

SOAH Docket No. 701-23-18991. IDEA  
TEA Docket No. 282-SE-0523

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

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**STUDENT by next friend  
PARENT, Petitioner,  
v.  
Frisco Independent School District,  
Respondent**

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## **DECISION OF THE HEARING OFFICER**

\*\*\* (Student), by next friend \*\*\* (Parent or, collectively, Petitioner), brings this action against the Frisco 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 main issue in this case is whether the District provided Student with a free, appropriate public education (FAPE).

The main issue is whether the District provided Student with a FAPE during the relevant time period. The hearing officer concludes the District provided Student with a FAPE and a program reasonably calculated enable Student to make

progress appropriate in light of Student's unique circumstances.

## **I. DUE PROCESS HEARING**

The due process hearing was conducted in-person October 31 – November 2, 2023, in Frisco, Texas. Student was represented throughout this litigation by Student's legal counsel, Janelle Davis with Janelle L. Davis Law PLLC. \*\*\*, Parent, also attended the hearing. The District was represented throughout this litigation by its legal counsel, Jennifer Carroll and Kaylyn Kirkpatrick with Walsh, Gallegos, Treviño, Kyle & Robinson P.C. and \*\*\*, Assistant General Counsel for the District. The Executive Director of Special Education, Dr. \*\*\*, and the Managing Director of Special Education, Dr. \*\*\*, also attended as party representatives.

The parties offered joint and separately disclosed exhibits. Petitioner offered 42 exhibits, and all or portions of 26 exhibits were admitted. Petitioner offered testimony of Student's \*\*\*, Student's \*\*\* \*\*\*(\*\*\*\*\*) teacher, a District behavior coach, Student's \*\*\* \*\*\*\*\* teacher, a District licensed specialist in school psychology (LSSP), and Parent.

Respondent offered 29 exhibits, and all or portions of 13 were admitted. Respondent offered testimony of the District's Executive Director of Special Education, the \*\*\* principal, the \*\*\* principal, the \*\*\* behavior coach, and the District's Managing Director of Special Education. The hearing was recorded and transcribed by a certified court

reporter. Both parties timely filed written closing briefs. The Decision in this case is due January 29, 2024.

## **II. ISSUES AND REQUESTED RELIEF**

### **A. Petitioner's Issues**

Petitioner alleged the withholding and misrepresentation exceptions to the two-year statute of limitations, and raised the following issues for hearing in this case:

#### FAPE:

1. Whether the District failed to provide Student with a FAPE.
2. Whether the District failed to develop an appropriate individualized education program (IEP) for Student.
3. Whether the District failed to properly implement Student's IEP.
4. Whether the District failed to educate Student in Student's least restrictive environment (LRE).
5. Whether the District failed to provide compensatory relief as required by Covid-19 Special Education Recovery Act (SB89).

#### Identification:

Whether the District failed to timely and appropriately identify Student for special education and related services as a Student with autism.

Evaluation:

Whether the District failed to timely and appropriately evaluate Student in all areas of suspected disability.

Bullying:

Whether the District failed to protect Student from bullying.

Procedural:

Whether the District impeded Student's right to a FAPE; significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student; or caused deprivation of educational benefit.

**B. Petitioner's Requested Relief**

Petitioner seeks the following items of relief:

1. Order private placement for the 2023-24, 2024-25, and 2025-26 school years, or in the alternative, order the District to establish individualized and measurable goals related to Student's academic achievement and, in particular, Student's independent reading ability and fluency in the LRE.
2. Order compensatory education and related services specific to Student's academic progress, speech therapy, and direct occupational therapy (OT).
3. Order an independent educational evaluation (IEE) in the area of cognitive ability and achievement for all suspected or known disabilities; occupational therapy to include sensory and/or

handwriting; speech therapy; and a functional behavior and physical evaluation to determine needs at District expense with no limitations.

4. Order the District to provide up \$2,500.00 for compensatory supplement support for summer of 2023 and summer of 2024.
5. Order any and all other remedies that Petitioners may be entitled to under the law.

### **III. FINDINGS OF FACT**

#### **Student's History**

1. Student was \*\*\*. Student's \*\*\*. One of Student's \*\*\*. \*\*\*.<sup>1</sup>
2. Student lives with Parent, \*\*\*. Student is a caring, sweet, energetic child who aims to please and has started Student's \*\*\*. Parent described \*\*\* as a "terrible influence" and indicated that—at home—Student displays "angry outbursts," exhibits elopement behaviors, and has Student's sleep interrupted \*\*\*.<sup>2</sup>
3. Student originally enrolled in the District in 2017 and left in 2019. Parent signed for receipt of notice of procedural safeguards on December \*\*\*, 2018. As of February 2020 in Student's prior district, Student performed below grade level and showed persistent negative behaviors, so they reduced the rigor of the curriculum to prevent the undesired behaviors and placed Student in the \*\*\* program. Student's prior

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<sup>1</sup> Transcript Volume (Tr. Vol.) I at 15-18; Tr. Vol. II at 383, 453.

<sup>2</sup> Joint Exhibit (JE) 1 at 4; JE 9 at 8; Tr. Vol. I at 26; Tr. Vol. II at 455, 474-76.

District conducted a full individual evaluation (FIE) in March 2020 and Student did not meet the criteria for a student with dyslexia.<sup>3</sup>

**\*\*\* School: January 2021 – May 2022**

4. Student transferred back into the District on January \*\*\*, 2021. A transfer ARD Committee meeting convened on January \*\*\*, 2021. Parent attended the meeting with a support person from \*\*\*. The Committee reviewed Student's most recent FIE and IEP from the previous district and agreed to rely on them without change or additional assessment. The Committee continued Student's eligibility under the criteria of emotional disturbance (ED) and other health impairment (OHI). Student also has a diagnosis of \*\*\*. The District placed Student in \*\*\*'s centralized \*\*\*\*\*\* classroom, which was comparable to Student's placement in the prior district's \*\*\* program. In both settings, Student spent more than 60% of Student's instructional day in a self-contained classroom. The meeting ended with all attendees, including Parent, in agreement. Parent received notice of procedural safeguards with the ARD meeting notice.<sup>4</sup>
5. Student's home campus (\*\*\*) School) did not have an \*\*\*\*\*\* classroom, and as a result, Student \*\*\*did not attend school on the same campus. Parent's advocate notified the ARD Committee that Student perceived this to mean Student was being a "bad \*\*\*."<sup>5</sup>
6. The District's \*\*\*\*\*\* classroom is used for students who demonstrate significant behavioral and emotional challenges that require intensive support. The program addresses students' academic and behavioral needs with highly individualized approaches. Additionally, social skills instruction is a critical component of the program.<sup>6</sup>

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<sup>3</sup> Petitioner's Exhibit (PE) 2 at 5, 7; PE 3 at 20; Respondent's Exhibit (RE) 15; JE 24 at 9.

<sup>4</sup> PE 3 at 18; PE 16 at 2; PE 31 at 340-42; RE 7 at 3, RE 7 at 3; JE 1 at 3; JE 2 at 1.

<sup>5</sup> PE 31 at 341.

<sup>6</sup> PE 16 at 2.

7. Student's ARD Committee met on April \*\*\*, 2021. Parent attended with a support person from \*\*\*. The Committee agreed to conduct formal counseling evaluation and a formal in-home/parent training evaluation. Student's \*\*\*\*\* teacher reported Student performs well academically when Student is emotionally regulated. She shared Student's verbal aggression started consistently on February \*\*\*, 2021, and Student's verbal behavior escalated with \*\*\* beginning March \*\*\*, 2021. The behavior coach reported on the restraints that had been used with Student. The Committee recommended collecting more data for the behavior intervention plan (BIP) and discussing it further at the next ARD meeting. The Committee also recommended extended school year (ESY) services for Student. The meeting ended with all attendees, including Parent, in agreement.<sup>7</sup>
  
8. In May 2021, Parent completed a parent needs assessment for in-home training. Parent indicated Student\*\*\* and Parent was concerned about Student's neurological functioning. Parent noted Student engaged in risky behavior, \*\*\*, fought with \*\*\* and Parent, and often ignored Parent's directions.<sup>8</sup>
  
9. The District conducted an evaluation for counseling services and in-home parent training on May \*\*\*, 2021. The evaluator reviewed the FIE from Student's previous district, which included information from an OHI report dated March \*\*\*, 2020. The OHI report, provided by Student's physician, indicated that Student displayed heightened alertness to environmental stimuli that resulted in limited alertness with respect to educational environment. Student had difficulty with focusing, \*\*\*, and disruptive behaviors.<sup>9</sup>

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<sup>7</sup> PE 21 at 2-3.

<sup>8</sup> RE 18 at 1-6.

<sup>9</sup> JE 1 at 1, 3.

10. For the in-home parent training evaluation, Student’s special education teacher and Parent shared the same concerns across settings. Student engaged in \*\*\*. The intensity and frequency of these behaviors varied. Student’s special education teacher indicated Student’s strengths included Student’s eagerness to please, sharing with peers, and following directions. Student was motivated by adult attention, \*\*\* reinforcers, and access to an online reading program. Parent reported Student’s strengths included being “street smart,” showing appreciation for Student’s Parent, and hyper-focusing on passion projects.<sup>10</sup>
11. The evaluation recommended Student’s ARD Committee consider adding psychological services to the IEP and continued implementation of the BIP. Additionally, the evaluator recommended parent training to provide Parent with strategies and techniques to support Student’s behavior in the home and community environments.<sup>11</sup>
12. On May \*\*\*, 2021, Student’s ARD Committee met for a revision to the annual ARD. Parent attended with a support person from \*\*\*. The ARD Committee reviewed the May \*\*\*, 2021 evaluation. During the ARD Committee meeting, Student’s \*\*\*\*\* teacher reported Student had shown progress on Student’s emotional/social/behavioral issues with the implementation of new strategies. Student made progress in reading, writing, and math. Parent expressed concerns about Student’s progress, and the ARD Committee informed Parent that—over time—as behaviors decrease, more academic progress typically follows.<sup>12</sup>
13. The ARD Committee continued Student’s accommodations, added one new goal to Student’s BIP, added 90 minutes of psychological indirect/consult

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<sup>10</sup> JE 1 at 12-13.

<sup>11</sup> JE 1 at 10, 13.

<sup>12</sup> JE 2 at 2-3.



services per 9 weeks, and added four sessions of in-home parent training. Student's IEP included one goal in reading, one goal in writing, one goal in math, and four goals in social skills. Parent expressed a desire for more psychological services and another full formal evaluation. The ARD Committee informed Parent that no additional evaluation was needed for Student because the District accepted the previous district's evaluation and eligibility was not in question. The meeting ended with all parties, including Parent, in agreement.<sup>13</sup>

14. On May \*\*\*, 2021, Parent emailed the District informing them that Student received private counseling for \*\*\*. Parent acknowledged that Student's life challenges and \*\*\* had a direct effect on Student's poor academic progress. Parent requested a new IEP for Student and for Student to return to Student's home campus of \*\*\* due to the success Student demonstrated at \*\*\*.<sup>14</sup>
15. On August \*\*\*, 2021, the ARD Committee met for a revision to the annual ARD. Parent attended the meeting with an advocate from Disability Rights Texas, two support people from \*\*\*. The purpose of the meeting was to review the required accelerated instruction plan (AIP) for Student because Student did not meet the standards on the State of Texas Assessments of Academic Readiness (STAAR) in the spring semester. The Committee developed Student's AIP. Parent brought up additional testing to include a functional behavior assessment (FBA) and an adaptive behavior and a neuropsychological evaluation. The District's LSSP was on leave, and the ARD Committee decided to reconvene when she returned to discuss additional testing. The meeting ended with all attendees, including Parent, in agreement.<sup>15</sup>
16. Between September \*\*\*, 2021 and October \*\*\*, 2021, Student was involved in \*\*\* restraints—each lasting two minutes or less—on \*\*\* different days. Staff attempted to de-escalate the situations and tried alternatives to

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<sup>13</sup> JE 2 at 2-3.

<sup>14</sup> PE 34 at 1589, 1605.

<sup>15</sup> JE 3 at 1, 2; PE 29 at 78.

restraint. At the end of each restraint, Student was still agitated. Staff used restraints because Student engaged in imminent serious physical harm to \*\*\*self and others. The behavior leading to the restraints included \*\*\*.<sup>16</sup>

17. On October \*\*\*, 2021, Student's ARD Committee met for a revision ARD. Parent attended with an advocate from Disability Rights Texas, Student's private psychiatrist, and Student's \*\*\*. The purpose of the meeting was to discuss additional testing in the form of an FBA and psychological evaluation. Parent mentioned Parent believes the \*\*\*\*\* classroom is too restrictive for Student. Student's behavioral coach shared new coping skills strategies for staff to implement and recommended the \*\*\* method for behavior management and development of positive behaviors. Parent informed the Committee that Student has \*\*\*. The District developed an \*\*\* individualized health plan (IHP). Parent asked about aide support for general education and was informed Student has someone with Student when Student leaves the classroom. The meeting ended with all parties, including Parent, in agreement with a plan to reconvene to discuss Parent's request for a one-on-one aide for Student. Parent signed consent for evaluation on October \*\*\*, 2021.<sup>17</sup>
18. The District \*\*\*\*\* classrooms use the \*\*\* method. This method is a behavior-based program that works on social skills as well as working towards small goals. It is a cost/benefit program with breaks embedded in it as well as rewards and privileges.<sup>18</sup>
19. On October \*\*\*, 2021, Student's \*\*\*\*\* teacher indicated via email to campus dyslexia teachers that Student was exhibiting dyslexia tendencies. The dyslexia teacher replied with strategies to help.<sup>19</sup>

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<sup>16</sup> PE 22 at 1-6; JE 1 at 12-13; TR Vol. I at 233.

<sup>17</sup> RE 10 at 12-13; JE 5 at 1-3; JE 6 at 14.

<sup>18</sup> TR. Vol. I. at 123-24.

<sup>19</sup> PE 30 at 80, 89.

20. Student's ARD Committee reconvened on November \*\*\*, 2021. Parent attended with Student's \*\*\*. The Committee discussed Student's progress in academics and behavior. Student's \*\*\*\*\* teacher shared Student's progress, and the behavior coach reported that Student was doing well with the new point program. Parent brought up the request for a one-on-one aide for Student, and the District informed Parent that this level of support is already built into Student's program and the new evaluation would determine the necessity. Parent asked about Student exiting the \*\*\*\*\* program, and the behavior coach explained the criteria for exit. Parent raised the issue of one-on-one counseling. The District's LSSP explained the new evaluation would determine the need for this. Parent asked about dyslexia. Per the deliberations, the District's LSSP explained how this was being addressed, but no details were provided in the documentation. Parent asked about Student's general education classes and was informed Student attended for \*\*\*, Orton-Gillingham reading, and Student's AIP group. Accommodations related to Student's \*\*\* were added to Student's IEP. The meeting ended with all parties, including Parent, in agreement. Parent signed receipt for notice of procedural safeguards on November \*\*\*, 2021.<sup>20</sup>
21. Student's ARD Committee met for Student's annual ARD on December \*\*\*, 2021. Parent attended with a person from \*\*\*. Student continued to meet eligibility as a student with ED and OHI due to ADHD. The ARD Committee discussed Student's behavior, social skills, and emotional regulation. The Committee determined that, as of November \*\*\*, 2021, that Student had shown no significant behaviors such as \*\*\*. Student's IEP included present levels of academic achievement and functional performance (PLAAFPs), updated academic goals in reading, writing, math, functional, BIP, social skills, and multiple accommodations. Student's educational placement continued to be the \*\*\*\*\* classroom, and Student continued to participate in the general education setting for \*\*\*. The Committee planned to reconvene upon completion of the FBA to address Student's BIP. Student's BIP included in the IEP had been updated

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<sup>20</sup> JE 5 at 3-4; RE 20 at 17.

from the October \*\*\*, 2021 IEP. The Committee reviewed the COVID-19 compensatory services supplement. The meeting ended with all parties, including Parent, in agreement.<sup>21</sup>

22. The District conducted a Review of Existing Evaluation Data (REED)/FIE dated December \*\*\*, 2021. The FIE included a Behavior Assessment System for Children, third edition (BASC-3), conducted on November \*\*\*, 2021. Teacher input indicated Student could be impulsive, displayed a high number of aggressive behaviors, and engaged in rule-breaking behaviors. Student was withdrawn and pessimistic and had difficulty comprehending and completing schoolwork in a variety of academic areas. Student engaged in behavior considered “odd.” Student had difficulty making friends, adapting to changing situations, and recovering from difficult situations.<sup>22</sup>
23. The REED/FIE included an FBA, which consisted of classroom observation, Parent input, and teacher input from October \*\*\*, 2021, to December \*\*\*, 2021. The data showed that Student’s behaviors all functioned in a single behavior chain which started with non-compliance, moved to verbal aggression, and resulted in physical aggression. When Student became frustrated with work or became “the target of bullying” in a small group, classroom, or one-on-one setting, Student demonstrated the behavior chain to escape the task or gain attention from an adult. The evaluation recommended an updated BIP due to the frequency and intensity of behavioral concerns identified. Current goals and accommodations remained the same because the targeted behaviors and function of the behaviors did not change. The evaluation recommended Student’s ARD Committee consider counseling as a related service and continuation of direct instruction in social skills and behavior support.<sup>23</sup>
24. Student’s ARD Committee met on January \*\*\*, 2022, for a revision to the annual ARD. Parent attended the meeting with a person from \*\*. The ARD

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<sup>21</sup> JE 8 at 1, 5, 8-17, 25, 27-28; JE 9 at 1.

<sup>22</sup> JE 9 at 2, 5, 7-8.

<sup>23</sup> JE 9 at 11, 13, 18

Committee discussed the progress Student made in Student's behaviors. Parent agreed that Student had progressed. Student's behavior coach proposed removing physical restraint from Student's BIP and replacing it with response blocking. Parent brought up dyslexia, and the Committee informed Parent Student had progressed in reading, and Student's deficits were being addressed through a multi-sensory program. Student's behavior was the more global issue affecting Student's academic performance. The Committee decided to wait to conduct a new cognitive evaluation until the next annual ARD Committee meeting when Student would have more time with successful behaviors. Student had started making connections with peers. Bullying was raised as a concern by Parent's team and the District indicated that it had not seen any evidence of bullying. Student had started attending \*\*\* in general education with support. The Committee planned for Student to attend general education classes alone and add an additional subject. The Committee added direct counseling for 15 minutes every other week and two counseling goals to Student's IEP. The meeting ended with all parties, including Parent, in agreement.<sup>24</sup>

25. Student's ARD Committee met on April \*\*\*, 2022, for a revision to the annual ARD. Parent attend with a person from \*\*\*. The Committee added extended school year (ESY) goals to Student's IEP in the areas of reading, writing, math, social skills, and behavior. Parent indicated Parent wanted Student in general education to be able to make more friends. The District informed Parent that Student refused to attend general education classes at times. Parent also raised concerns with the number of physical restraints. The District indicated the number had decreased. The Committee agreed to conduct cognitive, achievement, formal adaptive behavior, dyslexia, and dysgraphia evaluations. The meeting ended with all parties, including Parent, in agreement. Parent provided consent for all the proposed evaluations on April \*\*\*, 2022.<sup>25</sup>

26. In May 2022, Parent emailed the District requesting the criteria for a student to exit the \*\*\*\*\* program. Parent then emailed the District's executive

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<sup>24</sup> JE 10 at 1, 2, 4, 12.

<sup>25</sup> JE 12 at 1, 2; JE 13 at 13.

director of special education in July 2022 to transfer Student from \*\*\* to \*\*\*. Parent initially requested Student attend Student's home campus of \*\*\* so Student could \*\*\* each day and because Parent was dissatisfied with the services at \*\*\*. The District informed Parent that a move to \*\*\* was not an option because the campus did not have an \*\*\*\*\* classroom. While Student was at \*\*\*, the District offered to have Student picked up last in the morning and dropped off first in the afternoon in order to address Parent's concerns. During the summer of 2022, \*\*\* closed its \*\*\*\*\* classroom and Parent agreed to transfer Student to \*\*\* School.<sup>26</sup>

27. Student's \*\*\* teacher at \*\*\* implemented Student's accommodations during the 2021-2022 school year, including the work/break system and the reward system. During this school year, Student engaged in \*\*\*. Throughout the year, the intensity of the behaviors decreased, and Student accessed general education more for \*\*\*.<sup>27</sup>
28. During Student's time at \*\*\*, Student made progress on many of Student's IEP goals and mastered a reading goal and two math goals. In May 2022, Student's progress was affected, in part, by \*\*\* and occasional behaviors.<sup>28</sup>

**\*\*\* School: August 2022 to February \*\*\*, 2023**

29. When Student started at \*\*\* School, Student attended some general education classes, was socially appropriate, and made academic gains. When Student struggled academically, Student did not want to attend the general education classroom and had verbal escalations towards the teacher

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<sup>26</sup> PE 3- at 333, 339; RE 12 at 1-6; Tr. Vol. I at 83; Tr. Vol. II at 488.

<sup>27</sup> Tr. Vol. II at 305-07, 311.

<sup>28</sup> RE 16 at 1-30.

or peers. Student's \*\*\*. When Student was verbally aggressive, Student would \*\*\*.<sup>29</sup>

30. The District conducted a REED/FIE dated August \*\*\*, 2022, in the areas of cognitive ability and achievement. Student's full scale IQ was a \*\*\*, which is in the extremely low range; however, Student's scores were affected by the emotional and behavior factors and Student's \*\*\*background. During much of the testing, Student stated Student did not want to participate and wanted to go back to class. The dyslexia specialist was unable to obtain formal scores on the Gray Oral Reading Tests – Fifth Edition (GORT-5) because of Student's lack of engagement but was eventually able to collect informal data. Student's intellectual abilities and academic skills were below grade level.<sup>30</sup>
31. The results of the evaluations supported placement in the \*\*\* classroom with modified curriculum in all subject areas because Student's educational needs exceed what can be provided in the general education setting or by general education teachers. The evaluator concluded Student did not meet the eligibility criteria for a specific learning disorder because Student's deficits in academics are not unexpected given the impact of Student's ED and behavioral concerns. Student did not meet the eligibility of dyslexia because Student's deficits in reading and writing are not unexpected given Student's cognitive scores and the impact of Student's ED. The evaluation concluded Student continued to meet eligibility for ED and OHI.<sup>31</sup>
32. The evaluator made the following recommendations to the ARD Committee: modified curriculum in all subject areas, multisensory reading instruction, chunking of assignments and reduced length of assignments, extra time to complete assignments and assessments, graphic organizers for writing assignments, oral administration of assignments and assessments, small group instruction and administration of assessments, shortened spelling list,

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<sup>29</sup> Tr. Vol. I at 126-29.

<sup>30</sup> JE 15 at 1, 16, 17, 22, 24, 30.

<sup>31</sup> JE 15 at 30.

no penalty for spelling errors, allow opportunities to dictate answers, directions given in a variety of ways/simplified vocabulary, extra time for oral response, reading assistance on work upon student request, access to \*\*\*, access to portable word processor (Chromebook, iPad for academics).<sup>32</sup>

33. The evaluator recommended the ARD Committee consider the following behavior supports and strategies for Student: prepare Student for changes in routine and give warnings prior to transitions from preferred and non-preferred tasks/activities; provide student with a cool down area in order to regain control; proximity control/monitoring/supervision during transition activities; set easily attainable daily goals/simplify activities; frequent breaks; use of a task list; use of \*\*\* reinforcement; use of timer to cue next transition; visual, verbal, and/or written reminders to stay on task; and use of a visual/written schedule.<sup>33</sup>
34. Student's ARD Committee met on September \*\*\*, 2022. Parent attended the meeting with two people from \*\*\*. Student did not master Student's current reading IEP goals; however, Student did not have a full 36 instructional weeks to master the goals. Student's IEP included updated goals in reading, \*\*\*, math, and updated accommodations. Student's educational placement continued to be the \*\*\* classroom. Student's schedule of services included both general and special education time for all subjects. The IEP included parent training, counseling consultation for 15 minutes every nine weeks, and transportation. The Committee discussed a "bullying incident" that occurred on August \*\*\*, 2022. Student \*\*\*. Student made progress in appropriate classroom participation and interacting with peers. The Committee discussed the need for a formal adaptive behavior assessment because a formal assessment was not conducted in the August evaluation due to Student's prior teacher resigning and Student's current teacher not knowing Student for a long enough period of time. The meeting ended with all attendees, including Parent, in agreement Parent

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<sup>32</sup> JE 15 at 31.

<sup>33</sup> JE 15 at 31.



signed receipt for notice of the procedural safeguards provided on August \*\*\*, 2022.<sup>34</sup>

35. The District conducted an Adaptive Behavior Assessment System, third edition (ABAS-3) on November \*\*\*, 2022. An ABAS-3 is an assessment of adaptive skills for individuals and provides an assessment of the daily, functional skills of an individual. Parent did not return Student's ABAS-3 form. Based on the \*\*\* teacher's report, Student's adaptive behavior strength was in community use, and Student's weaknesses included communication, functional academics, self-direction, leisure, social skills, school living, health and safety, and self-care. Student's overall adaptive skills were low. Student's \*\*\* teacher indicated Student had social deficits with appropriate word choice and topics and that Student needed help with \*\*\*. The evaluator made no new recommendations for the ARD Committee.<sup>35</sup>
36. The District received Student's private evaluation on December \*\*\*, 2022. The evaluation was dated September \*\*\*, 2022. The private evaluator relied on a parent interview, Student's FIE from August \*\*\*, 2022, information from Student's \*\*\* grade teacher, and various formal and informal assessments. Student's eye contact, motivation, and effort on tasks varied during the assessment; Student needed frequent breaks to regain focus; and Student repeatedly asked about going home. Student denied being bullied at school and admitted to being a bully. The evaluator scored Student's cognitive ability in the low range and adaptive behavior in the below average range. Based on the DSM-5, the evaluator diagnosed Student with autism spectrum disorder without accompanying intellectual or language impairment; ADHD – combined presentation; \*\*\*; \*\*\*. The evaluator recommended the following: family and individual therapy; OT; classroom accommodations such as extended time on exams, oral administration of tests, chunking of assignments, and allowance for breaks, (most of which were already in Student's IEP); a structured setting at school and home; and speech therapy.<sup>36</sup>

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<sup>34</sup> PE 43 at 17; RE 20 at 23-24; JE 15 at 16; JE 16 at 1, 3, 6-8, 17-18, 23.

<sup>35</sup> JE 18 at 15, 25-28; Tr. Vol. I at 107.

<sup>36</sup> PE 8 at 1, 16-17; JE 24 at 10.

37. Student received private services from various agencies, including \*\*\*, \*\*\* and \*\*\* provided counseling services to Student and did not indicate a suspected or actual disability of autism.<sup>37</sup>
38. Student's ARD Committee met on December \*\*\*, 2022, for a revision to the annual ARD. Parent attended the meeting. Parent asked questions about the timeline for Student's autism evaluation. The Committee notified Parent that discussions and changes to Student's IEP would occur after the evaluation process. Indirect assistive technology (AT) services were added to Student's IEP and Student's schedule of services were updated. The meeting ended with all parties, including Parent, in agreement.<sup>38</sup>
39. The District conducted a REED on December \*\*\*, 2022, and determined Student needed additional evaluations in the following areas: psychological-autism, OT, speech-pragmatic language, and speech-receptive/expressive language due to the private evaluation the District received. Parent signed for consent for the evaluations on January \*\*\*, 2023.<sup>39</sup>
40. The District informed Parent of an investigation regarding a report of bullying \*\*\* on January \*\*\*, 2023.<sup>40</sup>
41. From August 2022 to February 2023, Student was not restrained at \*\*\*, nor did Student attempt to \*\*\*. Student's \*\*\* teacher at \*\*\* implemented Student's IEP accommodations during her teaching and used positive behavior supports such as earning computer time and snacks, offered choices that involved building or constructing, and earning time with certain adults to assist Student. Student made progress on Student's IEP goals and mastered some goals, Student was engaged, and had a willingness to try during Student's time in the \*\*\* classroom at \*\*\*

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<sup>37</sup> Tr Vol. II at 363-64, 463.

<sup>38</sup> PE 25 at 1-2.

<sup>39</sup> JE 21; JE 23 at 1.

<sup>40</sup> RE 13 at 8-9.

Elementary School. During this time period, Student \*\*\*, had \*\*\* excused absences, and \*\*\* unexcused absences.<sup>41</sup>

**\*\*\* School: February 2023 – May 2023**

42. On February \*\*\*, 2023, the District’s managing director of student services notified Parent via email and regular mail that Student would be transferred to the \*\*\* classroom at \*\*\* School due to a bullying incident that took place on January \*\*\*, 2023. The transfer occurred on February \*\*\*, 2023.<sup>42</sup>
43. On February \*\*\*, 2023, Student’s ARD Committee met for a revision to the annual ARD. Parent attended with a person from \*\*\*. No revisions were made to Student’s IEP other than changing Student’s campus to \*\*\* to reflect a safety transfer based on the bullying incident. The Committee determined Student’s behaviors could be addressed through classroom accommodations, social skills instruction, placement in the \*\*\* classroom, and Student’s BIP. \*\*\* staff indicated Student was doing well and adjusting to Student’s new placement. The meeting ended with all parties, including Parent, in agreement.<sup>43</sup>
44. The District completed a REED/FIE on April \*\*\*, 2023. Evaluations and observations occurred between March \*\*\*, 2023, and April \*\*\*, 2023. The District used the Clinical Evaluation of Language Fundamentals – fifth edition (CELF-5) to test Student’s basic foundations of mature language. Student scored in very low to severe range of language functioning, but Student’s scores were not valid due to uncooperative behavior. Student’s last CELF-5 was in November 2018, and Student scored in the average range. The change in Student’s standard scores between the two administrations of the evaluation contemplated a drop of twenty points. Such a drop would be highly unusual and should be attributed to Student’s lack of cooperation during testing.<sup>44</sup>

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<sup>41</sup> JE 34 at 1; RE 16 at 33-34; Tr. Vol. I at 131-33, 141-43.

<sup>42</sup> PE 31 at 1766-67, RE 13 at 6-7, 9; JE 24 at 1.

<sup>43</sup> JE 22 at 1-2.

<sup>44</sup> JE 23 at 1-2, 4-6.

45. The Pragmatic Language Skills Inventory (PLSI) indicated Student's pragmatic language skills were in the average range. Student does not display difficulty in social communication and reciprocal interaction. Student has a good understanding of correct receptive and expressive language, and any difficulties with the appropriate use of these skills is explained by Student's emotional disturbance rather than a speech and language disorder. Student's articulation, voice, and fluency skills are within functional limits.<sup>45</sup>
  
46. The District LSSP conducted an autism evaluation that included classroom observation, teacher information, and formal testing. The LSSP allowed Student to attend Student's new campus for four weeks to acclimate to the new environment before conducting the evaluation. The District requested information from Parent, but it never received it; instead, they used Parent's responses to the private evaluation completed in September 2022. The District LSSP used the BASC-3 to evaluate Student's behavior and adaptive skills. The LSSP used Student's previous \*\*\* classroom teacher's input because Student's current \*\*\* teacher at \*\*\* had not spent the required amount of time with Student to be able to report on Student's behaviors. Student's previous \*\*\* classroom teacher reported Student is restless, overactive, has difficulty controlling Student's impulses, displays a high number of aggressive behaviors, has difficulty adapting to changing situations and takes longer to recover from difficult situations compared to other students Student's age. Student displays behaviors stemming from worry, nervousness, and/or fear. Student has difficulty maintaining attention, comprehending, and completing schoolwork in a variety of academic areas. Student also engages in behaviors considered strange or odd, but the behaviors were not reported to be consistent.<sup>46</sup>
  
47. The District LSSP used the Autism Spectrum Rating Scale (ASRS) to measure behaviors associated with the autism spectrum disorder. Based on the teacher and parent form, Student has difficulty using appropriate verbal and nonverbal communication for social contact, relating to children and adults, providing appropriate emotional responses to people in social

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<sup>46</sup> JE 23 at 17-31; Tr. Vol. II at 375.

<sup>45</sup>J.E. 23 at 9, 64.

<sup>46</sup>J.E. 23 at 17-31; Tr. Vol. II at 375.

situations, tolerating changes in routine, and focusing attention. Student engages in unusual behaviors, has problems with inattention and/or motor and impulse control, uses language in an atypical manner, engages in stereotypical behaviors, and overreacts to sensory stimulation. Student does not have any difficulty with the ability to express emotions, understand others' emotions, initiate conversations, or make eye contact. Additionally, Student does not display excessive rigidity in routines, retains information, pays attention to preferred activities, seeks the company of peers, notices social cues, and does not overreact to stimuli.<sup>47</sup>

48. The Social Responsiveness Scale, second edition (SRS-2) provides an indication that a student meets the criteria for the autism spectrum disorder, and it distinguishes autism related characteristics from other psychological impairments. Student's total score fell in the severe range and indicated extreme difficulty relating to others. In addition to autism spectrum disorder, such high elevations could be indicative of other psychological conditions that affect social communication, reciprocal behavior, or behavioral rigidity.<sup>48</sup>
49. The Social Skills Improvement System Social-Emotional Learning edition (SSIS SEL) assessment provides a comprehensive view of social-emotional functioning and academic competence. Responses were obtained from Parent and Student's previous \*\*\* classroom teacher. Student's overall scores fell within the below average and well below average range. Students at this level will typically demonstrate deficiencies in most social-emotional learning competencies (self-awareness, self-management, social awareness, relationship skills, responsible decision-making, core skills, and academic competence) and often experience co-occurring academic difficulties.<sup>49</sup>
50. The District LSSP concluded Student does not demonstrate a profile of behaviors consistent with an autism spectrum disorder. Student does not display difficulty in social communication and reciprocal interaction. Student's verbal and nonverbal communications are synchronized, and Student makes appropriate eye contact during interaction. Student did not engage in sensory-based

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<sup>49</sup> JE 23 at 28-30.

<sup>47</sup> JE 23 at 24, 26.

<sup>48</sup> JE 23 at 26-28.

<sup>49</sup> JE 23 at 28-30.

behaviors and is able to engage in verbal communication using a variety of words, phrases, expressions, and coordinated facial expression. Student does not have social communication deficits. Student's behavior appears to be intentional, directed, and even though the behaviors are not often socially appropriate, Student appears to have a good understanding of appropriate/inappropriate behaviors. Student engages in disruptive and maladaptive behavior purposefully. Student can engage in appropriate social communication when Student chooses to do so and is emotionally regulated. Student can initiate friendships, but when Student's behaviors escalate, Student cannot maintain them.<sup>50</sup>

51. The District occupational therapist conducted an OT evaluation. The evaluation included a review of school records, observations, teacher interviews, a parent interview, and a functional classroom and social skills evaluation. Parent's form indicated Student was unable to \*\*\*. The District requested additional information, but it was not provided. Student's muscle tone, range of motion, and strength all fell within functional limits. During the assessment, Student refused tasks, had to be encouraged by the paraprofessional to participate, used inappropriate language, made \*\*\*, and continually asked to return to class. Student was able to perform all school-related self-care tasks independently. Student has the physical ability to complete all school activities; however, Student's work avoidance and lack of compliance interferes with Student's performance.<sup>51</sup>
52. On April \*\*\*, 2023, Student's ARD Committee met for a revision to the annual ARD. Parent attended the meeting with Parent's advocate, a person from \*\*\*, and Student's \*\*\*. Results of Student's most recent evaluations were reviewed. The ARD Committee discussed Student \*\*\*, and Parent's advocate asked why this was allowed. The District explained Student is unable to engage in learning when Student arrives at school due to Student's \*\*\*. Parent and Parent's advocate disagreed with the District's evaluations and left the meeting. The District sent emails and

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<sup>50</sup> JE 23 at 30, 56; Tr. Vol. II at 380.

<sup>51</sup> JE 23 at 56-57, 60, 64.



notices to Parent and the advocate about reconvening, and the advocate informed the District they were in disagreement and would not attend.<sup>52</sup>

53. The revision to the annual ARD Committee meeting reconvened on April \*\*\*, 2023. Parent did not attend the meeting. The Committee updated Student's BIP, academic goals, and proposed ESY services. The campus behavior coach developed and implemented a new intervention plan for verbal aggression. The Committee did not find Student eligible as a student with autism and found Student did not need OT. The Committee continued Student's eligibility under the criteria of ED and OHI.<sup>53</sup>
54. Student's BIP required three staff members total and two separate classrooms. Two staff to stay with Student when interventions were necessary and one staff to stay with the rest of the \*\*\* students when they were removed to an empty room next to the \*\*\* classroom.<sup>54</sup>
55. An incident occurred \*\*\* on April \*\*\*, 2023. Student \*\*\*. On April \*\*\*, 2023, Student had \*\*\*. The District contemplated placement in the disciplinary alternative education program (DAEP), but Student received out-of-school suspension for \*\*\* days total for both instances. The District sent a letter to Parent on May \*\*\*, 2023, questioning Student's absences since the end of the suspension period.<sup>55</sup>
56. The District sent notice to Parent on May \*\*\*, 2023, for an ARD Committee meeting for May \*\*\*, 2023. The District sent Parent prior written notice for a proposed IEP amendment on May \*\*\*, 2023, with implementation to begin on August \*\*\*, 2023. The proposed IEP included a new BIP for \*\*\*.<sup>56</sup>

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<sup>52</sup> PE 32 at 267-269; RE 13 at 34-36; JE 24 at 1, 7-8.

<sup>53</sup> JE 24 at 8-9; Tr. Vol. III at 624.

<sup>54</sup> TR. Vol. III at 6-30-31, 642-43.

<sup>55</sup> PE 33 at 487-88; JE 25 at 1; JE 26 at 1; JE 27; JE 33 at 1.

<sup>56</sup> JE 28; JE 29; Tr. Vol. III at 636.

57. On May \*\*\*, 2023, the District sent Parent a Notice of Proposal to Evaluate. The District proposed an FBA and an outside psychiatric evaluation at District expense.<sup>57</sup>
58. While at \*\*\* School, Student had no incidents involving \*\*\*, and only occasionally exhibited physical aggression. No restraints occurred at \*\*\*, and verbal aggression and/or outbursts decreased during this time due to the intervention plan put in place by the behavior coach regarding verbal aggression. Student progressed academically and started making friends. During this time, Student \*\*\*, had \*\*\* excused absence, and \*\*\* unexcused/unresolved absences. This does not include the \*\*\* out-of-school suspension days for the \*\*\* incidents in late April.<sup>58</sup>
59. The District proposed Student attend \*\*\* School in the \*\*\* classroom for the 2023-2024 school year because the \*\*\* classroom at Student's zoned campus was at capacity. Parent wanted Student to attend \*\*\* School so Student's \*\*\*. Student never returned to the District after the suspension on April \*\*\*, 2023, and is currently being educated by Parent at home for approximately three hours a day.<sup>59</sup>

## **IV. DISCUSSION**

### **A. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62

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<sup>57</sup> JE 30 at 40.

<sup>58</sup> JE 30 at 40; JE 34 at 1-2; Tr. Vol. II at 582-84, 587; Tr. Vol. II at 626-32, 648-49.

<sup>59</sup> RE 14 at 4-5; JE 34; Tr. Vol. I. at 28; Tr. Vol. II at 456-57, 489.

(2005). There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in this case is on Petitioner to show 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. *Schaffer*, 546 U.S. at 62; *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

## **B. Duty to Provide FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education 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). The basic inquiry is whether the IEP implemented by a school district “was reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 580 U.S. at 399.

**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 a 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. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1)-(2). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

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

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

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 limitations period. *G.I. v. Lewisville Indep. Sch. Dist.*, No. 4:12-cv-385, 2013 WL 4523581, \*8 (E.D. Tex. Aug. 23, 2013).

Petitioner filed this due process complaint on May 11, 2023, and asserted both

exceptions to the statute of limitations. The District raised the statute of limitations as an affirmative defense and contends any claims arising prior to May 11, 2021, are time-barred.

The evidence showed Petitioner knew or should have known about the alleged actions forming the basis of the complaint by April \*\*\*, 2021, when Petitioner expressed concerns about Student's emotional functioning during an ARD Committee meeting. Petitioner did not file Petitioner's complaint within two years of the accrual date.

The evidence did not support Petitioner's contention that the District misrepresented that it had resolved the problem forming the basis of the complaint, nor did it support the contention the District failed to provide procedural safeguards to Parent. Parent attended the April 2021 ARD Committee meeting with multiple support persons—including ones with special education work experience—and received the notice of procedural safeguards; therefore, the withholding exception does not apply. *El Paso Indep. Sch. Dist. v Richard R.R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008) ("When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statute of limitations for IDEA violations commences without disturbance . . . that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA").

Additionally, no District staff or personnel ever indicated to Parent that the allegations that form the basis of Petitioner's complaint were resolved. The District's continuous revisions to Student's IEP, continued progress monitoring, and

multiple updated evaluations of Student demonstrate the District's effort to provide Student

with an appropriate program. As such, the misrepresentation exception does not apply. The relevant time period for the case is within the two-year statute of limitations.

#### **D. 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 the District conducted multiple evaluations throughout Student's enrollment in the District. All the District evaluations met the IDEA requirements. Each evaluation included a variety of assessment tools and strategies including teacher and parent input, student observation, standardized and informal assessments and other technically sound instruments to assess

Student's abilities and needs. 34 C.F.R. § 300.304(b). Each evaluation addressed Student's educational strengths, deficits, and needs and continued to support Student's qualification for special education under the criteria for ED and OHI-ADHD.

Petitioner argues the District failed to conduct evaluations in a timely manner, but the credible evidence showed that, when Parent requested evaluations or brought up concerns, the District acknowledged the concerns and conducted new evaluations when necessary. Petitioner incorrectly argues a counseling evaluation was not completed after Parent requested one. The evidence shows the counseling evaluation discussed at the April \*\*\*, 2021 ARD Committee meeting was completed on May \*\*\*, 2021. The only evaluation request the District did not accommodate was on May \*\*\*, 2021, Parent request for a full formal evaluation. The ARD Committee determined Student's eligibility was not in question and Student's prior FIE from March 2020 was still valid. Petitioner's main concern is with autism. The credible evidence showed the District had no reason to suspect Student was a student with autism. After Parent provided the private autism evaluation to the District in December 2022, the District conducted an autism evaluation, which again complied with the IDEA evaluation requirements.

The District timely conducted multiple evaluations based on Parent request and ARD Committee deliberations, and none of the evaluations indicated a need for a new special education eligibility. Based upon the evidence presented, Petitioner did not prove the District failed to conduct timely evaluations in all areas of suspected disability.

**E. Identification**

Petitioner alleges that the District violated the IDEA by failing to identify Student as eligible for special education under the classification of autism. Questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student meets the criteria of one or more of the enumerated disability classifications and demonstrates a need for special education. *See* 34 C.F.R. § 300.8(a), (c)(1-13). To be eligible for special education services, a student must both have a qualifying disability and be in need of special education services to address the disability, not simply be likely to benefit from special education services. *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 382 (5th Cir. 2007).

Under the IDEA, autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction. 34 C.F.R. § 300.8(c)(1)(i). Characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. *Id.*

In this case, Student's private evaluator diagnosed Student with autism based on a medical diagnosis and not the criteria for special education eligibility. The private evaluator did not observe Student in the classroom, and he used teacher input from Student's \*\*\* grade teacher, when Student was a \*\*\* grader at the time of the evaluation. Additionally, the private evaluator did not



testify at hearing, so it is difficult to measure the credibility of the diagnosis. It is undisputed that Student demonstrates some characteristics of autism such as difficulty tolerating changes in routine, difficulty using appropriate verbal and nonverbal communication for social contact, and difficulty providing appropriate emotional responses in social situations. The credible evidence supports the conclusion that Student does not qualify for special education as a student with autism. The private evaluations followed the DSM-5 which is different from the criteria for special education eligibility.

The credible evidence aligns with the District LSSP's conclusions that Student makes appropriate eye contact, can engage in appropriate verbal communication, and can distinguish between appropriate and inappropriate behaviors. Student's eligibility under ED explains Student's inability to build and maintain social relationships and is the root cause of Student's deficits in social functioning, not autism. Petitioner failed to meet Petitioner's burden of establishing that the District failed to properly include the eligibility classification of autism in Student's IEP.

#### **F. FAPE**

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

1. Whether the program is individualized on the basis of the student's assessment and performance;
2. Whether the program is administered in the least restrictive environment;

3. Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
4. Whether positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F.*, 118 F.3d 245, 253 (5th Cir. 1997). *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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.*, 580 F.3d at 294.

### **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, 300.323(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 District's obligation when developing Student's IEP and BIP is to consider Student's strengths, Student's parent's 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). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

The evidence showed the District developed an IEP and BIP individualized based on assessment and performance. Student's IEPs included PLAAFPs, academic goals, behavior goals, and accommodations. The District updated Student's IEP multiple times as needed based on Student performance, ARD Committee deliberations, and multiple evaluations/assessments. All ARD Committee meetings from Student's \*\*\* meeting in January 2021 through February 2023 ended with Parent, aided by several advocates knowledgeable about special education services, in agreement with the ARD Committee decision. The ARD Committee meeting on April \*\*\*, 2023, was the first time Parent disagreed. Parent contends Student's IEP did not address Student's private autism diagnosis. As mentioned above, the District appropriately determined Student did not meet the criteria as a student with autism; however, many of the strategies in the autism supplement were already included in the accommodations in Student's IEP, for example use of a visual/written schedule, transition

cues, and positive

social/emotional supports. Additionally, many of the recommendations from Student's private evaluator for Student's IEP were already included in the District's IEP.

## **2. Least Restrictive Environment**

The IDEA requires that a student with a disability be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "LRE requirement." 34 C.F.R. § 300.114. State regulations require a school district's continuum of instructional arrangements to be based on students' individual needs and IEPs and include a continuum of educational settings, including mainstream, homebound, and hospital classes; resource rooms or services; self-contained programs or classrooms on a regular campus; nonpublic day school; and residential treatment facilities. 19 Tex. Admin. Code § 89.1005(c).

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).

The determination of whether a student with a disability can be educated in general education settings 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.* This determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- 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.*

The evidence showed Student was educated in Student's LRE. When Student enrolled in the District in January 2021, Student's placement in the \*\*\* classroom was based on Student's prior district's IEP. During Student's time at the District, Student continued to need the \*\*\* classroom setting. Parent requested Student's dismissal from the \*\*\* program multiple times and wanted Student in the general education setting with a one-on-one aid. However, Student's behaviors require a structured learning environment with multiple personnel implementing Student's IEP, and this level of structure and staff cannot be accomplished in the general education setting. Likewise, Student's modified curriculum and BIP could not have been implemented by general education staff.

Petitioner argues that, per District policy, the \*\*\* classroom is appropriate only when all other interventions have been tried, but Student came from a program that was substantially similar to the \*\*\* classroom before transferring into the District.

Student's attendance in the general education setting increased as Student's behaviors decreased. By the end of Student's time at the District, Student's behaviors had drastically decreased. This can be attributed to the multiple District personnel implementing Student's BIP, but Petitioner still required the \*\*\* classroom because it took two staff working with Student directly and an extra classroom to properly implement Student's IEP.

### **3. 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. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 766 (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.*

The evidence showed services were provided in a coordinated, collaborative manner by key stakeholders. Parent attended all ARD Committee meetings accompanied by an advocate and/or multiple professional and personal support persons. Petitioner incorrectly argues the \*\*\* classroom decision was made without an ARD Committee meeting. The ARD Committee met in January 2021. Parent attended the meeting with multiple professional support people. The Committee—including Parent and the professional support people—discussed the \*\*\* classroom and agreed upon Student’s placement in that classroom.

Between May 2021 to April 2023, the ARD Committee met \*\*\* times, and Parent exchanged multiple emails with District staff and personnel. Parent had meaningful input during ARD meetings which resulted in evaluations being conducted for Student. Parent’s concerns over Student’s exit from the \*\*\* program and academic progress were not ignored and were addressed by the District. The District continued to update Student’s IEP, conduct evaluations, and monitor Student’s progress. Parent complains Parent’s requests for evaluations were ignored for years; however, no credible evidence supports this claim. The District conducted numerous ARD Committee meetings which were attended by Parent with various professionals with special education credentials and all meetings ended in agreement. Additionally, the District conducted new or updated evaluations when needed in a timely manner.

Petitioner failed to establish 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.*, 703 F.3d at 813-14.

The evidence showed Student made academic and non-academic progress. Petitioner argues Student failed to make progress because Petitioner was reading below grade level. A student's progress should be measured with respect to the individual student and not in relation to the rest of the class. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). During Student's time in the District, Student improved in Student's reading skills, mastered math goals, and by the time Petitioner withdrew from the District, Student's behaviors had improved significantly. Student did not read at grade level and struggled with Student's unpreferred tasks of reading and writing; however, Petitioner showed progress in both. By the end of Student's time in the District, Student started making friends, Student's verbal aggression decreased, and Petitioner had not required a restraint in over a year. Student's program was appropriately ambitious in light of Student's unique circumstances. *Andrew F.*, 580 U.S. at 399. Overall educational benefit is the IDEA's statutory goal. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012) (rejecting the argument that a student's IEP was insufficient because it failed to enable Student to write and spell better where Student earned passing marks and advanced from grade to grade). In this case, Student made improvements in academic and nonacademic areas.

#### **5. FAPE Conclusion**



The District developed a program for Student that was reasonably calculated to provide Student educational benefit based upon Student's unique needs. *Andrew F.*, 580 U.S. at 399, 403. Student's IEP and program were developed using District evaluations and placed Student in Student's least restrictive environment. Parent, as well as key stakeholders from the District, provided input to develop Student's program and Student made progress. A review of the overall educational program shows Student was provided a FAPE and made progress with the program as it was developed and implemented. *Michael F.*, 118 F.3d at 253; *Hovem*, 690 F. 3d at 391.

### **G. IEP Implementation**

When a parent brings a claim based on a school district's failure to implement an IEP, the *Michael F.* first factor (whether the program is individualized) and second factor (whether the program is administered in the least restrictive environment) are generally "not at issue." *Spring Branch Indep. Sch. Dist. v. O.W. by next friend Hanna W.*, 961 F. 3d 781, 795-96 (5th Cir. 2020) (citing *Bobby R.*, 200 F.3d 341). Rather, a court or hearing officer must decide whether a FAPE was denied by considering, under the third factor, whether there was a "substantial or significant" failure to implement an IEP; and under the fourth factor, whether "there have been demonstrable academic and non-academic benefits from the IEP." *Id.* at 796 (citing *Bobby R.*, 200 F.3d at 349).

Petitioner alleged in the complaint that the District failed to implement Student's IEP, but Petitioner did not present evidence of any specific portions of the IEP the District failed to implement. Petitioner also did not address this claim

in its closing brief. The credible evidence shows the District implemented Student's IEP with fidelity and Student demonstrated progress in academics and behavior. To prevail on an implementation claim under the IDEA, Petitioner must show more than a *de minimis* failure to implement all elements of that IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Bobby R.*, 200 F.3d at 349.

Petitioner did not meet its burden to prove the District failed to implement substantial or significant portions of Student's IEP.

#### **H. Bullying as a Denial of FAPE**

Bullying is the unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior must be repeated, or have the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally and excluding someone from a group on purpose. *Government Accountability Office, Report on Bullying (June 2012)* (<http://www.gao.gov/assets/600/591202.pdf>).

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013) (bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied). Bullying may lead to a denial of a FAPE if school personnel were deliberately indifferent to, or failed to take reasonable steps, to

prevent bullying that adversely affects or results in the regression of educational benefit or substantially restricts the student with a disability from accessing educational opportunities. *T.K. and S.K. ex rel. K.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 316 (S.D.N.Y. 2011). The bullying need not be outrageous, but it must be sufficiently severe, persistent, or pervasive that it creates a hostile environment for the student with a disability. It is not necessary that Petitioner show the bullying prevented all opportunity for an appropriate education but only that it is likely to affect the opportunity of the student for an appropriate education. *Id.*, at 317.

The evidence showed Student was not bullied. Petitioner claims Student was bullied by other students \*\*\* and by District personnel. Multiple District personnel testified credibly that they did not witness, nor were they notified of, any bullying instances toward Student. The only mention of possible bullying toward Student was in the FBA conducted in 2021; however, no evidence was presented on the details of this bullying so this hearing officer cannot say the bullying was sufficiently severe, persistent, or pervasive that it created a hostile environment. Additionally, based on evidence of Student's progress, the bullying mentioned in the FBA did not affect Student's opportunity for an appropriate education. The credible evidence showed Student was the aggressor in bullying situations and \*\*\*. Petitioner also argues that Student \*\*\*, and Student's transfer to a different campus demonstrates the District bullied Student. Student's classroom placement at a different campus \*\*\* was due to Student's home campus not having an \*\*\* classroom as required by Student's IEP. Student \*\*\* and being transferred to a different campus were District decisions based on Student's own inappropriate conduct. Petitioner presented no

credible evidence to prove Student was bullied by other students or District staff.

Petitioner failed to meet Petitioner's burden in showing the District did not protect Student from bullying.

**I. COVID-19 Special Education Recovery Act (SB89)**

In 2021, the Texas legislature amended Chapter 29 of the Texas Education Code to require school districts to consider the impact of COVID-19 school closures on students with disabilities. Tex. Educ. Code § 29.0052 (expired). In relevant part, ARD Committees were required to consider whether special education and related services to students under their IEPs during the 2019-2020 or 2020-2021 school year were interrupted, reduced, delayed, suspended, or discontinued; and whether compensatory educational services are appropriate for the student. *Id.*

Petitioner alleged this issue in the complaint; however, no evidence was presented at hearing regarding this issue, and Petitioner's closing brief did not address it. The evidence showed the District addressed the COVID-19 Special Education Recovery Act in the ARD Committee meetings as noted in the Committee deliberations. Petitioner did not meet Petitioner's burden of proving the District failed to provide compensatory relief as required by the COVID-19 Special Education Recovery Act (SB 89).

**J. Procedural Issues**

Petitioner alleges 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).

The evidence showed the District did not significantly impede Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE or that this alleged violation caused a deprivation of educational benefit. As discussed above, Parent attended ARD Committee meetings with multiple professional support people, participated in the discussions about Student's program, and all meetings prior to April 2023 ended in agreement. Also, the District conducted evaluations at Parent's request, and Student made academic and non-academic progress.

Petitioner failed to meet Petitioner's burden on this claim.

## **V. CONCLUSIONS OF LAW**

1. The burden of proof in a due process hearing is on the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. The District provided Student a FAPE during the relevant time period, and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188, 203-04 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

3. The District met its obligation to conduct necessary and timely evaluations of Student. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303.
4. Student continues to be eligible for special education and related services as a student with emotional disturbance and other health impairment. 34 C.F.R. § 300.8(c)(4)(i), (9); 19 Tex. Admin. Code § 89.1040(c)(4), (8).
5. Petitioner failed to show Student required COVID-19 compensatory services. Tex. Educ. Code § 29.0052.

## **VI. ORDER**

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

**Signed January 25, 2024**

ALJ Signature:



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Kasey White

Presiding Administrative Law Judge

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

The Decision of the hearing officer 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; 19 Tex. Admin. Code § 89.1185(n).