a Google document nor any other specific technology was incorporated explicitly as an accommodation in the IEP. Parent requested an FBA and a functional \*\*\* evaluation by a private provider, which were agreed to by the ARD Committee. Remaining areas of disagreement were present levels, goals, the schedule of services, and accommodations. The meeting ended in disagreement. The ARD Committee agreed that another meeting would be

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<sup>34</sup> RE 27; Tr. 112, 149-51.

<sup>35</sup> RE 26; RE 35 at 13; Tr. 210-15.

scheduled in the future to review the newly completed speech evaluation and IEE.<sup>36</sup>

36. The disagreed meeting reconvened on November \*\*\*, 2022. Parent and Parent's attorney participated. The ARD Committee reviewed and addressed Parent's specific areas of disagreement. The ARD Committee also discussed Student's ongoing compensatory services and agreed that one hour per week would be provided through the end of the school year. Parent requested an autism evaluation and a speech IEE. Parent disagreed with the IEP. Prior written notice was issued and the new IEP was implemented beginning on December \*\*\*, 2023.<sup>37</sup>
37. Parent testified that the final IEP from the November \*\*\*, 2022 meeting that is in evidence is not the same IEP as was discussed at the meeting.<sup>38</sup>
38. The meeting notices for the November \*\*\*, 2022 ARD Committee meeting indicated that the IEE would be discussed at the meeting. \*\*\*, the IEE provider, was present at the November \*\*\*, 2022 meeting. The IEE was not reviewed at either meeting.<sup>39</sup>
39. A speech evaluation for Student was completed in November 2022 based on Parent consent signed on August \*\*\*, 2022. The evaluation found Student's receptive, expressive, and pragmatic language were all within or above average range. The evaluation request and consent also sought evaluation for \*\*\*, however \*\*\* was not addressed in the report.<sup>40</sup>
40. A psycho-educational IEE of Student was completed by \*\*\* of \*\*\*, report dated November \*\*\*, 2022. The IEE included cognitive and achievement testing, information collected from Parent, Student, and Student's teachers, and a review of some educational records provided to the evaluator by Parent, although notably not any IEPs. The

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<sup>36</sup> RE 12 at 47-49.

<sup>37</sup> RE 12 at 50-53.

<sup>38</sup> Tr. 58, 99.

<sup>39</sup> RE 12 at 50-52; RE 14; Tr. 46-47, 56-57.

<sup>40</sup> RE 2; RE 15.

evaluator tested Student over two days. Student did not \*\*\*. The evaluator repeated testing in some cognitive and achievement areas on the second day, using a different test, and compared results. This was an atypical way to conduct a psycho-educational evaluation.<sup>41</sup>

41. The variable cognitive and achievement scores \*\*\* are summarized in the table below.<sup>42</sup>

<b>Testing Domain</b>	<b>***</b>	<b>***</b>
<b>Oral Language</b>		
Oral expression	Low average	Average
Listening comprehension	Low	Low average
<b>Cognitive Ability/Processes</b>		
Crystallized intelligence (Gc)	Low average	
Fluid reasoning (Gf)	Low	
Long term storage (Gl) and Retrieval (Gr)	Low average	Below average
Visual-spatial thinking (Gv)	Low average	
Auditory processing (Ga)	Low	Very low
Processing speed (Gs)	Average	
Short-term memory (Gsm)	Low average	
<b>Academic Achievement</b>		
Basic reading	Low	Low average
Reading fluency	Very low	Average
Reading comprehension	Very low	Average
Math calculation	Low	Low average

<sup>41</sup> RE 4 at 1, 7-8; Tr. 247-49.

<sup>42</sup> RE 4 at 9-23.

Math fluency		Low average
Math reasoning	Low	Very low
Written expression	Low	Low average
Spelling	Average	Average

- 42. The IEE diagnosed Student with SLDs in basic reading (including dyslexia), math calculation (including dyscalculia), math problem solving, reading comprehension, and listening comprehension. The report acknowledges that Student generally performed better on academic achievement and oral language measures when Student had \*\*\*. The report does not explicitly acknowledge doing so but appears to have relied on the \*\*\* scores in making its diagnostic conclusions.<sup>43</sup>
- 43. On January \*\*\*, 2023, Student was \*\*\*. After Student was reinstated \*\*\*.<sup>44</sup>
- 44. Additional consent for evaluation was signed by Parent on January \*\*\*, 2023. The consent form does not specify which evaluations were sought with this consent.<sup>45</sup>
- 45. Student’s \*\*\* teacher was \*\*\* and a substitute was responsible for the class. Parent had significant concerns about the instruction and implementation of Student’s IEP by the substitute.<sup>46</sup>
- 46. A speech IEE was completed by \*\*\*, report dated April \*\*\*, 2023. The speech IEE concurred with the District’s

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<sup>43</sup> RE 4 at 23, 25.

<sup>44</sup> RE 26.

<sup>45</sup> RE 15.

<sup>46</sup> Tr. 63-64, 289.

evaluation that Student's expressive, receptive, and pragmatic language skills are age appropriate and that Student does not need speech therapy.<sup>47</sup>

47. A \*\*\* evaluation was completed by \*\*\*, report dated April \*\*\*, 2023. The evaluator reviewed the FIE and the spring 2022 IEP, but not the \*\*\* IEE or the fall 2022 IEP. The evaluator completed various aptitude assessments and interest surveys with Student and concluded that Student has the aptitude to \*\*\* program with accommodations. The evaluator made recommendations to support Student in attaining \*\*\*.<sup>48</sup>
48. An ARD Committee meeting notice was generated April \*\*\*, 2023, setting a meeting for May \*\*\*, 2023 to review IEEs. Parent declined the invitation.<sup>49</sup>
49. The District completed an assistive technology evaluation of Student on May \*\*\*, 2023. It is not clear from the record when this evaluation was requested. An assistive technology specialist met with Student and discussed Student's current assistive technology preferences and usage. The evaluation endorsed the technology included in Student's current IEP, including text-to-speech, speech-to-text, spell check, and grammar check. The evaluation recommended trying an additional program for spell check and annotation at the beginning of the new school year.<sup>50</sup>
50. The District contracted with a private provider to conduct additional assessments. A report dated May \*\*\*, 2023 evaluated Student for \*\*\* and autism. The report also contained an FBA. S\*\*\* falls under the ED eligibility category, so a battery of emotional/behavioral assessment tools were used. The evaluator did not recommend eligibility based on ED or autism, and concluded that Student's behavior is consistent

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<sup>47</sup> RE 6; RE 12 at 50.

<sup>48</sup> RE 5 at 37-40.

<sup>49</sup> RE 14.

<sup>50</sup> RE 8.



with Student's ADHD diagnosis. The FBA analyzed Student's off-task and noncompliant behaviors and made recommendations to support Student.<sup>51</sup>

51. Another ARD Committee meeting notice was generated on May \*\*\*, 2023, setting a meeting for May \*\*\*, 2023 to review IEEs. Another notice was generated on May \*\*\*, 2023, setting a meeting for June \*\*\*, 2023. Parent declined both meeting requests. None of the evaluations or IEEs completed since the FIE have been reviewed by the ARD Committee. There was testimony from a District administrator that the \*\*\* IEE was discussed in some capacity at a meeting in November 2022, but the evidence does not support that an ARD Committee meeting reviewed it.<sup>52</sup>
52. The evidence is unclear on what the District considers Student's IDEA eligibility areas. The Spring 2022 IEP listed SLDs in basic reading, math calculation, reading comprehension, and written expression, and OHI for ADHD. At some point thereafter, the District transitioned to a different IEP software program and the Fall 2022 IEP is in a different format. The Fall 2022 IEP lists eligibility as SLD and OHI without clarifying the areas or conditions within those categories. Nowhere in the Fall 2022 IEP clearly details Student's SLDs or OHIs. However, the May \*\*\*, 2023 evaluation report identified Student as eligible under the categories of SLD for basic reading, reading comprehension, math problem solving, math calculation, and listening comprehension, and OHI for ADHD, \*\*\*. The additional SLD eligibilities were recommended by the \*\*\* IEE, but that evaluation has not been reviewed by the ARD Committee yet.<sup>53</sup>
53. The schedules of services for Student's IEPs contain varied prescriptions for Student's dyslexia intervention. For the remainder of the Spring 2022 semester, Student was supposed to receive direct dyslexia intervention for 45 minute sessions, five times every two weeks. The same IEP included dyslexia services for the 2022-2023 school year at a frequency of four 45-minute sessions per week. The November 2022 IEP includes direct dyslexia services for 45-minute sessions, five times every two weeks. The ARD Committee

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<sup>51</sup> RE 7 at 1, 21, 33-40.

<sup>52</sup> RE 14; RE 45; Tr. 109, 192-93

<sup>53</sup> RE 4 at 23; RE 7 at 1; RE 10 at 4; RE 12 at 3, 39.

discussed different options for when Student would receive these services and ultimately agreed that Student would be pulled for dyslexia intervention from the \*\*\* time during \*\*\*. The ARD Committee also agreed that Student would receive dyslexia intervention in compensatory service sessions in the evenings. Dyslexia intervention is typically recommended at a frequency of 30-45 minutes five times a week or 45-60 minutes four times a week.<sup>54</sup>

54. During the Spring 2023 semester, Student attended 22 hours of compensatory math services. During the 2022-2023 school year, Student attended 35.8 hours of compensatory dyslexia services. Overall, including the summer 2022, Student attended 93.3 hours of compensatory services. Parent is dissatisfied that these services were not provided on a consistent schedule and were subject to frequent schedule changes.<sup>55</sup>
55. By the end of the Spring 2023 semester, Student had worked through and mastered Volume 5 of the Reading by Design program. Volume 5 is the final volume of the program. The dyslexia teacher recommended that the ARD Committee discuss removing Student from direct dyslexia instruction for the upcoming school year and continue to provide support in the general education classroom. The District's dyslexia expert also recommended that Student no longer needs direct dyslexia instruction.<sup>56</sup>
56. Student's final grades for the 2022-2023 school year were all in the \*\*\*. Student completed a \*\*\*.<sup>57</sup>
57. Student made mixed progress on Student's IEP goals from the Fall 2022 IEP during the 2022-2023 school year. Student regressed in the final grading period of the year on a reading comprehension goal. Student mastered one goal on using various

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<sup>54</sup> RE 10 at 21-22; RE 12 at 28, 45; Tr. 254.

<sup>55</sup> RE 28; Tr. 116-18.

<sup>56</sup> RE 38; Tr. 240-41.

<sup>57</sup> RE 19; RE 20; Tr. 146.

tools and a calendar to manage Student's school responsibilities. Student made progress on the rest of Student's IEP goals without mastering them yet.<sup>58</sup>

58. Student has taken and passed \*\*\*. Student did not pass but has met participation requirements to move past the exams for \*\*\*. Student was scheduled to take the \*\*\* in the Spring 2023 semester.<sup>59</sup>

#### **IV. DISCUSSION**

Petitioner alleges that the District denied Student a FAPE by failing to devise and implement appropriate IEPs for Student, failing to timely identify Student as eligible for special education, and committing various procedural violations of the IDEA. Petitioner seeks an order that the District provide compensatory services, staff training, reinstatement in \*\*\*, and certain evaluations.

##### **A. BURDEN OF PROOF**

The burden of proof in a due process hearing is on the party challenging the IEP and/or placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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). The burden of proof in this case is on Petitioner to show that the District failed to provide Student with a FAPE *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Tatro v. State of Tex.*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Indep.*

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<sup>58</sup> RE 24.

<sup>59</sup> RE 12 at 26, 47.

*Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), and *vacated in part*, 741 F.2d 82 (5th Cir. 1984) (emphasis added).

## **B. CHILD FIND**

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 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. Haw. 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).

Petitioner alleges that the District violated its Child Find responsibility to timely identify Student's need for special education and evaluate Student. Parent requested an evaluation on August \*\*\*, 2021, at the beginning of Student's \*\*\* grade year. The District's response to that request and the timeliness of the subsequent evaluation are analyzed in Section IV.D.1 below. The Child Find inquiry must examine whether the District should have suspected that Student needed to be evaluated earlier than Parent's request. The District was aware that Student had a disability by virtue of Student's Section 504 Plan addressing Student's ADHD, \*\*\*. However, the evidence does not support that the District should have suspected that Student needed special education and related services before Parent's request for an evaluation.

Student failed \*\*\* grade, the 2020-2021 school year. Student did not pass \*\*\*. Parent testified generally that Student had struggled in school for many years. There is no other evidence of any struggles Student exhibited prior to the 2021-2022 school year. With the exception of \*\*\*, Student's \*\*\* grade grades were in the \*\*\*. There is not sufficient evidence in the record to support that Student was struggling such that the District was on notice that Student may require special education and related services at any point before Parent requested an evaluation. Petitioner did not meet Petitioner's burden of proof on Petitioner's Child Find claim.

### **C. 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). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001. The district is responsible for providing Student with specially-designed, personalized instruction with sufficient support services to meet Student’s unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with 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).

Determining compliance with the IDEA requires a two-part inquiry: first, whether the school district has complied with the procedural requirements of the law, and second, whether the student’s program is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 206-07.

### **D. PROCEDURAL REQUIREMENTS**

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

Petitioner alleged a number of procedural violations in this case: that the District failed to timely evaluate Student in all areas of suspected disability, failed to provide agreed IEEs, changed Student's IEP outside the ARD Committee process, and failed to issue required prior written notice.

### **1. Evaluation Timeliness**

It is undisputed that the District's FIE was not timely completed. When a parent submits a written request for a special education evaluation, a school district must, as applicable here, provide the parent with prior written notice and the opportunity to sign consent to evaluate within 15 school days. 19 Tex. Admin. Code § 89.1011(b)(1). The evaluation must be completed within 45 school days from the date signed consent was received. 19 Tex. Admin. Code § 89.1011(c)(1). Parent requested an evaluation in writing on August \*\*\*, 2021. Parent testified that Parent signed consent on September \*\*\*, 2021, which was 15 school days later.<sup>60</sup> District records reflect notice and consent signed on October \*\*\*, 2021, 28 school days later. The evaluation was not completed until March \*\*\*, 2022, which is 101 days after Parent's alleged consent date and 88 days after the District's alleged consent date. An evaluation provided timely in response to Parent's August \*\*\*, 2021 request should have been completed by November \*\*\*, 2021 and reviewed by an ARD Committee by December \*\*\*, 2021. *See* 19 Tex. Admin. Code § 89.1011(d). An ARD Committee did not meet to review Student's FIE until March \*\*\*, 2022. This procedural violation resulted in approximately 11 weeks of delay in determining that

<sup>60</sup> The Hearing Officer takes judicial notice of the District's 2021-2022 school calendar available on the District's website.

Student is eligible for special education and related services. This prevented Student from receiving a FAPE during this time period.

Parent requested other evaluations from the District following the FIE, including evaluations for speech, selective mutism, assistive technology, \*\*\*/\*\*\*, and autism. An FIE must assess a student in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4). The evidence does not support that either Parent or the District suspected disability in any of these additional areas at the time of Student's FIE, and these areas were not addressed in the consent for the FIE. Parent alleges that the FIE was incomplete, however Petitioner did not meet Petitioner's burden of proof as to that allegation. Therefore, there was no violation in the District's failure to include these areas in the FIE.

Whether or not these evaluations were timely on their own is a separate inquiry. The 45 school day timeline to complete an evaluation and 30 calendar day timeline to review an evaluation apply to initial FIEs and initial eligibility considerations. 19 Tex. Admin. Code § 89.1011(c)-(d). The only other statutory timeline for evaluations requires that students receive a full re-evaluation at least every three years, unless there is agreement that it is unnecessary. 34 C.F.R. § 300.303(b)(2). The best practice for school districts is to complete additional evaluations within the same 45 day time period as is required for an initial evaluation, and likewise review the evaluation within 30 calendar days, however there is no statutory requirement that school districts do so. The evidence reflects that the District followed this best practice as to the 45 day timeline for some of the additional



evaluations, but not for others. Because there is no statutory requirement, there can be no procedural violation for failing to meet these expectations.

## **2. IEEs**

The evidence reflects that all IEEs requested by Parent have been completed. When a parent requests an IEE, a school district must grant or deny the request “without unnecessary delay.” 34 C.F.R. § 300.502(b)(2). Parent requested an IEE at the ARD Committee meeting on August \*\*\*, 2022. On September \*\*\*, 2022, the request was granted in the areas of communication/language, intellectual abilities, academic achievement, emotional/behavioral, sociological, health/motor abilities, and possible assistive technology needs. The \*\*\* IEE was completed November \*\*\*, 2022 in the areas of communication, cognitive, and achievement. The evidence does not reflect that Parent ever sought another IEE provider to complete the remaining areas of assessment from the September \*\*\*, 2022 approval letter.

The parties negotiated over a \*\*\* assessment. The District ultimately agreed to provide an IEE for a \*\*\* assessment on November\*\*\*, 2022, which was completed by \*\*\* on April \*\*\*, 2023. Parent requested an IEE for the District’s speech evaluation on November \*\*\*, 2022 and a speech IEE was completed on April \*\*\*, 2023. The evidence does not reflect what accounted for the amount of time that passed between the approvals of the \*\*\* IEE and the speech IEE and their completion. In the absence of evidence, the Hearing Officer cannot conclude that the District unnecessarily delayed the completion of these IEEs. The evidence reflects that all requested IEEs have been provided and no procedural violation occurred regarding the IEEs.

### **3. Changing IEP**

Parent alleges that Student's IEPs have been changed outside of ARD Committee meetings. In particular, Parent testified that the November \*\*\*, 2022 IEP in evidence is somehow different from the IEP that was discussed at the ARD Committee meeting. There is no other evidence in the record to support this allegation. Only two IEPs are included in the evidence: the final Spring 2022 IEP and the final Fall 2022 IEP. To the extent that drafts were circulated and discussed that differ from these, that information is not included in the evidence. Student also had some class schedule changes in the 2022-2023 school year, including removal from \*\*\*,<sup>61</sup> but these are not changes to the IEP. Overall, the evidence does not support that Student's IEP was changed outside of ARD Committee meetings.

### **4. Prior Written Notices**

Petitioner alleges that the District has not provided prior written notice when required, although Petitioner does not specify when these instances occurred. Prior written notice is required whenever a school district proposes or refuses to initiate or change the identification, evaluation, educational placement, or provision of FAPE to a student. 34 C.F.R. § 300.503(a). Notice was issued with the consents for evaluation, and prior written notice was included for both of the IEPs in evidence. The evidence does not indicate that prior written notice was required at any other times. The District procedurally complied with the IDEA regarding prior written notices.

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<sup>61</sup> Petitioner's Closing Brief makes arguments about the\*\*\* as a disciplinary removal that should have triggered a manifestation determination review. This was not identified as an issue for hearing and is not addressed in this Decision.

Overall, the Hearing Officer concludes that the District is liable for a procedural violation of failing to timely complete Student's FIE. The Hearing Officer further concludes that the District procedurally complied with the IDEA as to all other allegations.

**E. APPROPRIATE PROGRAM**

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program is reasonably calculated to enable the child to receive educational benefit. 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 (LRE);
- 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).

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). The basic inquiry is whether the IEP implemented by the school district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*

*RE-1*, 580 U.S. 386, 399 (2017). Even after the Supreme Court’s 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (citing *Endrew F.*, 137 S. Ct. at 1000-01).

### **1. Individualized on the Basis of Assessment and Performance**

In meeting the obligation to provide 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, 300.320, 300.323(a).

The District’s obligation when developing Student’s IEP is to consider Student’s strengths, Student’s 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)(i). 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).

There are two IEPs in evidence, both implemented during the 2022-2023 school year, which are analyzed herein. As discussed in Section IV.D.1 above, the District's procedural violation related to the untimely FIE prevented Student from being offered a FAPE for approximately 11 weeks in the 2021-2022 school year. Thereafter, the District chose not to implement an IEP for Student for the remainder of the 2021-2022 school year, which is addressed in Section IV.F below. During this roughly semester-long period in spring 2022 without special education services, Student was not receiving a program individualized on the basis of Student's assessment and performance because Student was not receiving any special education program at all.

Petitioner did not identify specific deficiencies with either the April 2022 IEP or the November 2022 IEP, which were both implemented during the 2022-2023 school year. At the Spring 2022 ARD Committee meetings, the committee considered the FIE, teacher information, as well as information from Student's parents, to create a program for Student. The ARD Committee developed a program that included inclusion support in Student's \*\*\* classes, direct dyslexia intervention, direct intervention time for behavioral/functional/organizational support, direct and indirect counseling services, extensive accommodations, and annual goals targeted at Student's areas of need.

During the Fall 2022 ARD Committee meetings, the Committee considered updated information about Student's performance, and additional parent information, before revising Student's program. The November 2022 IEP contains the same components as the prior one, but counseling services were increased, accommodations were revised, and new goals were developed. Parent expressed concern in the Fall 2022

ARD Committee meetings about Student's IXL data indicating significantly below grade level skills. However, the record reflects that the ARD Committee discussed this data point and its failure to fully encapsulate Student's present levels.

The evolving frequency of Student's dyslexia services in these IEPs raises questions about whether these services were determined based on appropriate data. An appropriately implemented dyslexia program generally needs to include services four to five days a week, according to the District's dyslexia expert. At some points, Student's IEPs have included services that meet this threshold, and at other times they do not. Dyslexia services at a frequency of five times every two weeks appears aligned to the campus's block scheduling, rather than the necessary interval for implementing an effective dyslexia program. However, the ARD Committee had many conversations about the schedule for providing dyslexia interventions and, with Parent's input, agreed to the appropriateness for Student of the five times per two weeks frequency. Additionally, during the 2022-2023 school year, Student was typically actually receiving direct dyslexia services at least four times per week because of supplemental sessions provided after school in what the District called compensatory services sessions. Therefore, the services Student actually received were sufficient and appropriately data based.

Overall, the evidence showed that Student's IEPs, when they were implemented, were individualized on the basis of assessment data and Student's performance. However, Student did not receive any special education program during the Spring 2022 semester, when Student should have.

## **2. Least Restrictive Environment**

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R. § 300.114(a)(2)(i)-(ii).

To determine whether a school district is educating a student with a disability in the LRE, 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).

Petitioner’s Complaint and Closing Brief did not challenge the restrictiveness of Student’s educational placement, which is almost exclusively in the general education setting with inclusion support in core classes, when Student’s IEPs were being implemented. Student is only outside the general education setting for study/organizational skills and counseling. This very limited removal from the general education setting is appropriate based on Student’s particular needs.

Student's

program was administered in the least restrictive environment and Student was included to the maximum extent appropriate.

### **3. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders**

The IDEA contemplates a collaborative process between school districts and parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). 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 ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). 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.*

Parent alleges that Parent was denied meaningful participation in the development of Student's IEP by the District prohibiting teachers from communicating with Parent and failing to produce work samples and educational records. The evidence does not support these allegations. The campus principal testified that an assistant principal was appointed to consolidate communications with Parent due to volume and intensity of Parent's emails to teachers. However, Parent was not prohibited from communicating with Student's teachers. The evidence also does not reflect any records or work sample



requests that were made.

More generally, the record is mixed on the degree to which Student's services were provided in a coordinated and collaborative manner. At times, both Parent and the District made collaborative efforts and also engaged in uncollaborative behavior. Student was not provided any special education services at all during the Spring 2022 semester. If the District had completed a timely evaluation and started implementing the IEP when Parent signed consent for services, Student would have received services much sooner. In the IEP development process, the District considered and discussed extensive feedback from Parent, an active participant in the eight ARD Committee meetings that have been held. Although District staff have not always agreed with Parent's requests in ARD Committee meetings, a failure to agree does not indicate an unwillingness to collaborate. The IEPs, IEEs, discussions over eligibility labels, attempting a third-party ARD Committee facilitator, and negotiations over compensatory services show efforts to collaborate. On the other hand, Parent testified credibly about some uncollaborative behavior by District staff members during ARD Committee meetings.<sup>62</sup>

It is concerning that there are six evaluations that have not yet been reviewed by an ARD Committee, including two that were completed in November 2022. The District's meeting notice indicated an intent to discuss the \*\*\* IEE at the November \*\*\*, 2022 ARD Committee meeting, Ms. \*\*\* attended a meeting, and still this IEE was not reviewed. Parent has subsequently declined to attend any ARD Committee meetings to which the District has invited Parent to review IEEs. The District's ARD paperwork has also been confusing, as reflected in the lack of clarity

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<sup>62</sup>Tr. 53-54.

on Student's eligibility areas and unexplained additional prior written notices. Further, some of the evaluations and IEEs have taken a long time to complete. Although not a procedural violation of the IDEA, this time lag on some evaluations contributed to deficits in coordination.

Overall, the evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders at times, but not always. However, the blame for an absence of collaboration is shared between the parties. Petitioner failed to show that the District excluded Parent in bad faith or refused to listen to Parent.

#### 4. 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).

Here, the record shows that Student received academic benefit once Student's IEPs were implemented in the 2022-2023 school year. Student's grades were better than the prior school year when Student received no special education services, especially in \*\*\*. During \*\*\* grade, Student \*\*\* Student did not receive due to Student's failing grades in \*\*\*. Student made excellent progress through the dyslexia curricula used in Student's targeted dyslexia instruction. Student also made progress on most of Student's IEP goals. The record supports that Student

experienced non-academic benefits as well. Although there were various issues with Student's participation in \*\*\*, including interpersonal disputes with \*\*\*, the record reflects that Student was generally socially successful in Student's mainstreamed placement.

Overall, the IEPs implemented in the 2022-2023 school year provided Student academic and non-academic benefits. Student experienced less benefit in the Spring 2022 semester when Student should have been eligible and provided special education services but was not.

## **5. FAPE Conclusion**

When looking at the totality of the *Michael F.* factors as applied to the IEPs at issue here, the evidence showed that the IEPs implemented in 2022-2023 were individualized based on Student's assessment and performance, provided in Student's LRE, provided in a sufficiently coordinated and collaborative manner by the key stakeholders, and provided Student academic and non-academic benefit. The evidence showed that Student's program was reasonably calculated to provide meaningful educational benefit and was appropriately ambitious in light of Student's unique circumstances for the 2022-2023 school year. *Andrew F.*, 137 S. Ct. at 992. Based on the four factors of *Michael F.*, the evidence establishes that the District provided Student a FAPE during the 2022-2023 school year. However, Student was denied a FAPE during the Spring 2022 semester due to the delayed evaluation and the District's decision not to implement Student's IEP for the remainder of that school year.

Petitioner also alleged that the District denied Student a FAPE by failing to address incidents of bullying. The evidence showed that the District conducted multiple investigations of alleged bullying, and each investigation concluded that bullying had not occurred. The due process hearing record does not contradict the conclusions of these investigations. Therefore, the District did not deny Student a FAPE by its response to these incidents, which did not constitute bullying.

#### **F. IEP IMPLEMENTATION**

When determining whether a school district failed to adequately implement a student's IEP, a hearing officer must determine whether a FAPE was denied by considering under the third *Michael F.* factor whether there was a significant or substantial failure to implement the IEP and whether, under the fourth *Michael F.* factor, there have been demonstrable academic and nonacademic benefits from the IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). To prevail on Student's claim under the IDEA, Petitioner must show more than a *de minimis* failure to implement all elements of Student's IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

The District made an intentional choice not to implement any IEP for Student following the ARD committee meetings in the Spring 2022 semester. Student did worse during that school year. Student received no special education or related services in the 2021-2022 school year when Student should have.

Petitioner also made specific allegations about failures to implement Student's IEP in the 2022-2023 school year. Petitioner alleges that no IEP was implemented for Student until the District began implementing the November \*\*\*, 2022 IEP. However, the record reflects that the Spring 2022 IEP was implemented in the Fall 2022 semester. Petitioner complains about the accommodations snafu with the \*\*\*. The \*\*\* is not a District program and Student's IEP did not apply to this exam. This was not a failure to implement. Parent complains about the District not consistently implementing the Google document reminders for Student that were discussed at the November \*\*\*, 2022 ARD Committee meeting. However, this was not adopted as a particular accommodation. Instead, the ARD Committee agreed that Student's case manager would work with Student on different technology options for organizational support. The record reflects that this was done and Student was generally successful in using a calendar system, although still sometimes forgetting items for \*\*\*. Parent was concerned about the services and instruction Student received in \*\*\* class while the teacher was out \*\*\* and the class was covered by a substitute. However, no evidence was brought forth to support any failure to implement Student's IEP in \*\*\* class.<sup>63</sup>

Petitioner complains about Student's accommodations not being appropriately applied in \*\*\*. Specifically, Petitioner complained that Student should not have \*\*\* because Student has IEP accommodations to \*\*\*. However, the record reflects that these \*\*\*. Student then met the threshold of \*\*\*

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<sup>63</sup> Petitioner's Closing Brief makes arguments to the contrary with citations to the record that do not support Petitioner's arguments.

\*\*\*.

As discussed, Student's IEP was intentionally not implemented in the Spring 2022 semester. However, Petitioner did not meet Petitioner's burden of proof to show that Student's IEPs were not implemented in the 2022-2023 school year.

### **G. REMEDY**

The District procedurally violated the IDEA and failed to implement an IEP for Student in the 2021-2022 school year, leading to a denial of a FAPE for Student. Student should have been eligible and receiving special education services for essentially all of the Spring 2022 semester and Student received none. As such, the District must compensate Student for this failure.

An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite educational benefit denied by the school district's failure to comply with the IDEA. *Letter to Kohn*, 17 IDELR 522 (OSERS 1991). Compensatory education imposes liability on the school district to pay for services it was required to pay all along and failed to do so. *See Meiner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *D.A. v. Houston Indep. Sch. Dist.*, 716 F.Supp.2d 603, 612 (S.D. Tex. 2009), *aff'd*, 629 F.3d 450 (5th Cir. 2010) (upholding decision that student failed to prove amount of compensatory reimbursement for school district's failure to timely evaluate).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided

prospectively in order to compensate the student for a deficient educational program provided in the past. *G. ex. rel. RG v. Fort Bragg Dependent Schs.*, 343 F. 3d 295 (4th Cir. 2003). Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 374 (1996). A qualitative, rather than quantitative, standard is appropriate in fashioning compensatory and equitable relief. *O.W.*, 961 F.3d at 800; *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Petitioner requested compensatory services for dyslexia, reading, spelling, and math, \*\*\*, staff training, a speech IEE, and a \*\*\* evaluation. The speech IEE and \*\*\* evaluation have already been provided since Petitioner filed this Complaint. Student is also already eligible to \*\*\* for the 2023-2024 school year. Petitioner did not meet Petitioner's burden of proof that staff training is the appropriate remedy for the FAPE denial here.

In the area of compensatory services, the District proactively offered compensatory services during the Spring 2022 ARD Committee meetings due to the failure to timely complete Student's FIE. The ARD Committee agreed to provide 80 hours of compensatory services for dyslexia and math. The evidence does not reflect that the District ever considered or offered compensatory services for the District's failure to implement any special education program for Student for the

remainder of the Spring 2022 semester.<sup>64</sup> Additionally, the compensatory services provided in the 2022-2023 school year to supplement Student's dyslexia interventions during the school day constituted instruction that should have been provided in Student's IEP to appropriately implement a 4-5 day per week dyslexia intervention curriculum. Therefore, the Hearing Officer does not consider all of the hours that the District called compensatory to truly be compensatory.

However, compensatory awards are qualitative, and not an hour-for-hour calculation. These hours that Student attended in the 2022-2023 school year resulted in Student successfully completing the dyslexia intervention curricula and no longer needing targeted dyslexia instruction. Similarly, Student performed much better in Student's \*\*\* class during the 2022-2023 school year than Student had in previous years and \*\*\*. Student had an academically successful \*\*\* grade overall and made up lost ground from previous school years.

Petitioner brought forward no expert testimony or evidence explaining the nature and scope of the compensatory services Student requires to remedy the denial of FAPE in this case. In light of Student's progress in the 2022-2023 school year and the record as a whole, the evidence does not support that additional compensatory services are required to remedy the denial of FAPE found here, beyond what the District already offered and provided.

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<sup>64</sup> The District's Closing Brief asserts that the District approved additional compensatory services. Student did end up receiving more than the agreed 80 hours. However, it is not clear from the record that this was in consideration for the Spring 2022 implementation failure.



**V. CONCLUSIONS OF LAW**

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer*, 546 U.S. at 62.
2. Petitioner did not meet the burden of proving the District violated its Child Find obligation during the relevant time period. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.
3. Petitioner met Petitioner's burden of proving that Respondent failed to comply with procedural rights under the IDEA by failing timely complete Student's FIE. *Schaffer*, 546 U.S. at 62; 34 C.F.R. § 300.513(a)(2); 19 Tex. Admin. Code § 89.1011(b)-(c).
4. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comply with procedural rights under the IDEA as to all other allegations. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.502(b)(2), 300.503(a), 300.513(a)(2).
5. Petitioner met Petitioner's burden of proving that Respondent denied Student a FAPE for the Spring 2022 semester. *Rowley*, 458 U.S. at 188-89; *Endrew F.*, 580 U.S. at 386.
6. Student was provided FAPE and Student's IEPs were reasonably calculated to address Student's needs in light of Student's unique circumstances for the 2022-2023 school year. *Rowley*, 458 U.S. at 188-89; *Endrew F.*, 580 U.S. at 386.
7. Petitioner did not meet Petitioner's burden of proving that Respondent denied Student a FAPE through its response to alleged bullying. *Rowley*, 458 U.S. at 188-89; *Endrew F.*, 580 U.S. at 386.
8. Petitioner met Petitioner's burden of proving that the District failed to implement Student's IEP during the Spring 2022 semester. *Schaffer*, 546 U.S. at 62; *Bobby R.*, 200 F.3d at 349.
9. Petitioner did not meet Petitioner's burden of proving that the District failed to implement Student's IEP in the 2022-2023 school year. *Schaffer*, 546 U.S. at 62; *Bobby R.*, 200 F.3d at 349.

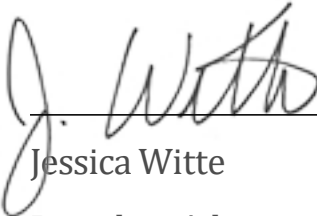
10. The District appropriate remedied the FAPE violation found herein through the compensatory services already offered and provided. *Reid*, 401 F.3d at 523-24.

## **VI. ORDER**

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED**.

**Signed SEPTEMBER 12, 2023.**

ALJ Signature:

A handwritten signature in black ink, appearing to read "J. Witte", is written over a horizontal line.

Jessica Witte

Presiding Administrative Law Judge

## **VII. NOTICE TO THE PARTIES**

The Decision in this cause 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. §§ 300.514(a), 300.516(a); 19 Tex. Admin. Code § 89.1185(n).