

**DOCKET NO. 192-SE-0220**

**STUDENT, B/N/F PARENT,  
Petitioner**

v.

**MCKINNEY INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student, by next friend Parent (Student or, collectively, Petitioner), brought this action against McKinney Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations.

Petitioner requested a due process hearing on February 24, 2020, with notice issued by the Texas Education Agency (TEA) the next day. Respondent filed a Response on March 6, 2020.

The main issue in this case is whether the District denied Student a free, appropriate public education (FAPE) by failing to develop an appropriate Individualized Education Program (IEP) reasonably calculated to enable Student to make progress in light of Student's unique circumstances.

The Hearing Officer concludes the District provided Student a FAPE. Petitioner's requested relief is therefore denied.

**II. DUE PROCESS HEARING**

The due process hearing was held remotely via Zoom June 8-9, 2020, and recorded and transcribed by a certified court reporter.

Petitioner was represented by Petitioner's legal counsel, Jordan McKnight. Debra Liva, parent advocate, assisted as part of the legal team. Student's parents attended the hearing.

Respondent was represented by Rebecca Bradley, assisted by co-counsel, Sadia Ahmed. In addition, \*\*\*, the District's Director of Special Education, attended as the party representative. The parties filed timely written closing briefs. The Hearing Officer's Decision is due on July 24, 2020.

### **III. ISSUES**

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

Petitioner raised the following issues for decision:

#### **EVALUATION AND IDENTIFICATION**

- Whether the District failed to timely identify and/or appropriately evaluate Student for eligibility as a student with Autism.
- Whether the District failed to timely identify and/or appropriately evaluate Student for a Specific Learning Disability (SLD) in reading and math.
- Whether the District failed to appropriately evaluate Student for a speech impairment, to include pragmatic speech.
- Whether the District failed to timely evaluate Student for occupational therapy (OT).

#### **FREE, APPROPRIATE PUBLIC EDUCATION**

- Whether the District denied Student a FAPE by failing to consider and implement the strategies required in 19 Tex. Admin. Code § 89.1055(e).

- Whether the District denied Student a FAPE by failing to implement appropriate accommodations, supports, and goals related to Student's suspected learning disabilities.
- Whether the District denied Student a FAPE by failing to create speech goals to address issues with expressive and receptive language.
- Whether the District denied Student a FAPE by failing to implement appropriate OT goals, including those recommended in a private OT evaluation obtained by the parent.
- Whether the District denied Student a FAPE because Student's IEP was insufficient, and failed to provide meaningful benefit.
- Whether the District denied Student a FAPE by failing to adequately implement Student's IEP.
- Whether the District denied Student a FAPE by failing to develop appropriate behavior goals.
- Whether the District denied Student a FAPE by failing to target specific behaviors in Student's Behavior Intervention Plan (BIP), and failing to timely update the BIP despite ongoing and increasing behaviors.
- Whether the District failed to conduct a functional behavioral assessment (FBA) after finding an alleged \*\*\*, 2019 behavioral incident was not a manifestation of Student's disability, and failed to create goals to address the alleged behavior.
- Whether the District failed to provide Student a FAPE by failing to offer any support, or otherwise adequately address, Student's \*\*\*.
- Whether the District denied Student a FAPE by failing to take appropriate action to address bullying concerns.
- Whether the District denied Student a FAPE when teachers refused to provide the accommodations in Student's IEP.
- Whether the District denied Student a FAPE by failing to provide Extended School Year (ESY) services.

### **RELATED SERVICES**

- Whether the District failed to provide a sufficient amount of OT, as recommended by the private OT evaluation obtained by the parent.

- Whether the District failed to provide Student sufficient social skills training, and/or sufficient therapy/support, to allow Student to achieve independence and develop positive behavioral intervention strategies.
- Whether the District failed to provide Student counseling.

**B. Petitioner's Requested Relief**

1. An order finding the District denied Student a FAPE;
2. An order directing the District to provide an Independent Educational Evaluation (IEE) at District expense in all areas of actual or suspected need, including but not limited to: cognitive and achievement testing, a complete psychological evaluation for all suspected or known disabilities, to include Autism, an FBA, speech, OT, and counseling;
3. A one-time medical evaluation for Other Health Impairment (OHI) eligibility, including but not limited to, evaluations for Attention Deficit Hyperactivity Disorder (ADHD) and Autism;
4. An order directing the District to establish an interim BIP pending any evaluations, to include the IEE, that addresses Students unique needs;
5. An order directing the District to convene an Admission, Review, and Dismissal (ARD) Committee meeting after the IEE is complete to establish supports, accommodations, and specific and measurable goals to address Student's unique needs;
6. An order directing the District to facilitate and fund participation of each IEE evaluator at an ARD Committee meeting where the testing is reviewed;
7. An order directing the District to provide compensatory education and related services to address Student's area of disabilities and/or needs including, but not limited to OT, speech therapy, tutoring, social skills training, counseling, and Applied Behavioral Analysis therapy;
8. An order directing the District to provide training by a certified behavior specialist to all staff working with Student on Student's specific areas of need and disabilities;
9. Reimbursement of parental expenses for educational or diagnostic services;
10. Attorney's fees (dismissed under 19 Tex. Admin. Code § 89.1192); and
11. Any and all other remedies Petitioner may be entitled to under the law.

### C. The School District's Legal Position

The District generally denied the allegations, and maintains it provided Student a FAPE at all relevant times. The District also raised the below affirmative defense:

**STATUTE OF LIMITATIONS:** Whether any of Petitioner's claims accruing outside of the one year statute of limitations should be dismissed.

### IV. FINDINGS OF FACT

1. Student is \*\*\* year-old, \*\*\* grade student in the District. Student lives with Student's parents \*\*\*. At home, Student is \*\*\*. Student enjoys \*\*\*.<sup>1</sup>
2. Student is currently eligible for special education as a student with an Emotional Disturbance (ED), Speech Impairment, and an Other Health Impairment (OHI) for ADHD.<sup>2</sup>
3. Student was referred for a special education evaluation by the District's Response to Intervention Team in April 2015 due to significant behavioral concerns and lack of progress in all academic areas. An ARD Committee convened in August 2015 to review a Full and Individual Evaluation (FIE) completed in June 2015, and found Student eligible for special education as a student with an ED and Speech Impairment. The ARD Committee developed an IEP with academic goals, a BIP, a social skills group, and speech therapy.<sup>3</sup>
4. Student has difficulty with Student's behavior in school. Student struggles to \*\*\*. Student also has difficulty effectively expressing \*\*\*self. Student may \*\*\*. Student engages in \*\*\*, and has few coping strategies.<sup>4</sup>
5. Student has difficulty learning in the general education classroom and receives instruction in a resource classroom in English Language Arts and Reading (ELAR) and Math. Student also receives social skills training in one-on-one and group settings, and one-on-one speech therapy. Student works best in a small group setting where Student can follow directives and classroom expectations, and keep Student's hands, feet, and objects to \*\*\*self. Student understands what is asked of Student, but at times exhibits behaviors that impedes Student's learning and that of others.<sup>5</sup>

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<sup>1</sup> Joint Exhibit (JE) 3, p. 42.

<sup>2</sup> JE 1, p. 22-24.

<sup>3</sup> JE 1; JE 7, p. 224-236, 245-247.

<sup>4</sup> JE 1, p.13-14; JE 3, p.47; Petitioner's Exhibit (PE) 3, p.1.

<sup>5</sup> JE 12, p. 3-4; JE 14, p.5; JE 15, p. 28.

**2018 Full Individual Evaluation**

6. The District provided a Notice of Proposal to Evaluate on November \*\*\*, 2017, and obtained parental consent to conduct the evaluation on January \*\*\*, 2018.<sup>6</sup>
7. The Licensed Specialist in School Psychology (LSSP), administered the Woodcock-Johnson IV (WJ-IV), which tests seven areas of cognitive abilities, including: Oral Vocabulary, Number Series, Verbal Attention, Letter-Pattern Matching, Phonological Processing, Story Recall, and Visualization. Student did well on tasks that were visual and engaging, but struggled with more abstract tasks, scoring in the below average range in general intellectual ability when compared to same-aged peers.<sup>7</sup>
8. The evaluator assessed Student's social, emotional, and behavioral functioning using various measures including staff observations, rating scales, parent and teacher information forms, and review of Student's background/history and educational records. The Behavioral Assessment System for Children, Third Edition (BASC-3), which measures behavior, social skills, and emotional development, showed Student's behavior in school influences Student's learning, behavioral patterns, educational placement, programming, or discipline. As a result of Student's BASC-3 results, the evaluator recommended continuing eligibility under the ED classification.<sup>8</sup> On the BASC-3 rating scale, Student received \*\*\*, with Student's teacher reporting more clinically significant scores when compared to the parent. The score in each domain assessed indicated the behaviors were observed in both the home and school environments.<sup>9</sup>
9. The District evaluated Student's communication skills through formal and informal testing, including in-person observation and parent and teacher information. The evaluator used the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), to measure Student's general language ability with various subtests, including word class, following directions, formulating sentences, recalling sentences, sentence assembly, semantic relationships, core language, receptive language, expressive language, and language memory.<sup>10</sup>
10. The CELF-5 showed Student exhibited strengths in expressive language. Student could also appropriately use basic vocabulary in grammatically correct sentences and express \*\*\*self in the classroom. Student struggled with receptive language, including following oral directions, and recalling sentences during standardized tests. Results indicated Student has difficulty comprehending grade-level information and does not learn vocabulary at the same rate as classmates. Neither formal nor informal testing showed impairments in the

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<sup>6</sup> JE 2, p. 39.

<sup>7</sup> JE 3, p. 49-50.

<sup>8</sup> *Id.*, p. 41-49.

<sup>9</sup> Tr. Vol.11, p. 156-157; JE 3, p.49.

<sup>10</sup> *Id.*, p. 42-46.

area of pragmatic language.<sup>11</sup>

11. The FIE recommended strategies to help Student achieve and maintain satisfactory progress in the area of language/communication, including one-on-one or small group pre-teaching of vocabulary and concepts before introduction in a large group setting, and checking often for understanding and attention. Student continued to be eligible as a student with a Speech Impairment.<sup>12</sup>
12. The FIE also assessed Student's adaptive behavior functioning through observations, parent and teacher reports, and student interview, in communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Student's overall adaptive behavior was considered within normal limits.<sup>13</sup>
13. The FIE documented one behavioral incident, \*\*\*, 2018.<sup>14</sup> However, during the 2017-18 school year, Student had \*\*\* days with reported behavior, and \*\*\* behavior incidents, for a total of \*\*\*.<sup>15</sup> The LSSP who prepared the FIE did not utilize all available resources to review Student's behavior data, specifically the Antecedent Behavior Consequence (ABC) data collection.<sup>16</sup>
14. Student's academic performance was evaluated through informal and/or formal testing. These measures included parent and teacher summary reports, report cards, District assessments such as the Measure of Academic Progress (MAP), and iStation Reading Program results. On MAP testing in spring 2018, Student received a score, placing Student in the \*\*\* percentile. iStation results from January 2018 ranked Student in the \*\*\*.<sup>17</sup>
15. The evaluator administered the Woodcock-Johnson IV Achievement Test (WJ-IV), which measures academic achievement. Student performed below grade level expectations in \*\*\*. These results indicate Student would likely experience difficulties with age-level tasks in these areas. Student was on grade-level in \*\*\*, in the average range. Student could express Student's ideas in \*\*\*.<sup>18</sup>
16. The May 2018 FIE confirmed Student's continuing eligibility as a student with an ED,

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<sup>11</sup> *Id.*, p. 45, 61; Transcript (Tr.) Vol. II, p. 210.

<sup>12</sup> JE 3, p.46.

<sup>13</sup> JE 3, p. 50.

<sup>14</sup> JE 3, p. 47.

<sup>15</sup> JE 15, p.355; PE 7.

<sup>16</sup> Tr. Vol. II, p. 150-153.

<sup>17</sup> JE 3, p. 52-53.

<sup>18</sup> *Id.*, p. 50-55.

Speech Impairment in receptive and semantic language, and OHI for ADHD.<sup>19</sup> The FIE recommended accommodations and teaching strategies, which included \*\*\*.<sup>20</sup>

### Student's 2018-19 Individualized Education Plan

17. Student's ARD Committee convened on May \*\*\*, 2018 to consider the FIE, and design an IEP addressing identified problems with behavior, social skills, and speech and language. The ARD committee developed a BIP based on the May 2018 FIE's recommendation to target behaviors such as: \*\*\*.<sup>21</sup> Student's parent attended the meeting.<sup>22</sup>
18. The ARD Committee considered Student's Present Levels of Academic Achievement and Functional Performance (PLAAFPs). In the area of behavior, Student had mastered each of Student's behavioral goals from the 2017-18 school year, including \*\*\*.<sup>23</sup> In the area of communication, Student mastered Student's speech goals, \*\*\*, but continued to need speech therapy to address receptive and semantic language deficits. Student also mastered Student's ELAR and math goals.<sup>24</sup>
19. The ARD Committee developed sixteen annual goals for the 2018-19 school year. In \*\*\*, Student had four goals and four objectives targeting \*\*\*. In Language Arts, Student had five goals and five objectives targeting Student's \*\*\*. In Mathematics, the ARD Committee developed four goals and four objectives targeting \*\*\*.
20. The May 2018 IEP included three Behavior goals:
  - \*\*\*;
  - \*\*\*; and
  - \*\*\*.<sup>25</sup>
21. The ARD Committee adopted accommodations recommended in the May 2018 FIE, including \*\*\*.<sup>26</sup> Based on the 2018 FIE, the ARD Committee found Student required certain assistive technology (AT), including \*\*\* for behavior.<sup>27</sup>

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<sup>19</sup> *Id.* p. 41, 58-61.

<sup>20</sup> *Id.*, p.56.

<sup>21</sup> *Id.*, p. 128-129.

<sup>22</sup> *Id.*, p. 155.

<sup>23</sup> JE 8, p. 131-132; Tr. Vol. II, p.159-162.

<sup>24</sup> JE 8, p.130-132.

<sup>25</sup> *Id.*, p. 142-143.

<sup>26</sup> JE 8, p. 144.

<sup>27</sup> JE 8, p. 136-137.



22. Student's schedule of services called for ELAR \*\*\* minutes per week, and \*\*\* classroom for \*\*\* minutes per week. Student also received \*\*\* weekly of social skills group services in the resource classroom. Student's placement was the general education classroom with supports for \*\*\* weekly. The IEP also called for Speech therapy for a minimum of \*\*\* minutes per week per \*\*\* grading period in the \*\*\*.<sup>28</sup>
23. The ARD Committee updated Student's BIP to target \*\*\*. The BIP listed behavior management techniques to avoid, \*\*\*.<sup>29</sup> The BIP listed a number of prosocial strategies to implement, such as \*\*\*. The BIP included suggestions for adapting the classroom environment, including \*\*\*.<sup>30</sup>

### The 2018-19 School Year

24. During the 2018-19 school year, Student's \*\*\* grade year, Student's general education classroom was a "\*\*\*\* classroom," which means the classroom had few \*\*\*.<sup>31</sup> Student's parents noted an escalation of behaviors, and grew concerned the classroom was not structured enough. The parents also contacted the District on December \*\*\*, 2018 about failing to provide \*\*\* in the classroom, as required by Student's IEP. Student's teacher provided \*\*\* \*\*\*, \*\*\*.<sup>32</sup> Student responded well to \*\*\* when Student became frustrated.<sup>33</sup>
25. On \*\*\*, 2018, Student allegedly \*\*\*.<sup>34</sup> Student's IEP was amended on December \*\*\*, 2018 to add another behavioral goal to address renewed.<sup>35</sup>
26. Student's IEP was amended again on December \*\*\*, 2018 to add new goals for Speech Therapy because Student mastered all goals.<sup>36</sup> A Speech and Language Pathologist (SLP) who has worked with student since \*\*\* identified some issues with pragmatic speech, and the District modified Student's IEP to include \*\*\*.<sup>37</sup>
27. On March \*\*\*, 2019, the District responded to a report from Student's parent about \*\*\*. The District did not address the complaint as a disciplinary matter or investigate because the allegation occurred off school property, but offered to \*\*\*, which was acceptable to

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<sup>28</sup> *Id.*, p. 150.

<sup>29</sup> *Id.*, p. 158-159.

<sup>30</sup> *Id.*, p. 160.

<sup>31</sup> PE 13; Tr. Vol. II, p. 172-173.

<sup>32</sup> PE 10; JE 8, p. 160; Tr. Vol. II, p. 181-82, 311; Tr. Vol. V, p. 442-44.

<sup>33</sup> JE 12, p. 262.

<sup>34</sup> PE 6, p. 103.

<sup>35</sup> JE 9, p.173-174, PE 11, p. 312-313.

<sup>36</sup> JE 10, p.176-178; JE 25, p. 428-29.

<sup>37</sup> PE 5, p. 61; Tr. Vol. II, p. 224.

- Student's parents.<sup>38</sup> Student's parent also expressed frustration Student was \*\*\*.<sup>39</sup>
28. Student's ARD Committee met on March \*\*\*, 2019 to consider an outside OT evaluation completed on March \*\*\*, 2019. Based upon standardized testing, Student indicated a need for \*\*\*.<sup>40</sup> OT goals were added to Student's IEP to address \*\*\*.<sup>41</sup> Student would receive \*\*\* minutes of OT quarterly, with a minimum of \*\*\* minutes per week.<sup>42</sup>
29. The ARD Committee modified Student's IEP to include two goals based upon the private OT evaluation, including a Language Arts goal to improve \*\*\*, and a behavior goal to improve \*\*\*.<sup>43</sup> The ARD Committee also adopted accommodations to assist Student with meeting the OT goals, including pairing visual supports with verbal information; \*\*\*.<sup>44</sup>
30. The ARD Committee completed an FBA at the March 2019 meeting, and developed a BIP targeting \*\*\*. Student's teachers reported behaviors including \*\*\*. The behaviors tended to occur during \*\*\*. When a \*\*\* occurred, interventions included \*\*\*. Functional Analysis Screen Tool (F.A.S.T.) scoring indicated the potential sources of reinforcement for Student's behaviors are \*\*\*.<sup>45</sup>
31. Student's IEP was also modified to include three behavior goals targeting refusal behaviors in the form of \*\*\*. The ARD Committee also developed a plan to help \*\*\*.<sup>46</sup>
32. Student's performance on the State of Texas Assessments of Academic Readiness (STARR) exams improved from the 2017-18 school year in the areas of \*\*\*, with accelerated progress in \*\*\* and expected progress in \*\*\*.<sup>47</sup> Student mastered all speech therapy and math goals, but did not make sufficient progress on three of the IEP's Language Arts goals.
33. Student mastered one behavioral goal on \*\*\*, but did not make sufficient progress on the other three behavioral goals, including \*\*\* behaviors based on Student's BIP.<sup>48</sup>
34. Student was multiple grade levels behind in ELAR, Math, and social skills, and required

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<sup>38</sup> JE 62, p. 1013; PE 22.

<sup>39</sup> PE 22, p.325.

<sup>40</sup> JE 4, p. 71.

<sup>41</sup> PE 3 p.2; JE 12, p. 9, 23, Tr. Vol. III, p. 350-64.

<sup>42</sup> JE 12, p. 245, 250; Tr. Vol. III, p. 323-25.

<sup>43</sup> JE 4, p. 71-72; Tr. Vol. III, p. 328.

<sup>44</sup> *Id.*, p. 236.

<sup>45</sup> JE 12, p. 260-265.

<sup>46</sup> *Id.*, p. 248, 253.

<sup>47</sup> RE 26; Tr. Vol. IV, p. 445-46.

<sup>48</sup> JE 25, p. 428-37.

extensive supports to access the general education curriculum. Student is not expected to progress at the same rate or level of rigor as grade level peers.<sup>49</sup>

35. The March 2019 ARD Committee developed seventeen annual goals. In Speech Therapy-Language, Student had four goals and four objectives targeting \*\*\*. In Language Arts, Student had five goals and five objectives targeting Student's ability to \*\*\*. In Mathematics, the ARD Committee developed four goals and four objectives targeting \*\*\*.<sup>50</sup>
36. In the area of Behavior the ARD Committee developed four goals and four objectives targeting Student's ability to \*\*\* with the consent and agreement of Student's parent.<sup>51</sup>
37. The ARD Committee considered, along with Student's parent, if Student needed Extended School Year (ESY) services and it was not recommended by either Student's parent or the District.<sup>52</sup>
38. Notices of Procedural Safeguards were provided to Student's parents at the March \*\*\*, 2019 ARD Committee meeting, and previous annual meetings in August 2015, May 2016, April 2017, and May 2018.<sup>53</sup>

### The 2019-20 School Year

39. Student began the 2019-20 school year with \*\*\* days with behavioral incidents, including \*\*\*, for a total of \*\*\* minutes of time involving behaviors.<sup>54</sup>
40. On September \*\*\*, 2019, after being asked about a \*\*\*. Student's parent was contacted, and \*\*\* proposed convening an ARD Committee meeting to consider revisions to Student's IEP.<sup>55</sup>
41. \*\*\*, Student \*\*\*. The ARD Committee convened on September \*\*\*, 2019, and found the alleged behavior was not a manifestation of Student's disability, or a result of the District's failure to implement Student's IEP. As a result, the Committee recommended \*\*\* days of Out of School Suspension (OSS) and \*\*\* days at a Disciplinary Alternative Education Program (DAEP).<sup>56</sup>

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<sup>49</sup> JE 12, p. 226.

<sup>50</sup> *Id.*, p. 229-235.

<sup>51</sup> *Id.*, p. 229-33.235.

<sup>52</sup> *Id.*, p. 244.

<sup>53</sup> JE 8, p. 155-157; JE 12, p.251-52; PE 4, p.45-47; PE 5, p.84-86.

<sup>54</sup> JE 15, p. 353-55. JE 52, p. 830-36.

<sup>55</sup> JE 75 p. 1166; JE 76, p. 1169.

<sup>56</sup> JE 6, p. 2; JE 14, p.5, 40, 55.

42. The ARD Committee also conducted a Review of Existing Evaluation Data (REED) to determine an appropriate evaluation plan following \*\*\* incident. Information was obtained from Student's parent, teachers, related service providers, current evaluations, and classroom observations. The ARD Committee recommended an FBA and Psychological Services Evaluation (PSE).<sup>57</sup>
43. Student's parent reported to the ARD Committee Student was \*\*\*. The District began an investigation the same day by interviewing Student, \*\*\*. The investigation was completed on October \*\*\*, 2019, and the District found no evidence Student was \*\*\*. The District took measures to \*\*\*.<sup>58</sup>
44. Student attended school at the DAEP from September \*\*\*, 2019 to November \*\*\*, 2019, and continued receiving resource supports and speech services. Student had one behavioral referral while in the DAEP on \*\*\*, 2019 for \*\*\*.<sup>59</sup>
45. The District contacted Student's parent on October \*\*\*, 2019 to offer a tour of the \*\*\* , self-contained behavioral placement Student could attend if the ARD Committee recommended a change to Student's placement after completion of the FBA and PSE.<sup>60</sup>
46. Student's parent's response to the District's offer to tour the \*\*\* was to inquire about \*\*\*.<sup>61</sup>
47. On November \*\*\*, 2019, with parental consent, the District completed the PSE recommended after \*\*\* incident and concerns about Student's lack of behavioral progress since Student's annual ARD Committee meeting in March 2019.<sup>62</sup> The PSE included parent and teacher information, and information from an interview with Student. The evaluation concluded Student would benefit from direct psychological services to support progress on Student's IEP goals. The ARD Committee also proposed placement in the \*\*\* program, with \*\*\* minute sessions of psychological services, with the possibility of additional time if significant concerns were still present after the \*\*\* direct sessions.<sup>63</sup>
48. Student's \*\*\* as observed during the PSE are attributable to Student's primary disability of ED. The LSSP who did the PSE observed \*\*\*, and patterns of behaviors in a student with an ED and Autism have significant overlap. However, the LSSP did not suspect Autism because Student was already identified as a student with ED.<sup>64</sup>

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<sup>57</sup> *Id.*, p. 325-326.

<sup>58</sup> RE 15; Tr. Vol. IV, p. 499-500.

<sup>59</sup> JE 14, p.319; JE 70, p. 1089.

<sup>60</sup> JE 79, p. 1184.

<sup>61</sup> *Id.*, p. 1189.

<sup>62</sup> JE 43, p. 582; JE 5, p. 80.

<sup>63</sup> JE 6, p. 82; JE 12, p. 220.

<sup>64</sup> Tr. Vol. II, p. 276-77.

49. The ARD Committee completed Student's FBA on November \*\*\*, 2019. The ARD Committee identified new inappropriate behaviors of \*\*\* in response to a significant behavioral incident. The ARD Committee continued to find behaviors of \*\*\*. Student engaged in the identified behaviors to\*\*\*.<sup>65</sup>
50. In a November \*\*\*, 2019 notice the District proposed convening an ARD Committee meeting on November \*\*\*, 2019 to consider any educational or related service not proposed, any new evaluations, IEP development and review, placement change, initiate or change elements of Student's program. An updated Student's BIP in anticipation of the meeting, which was on November \*\*\*, 2019 but was subsequently cancelled by Student's parent.<sup>66</sup> The BIP targeted \*\*\*. The District also planned to propose a change in placement to the \*\*\* to address Student's need for additional social skills support and direct social skills instruction.<sup>67</sup>
51. Student's IEP was amended on January \*\*\*, 2020, with the consent of Student's parents, to add another accommodation to \*\*\*. Student could \*\*\*.<sup>68</sup>
52. Petitioner filed a due process complaint on February 25, 2020, and invoked stay put. As a result, Student did not attend the \*\*\* placement.
53. The District sent subsequent ARD Committee meeting notices to Student's parents on March \*\*\*, and \*\*\*, 2020. Student's parents did not agree to attend any of the meetings.<sup>69</sup>
54. By March \*\*\*, 2020, Student mastered each speech therapy goal and reading goal, three of five Mathematic goals, and was a work in progress on Student's behavioral goals, based on progress reports. Student also mastered each OT goal, including \*\*\*.<sup>70</sup>

## V. DISCUSSION

### A. 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

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<sup>65</sup> JE 15, p. 377-78.

<sup>66</sup> JE 15, p. 371, 388-92.

<sup>67</sup> JE 6, p. 2; JE 15, p. 382-84; Tr. Vol. I; p. 114, 116.

<sup>68</sup> JE 16.

<sup>69</sup> RE 5, 6, 7, 8.

<sup>70</sup> RE 36.

FAPE within two years of the date the parent knew or should have known about the alleged action forming the basis of the complaint. 20 U.S.C. § 1415(b)(6)(B); 34.C.F.R. § 300.507(a)(1)(2).

The two year limitations period may be more or less if a state has an alternate time limitation for requesting a hearing, in which case state timelines apply. 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Texas regulations require a parent to request a hearing within one year of the date the parent knew or should have known (i.e. discovered) of the alleged action(s) forming the basis of the petition. 19 Tex. Admin. Code § 89.1151(c).

The one year statute of limitations rule will not apply in Texas if the parent was prevented from requesting a due process hearing due to either:

1. Specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or
2. The school district withheld information from the parent that it was required to provide under IDEA. 20 U.S.C. § 1415 (f)(3)(D); 34 C.F.R. § 300.511 (f)(1)(2).

Petitioner raised the second exception, alleging the District withheld information required under IDEA.<sup>71</sup> The District raised the one year statute of limitations as an affirmative defense.<sup>72</sup> When a school district delivers a copy of IDEA procedural safeguards to a parent, the statute of limitations period for IDEA violations begins regardless of whether the parent later examines the text to acquire actual knowledge of procedural rights – the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008), *rev'd on o.g.*, 591 F.3d. 417 (5th Cir. 2009).

The evidence showed Student's parents received Notices of Procedural Safeguards at least annually since 2015. Petitioner also stipulated to receiving notices for all ARD Committee meetings

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<sup>71</sup> Order No. 2 - Memorializing the Prehearing Conference (March 13, 2020) at p. 2 PHC Transcript (March 12, 2020) at p. 5-6.

<sup>72</sup> Respondent's Response to Due Process Complaint (March 6, 2020) at p. 1.

up to March 2019. The evidence also showed Student's parents received a Notice of Procedural Safeguards in connection with the March \*\*\*, 2019 annual ARD Committee meeting.

Student's causes of action accrued when Student's parent knew, or had reason to know, of the injury forming the basis of the complaint. *See Doe v. Westerville City Sch. Dist.*, 50 IDELR, 132, p. 5-6 (D.C. Ohio 2008). Petitioner filed a due process complaint on February 25, 2020. Texas courts have consistently ruled that claims arising prior to one year before the date of filing of a request for a due process hearing are time-barred. *Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 591 (W.D. Tex. 2006) (noting that "the statute of limitations precludes recovery for any procedural violations occurring prior to one year from the date that Plaintiffs filed their request for a due process hearing."); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 944 (W.D. Tex. 2008); *T.C. v. Lewisville Indep. Sch. Dist.*, 2016 WL 705930, \*9 (E.D. Tex. 2016). The date one year prior to the filing of the Complaint was February 25, 2019, the date on which Petitioner filed the Due Process Complaint. Any violations of the IDEA that may have occurred outside of those dates will not be considered in this case. The affirmative defense of the statute of limitations is granted.<sup>73</sup>

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

Students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). The District must offer a FAPE to all students with disabilities living in its jurisdiction between the ages of three and twenty-one. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). The District must provide these students specially designed, personalized instruction with sufficient support services to meet their unique needs so they may receive educational benefit. Instruction and services must be at public expense, and must comport with the IEP developed by an ARD Committee. 20 U.S.C. § 1401(9)(A)-(D); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

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<sup>73</sup> Petitioner, for the first time, in Student's closing brief raised the misrepresentation exception to the one year statute of limitations. The hearing officer declines to treat this issue, as it was not timely pled, and Respondent did not receive required notice. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

### C. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). The burden of proof is on Petitioner to show the District did not provide Student a FAPE.

### D. Free, Appropriate Public Education

#### The Four Factors Test

The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program meets the IDEA requirements, to include whether:

- The program is individualized on the basis of assessment and performance;
- The program is delivered in the least restrictive environment;
- Services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Positive academic and non-academic benefits are demonstrated.

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

These factors are indicators of an appropriate program, guiding the fact-intensive inquiry required to evaluate the educational program offered, and are not given any particular weight or applied a particular way. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009). See also, *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F. 3d 390, 397 (5th Cir. 2012).

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



To meet its obligation to provide a FAPE, a school district must ensure an IEP is in effect at the beginning of each school year. A student's IEP is more than a written statement of annual goals and objectives and how they will be measured, but must instead describe the ARD Committee's recommendations for a student's related services, supplementary supports and services, instructional arrangement, and program modifications. The IEP must also specify the supports and services a student will receive and designate staff to provide them, and include their duration, frequency and location. 34 C.F.R. §§ 300.22; 300.323(a).

In developing an IEP, the ARD Committee must consider student strengths, parental concerns for enhancing the student's education, results of the most recent evaluation data, and academic, developmental, and functional needs. The IEP must include a statement of PLAAFPs, including how the student's disability affects involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1)(i). For a student whose behavior impedes his or her learning or that of others, the IEP must consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i). The ARD Committee must review, at least annually, a student's IEP, and make any needed revisions to address lack of expected progress based on re-evaluations, parental information, or the student's anticipated needs, including behavioral needs. 34 C.F.R. § 300.324(b).

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 Ind. Sch. Dist. v. V.P.*, 582 F.3d 576, 583(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. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017).

The inquiry here is whether the IEP developed and implemented by the District during the relevant time period - February 2019 to present - was reasonably calculated to enable Student to make progress appropriate in light of Student's unique circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

The evidence showed Student's program was individualized on the basis of assessment and performance. A school district must conduct an FIE that meets certain requirements, and that determines whether the student has a disability, and his or her educational needs. 20 U.S.C. §§ 1414(a)(1)(A); 1414 (a)(1)(C)(i)(I)-(II); (b)(2)(A-C). Assessments and other evaluations must assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B).

Student was first identified as eligible for special education services as a student with an ED and Speech Impairment in 2015, with continued eligibility established by the May 2018 FIE. Student's eligibility as a student with an OHI for ADHD was confirmed by a medical doctor on May \*\*\*, 2018, and the ARD Committee added this classification at the May \*\*\*, 2018 ARD Committee meeting. Student's IEP goals and objectives were developed to address deficits in Speech Therapy-Language, Reading, Mathematics, Language Arts, and Behavior based upon deficits identified in the FIE. The ARD Committee considered Student's PLAAFPs, using them as the basis for Student's IEP goals and objectives, relying on assessments, progress reports, service providers, standardized tests, teacher input, as well as observations and parental input. As skills were mastered, or sufficient progress on a goal was not made, Student's ARD Committee updated or modified Student's IEP, with revisions to Student's IEP to reflect mastery or lack of progress on December \*\*\*, 2018.

To address Student's increased \*\*\* during the 2018-19 school year, the ARD Committee conducted an FBA in March 2019 to determine the nature, frequency, and impact of Student's behavior. The ARD Committee, utilized the FBA to develop a BIP targeting \*\*\*. The BIP contained goals for improving targeted behaviors, and positive strategies for staff to utilize, including techniques to \*\*\*, prosocial replacement behaviors, and identified antecedent events, classroom strategies, and consequences.

Petitioner argues, and points to Student's PSE to support the claim that, despite "mastering" Student's behavioral goals, even the District's LSSP believed Student continued working on the same behavioral goals every year, as reflected in IEPs from 2015 to March \*\*\*, 2019. However, the inquiry in this case 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. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017).

Student's BIP was modified multiple times to address Student's needs in response to increasing behaviors. While some of the targeted behaviors in the BIP remained the same, others changed, such as \*\*\*, and Student mastered this goal during the 2017-18 school year, and it was not included going forward.

The ARD Committee also considered Student's behavior at school, and found it did impede Student's learning or that of others, and otherwise addressed Student's behavioral needs. The evidence supports the conclusion Student exhibited a need for a BIP or other behavioral supports. 34 C.F.R. § 300.324(b); *V.P.*, 582 F.3d at 583.

Petitioner argues that the School District failed to timely update Student's BIP despite ongoing and increasing behaviors. The evidence shows that on September \*\*\*, 2019, Student \*\*\*. The \*\*\* recommended holding an ARD Committee meeting to consider revising Student's services and supports. \*\*\*. The ARD Committee conducted a REED on September \*\*\*, 2019 during the MDR. The sources of information consisted of parental input, the March 2019 FBA, and May 2018 FIE. This meeting was held timely following Student's significant behaviors, and resulted in an updated FBA on November \*\*\*, 2019. The FBA was used to make proposed revisions to Student's BIP for targeted behaviors, specifically \*\*\* for the ARD Committee's consideration on November \*\*\*, 2019. Since cancelling this meeting, the parties have not reconvened.

ARD committees may conduct a Review of Existing Evaluations and Data (REED), and as part of any reevaluation, must consider alongside qualified professionals, as appropriate, evaluations and information provided by the parent(s); current, classroom-based, local or state assessments and classroom-based observations; observations by teachers and related service providers; and on the basis of that review, to include input from the student's parent(s), identify what additional data, if any, is needed to determine: whether the student continues to be eligible for services under the IDEA, and his or her educational needs, PLAAFPs, related service needs, and whether additions

or modifications to the student's program are needed to allow the student to meet his or her IEP goals and participate, as appropriate, in the general education curriculum. 20 U.S.C. § 1414(c)(1)(A)(i)-(iii); (B)(i)-(iv).

During the fall of 2019, after Student's behaviors began to escalate and Student had a \*\*\*, Before proposing a change in placement, the District convened an MDR meeting, as required, and found this behavior was not a manifestation of Student's disability. The District members of the ARD Committee recommended a DAEP placement for \*\*\* days. The District also completed a new FBA and a PSE, which recommended direct psychological services to assist Student in making better progress on Student's IEP goals. The evidence showed the District's program was individualized on the basis of assessment, used positive behavior interventions and supports, and was designed to meet Student's unique needs. 34 C.F.R. § 300.324(a)(2)(i);

Related services may be required to assist a student with a disability in benefitting from special education. 34 C.F.R. § 300.34(a). The May 2018 FIE did not recommend related services, apart from speech therapy based on Student's identification as a student with a speech impairment in 2015, with continued eligibility established by the FIE. Student's speech needs were considered at every annual ARD Committee meeting, with goals and objectives developed by a Speech Therapist. Student received speech therapy for \*\*\* during the 2019-20 school year, delivered one on one or in small groups, to target identified needs in the areas of receptive and semantic language. Student's goals were modified in December 2018 to reflect Student's progress. This aspect of Student's IEP was individualized on the basis of assessment and performance.

If the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. § 300.502(c). The ARD Committee considered an outside OT evaluation at the March \*\*\*, 2019 annual ARD Committee meeting after Student was evaluated on March \*\*\*, 2019. The ARD Committee recommended OT as a related service in the school setting to support Language Arts goals in writing, and improved adaptive behavior with sensory processing skills. Student received OT for a minimum of \*\*\* minutes per week quarterly during the 2019-20 school

year. Student's goals were later modified to reflect progress in OT. The School District appropriately considered the outside OT evaluation data, and created measurable goals designed for Student to make progress. 34 C.F.R. § 300.502(c).

ESY services must be provided only if a student's IEP team determines, on an individual basis, that the services are necessary. 34 C.F.R. §300.103; 19 Tex. Admin. Code §89.1065. The need for ESY services must be documented and determine that a student has exhibited a severe or substantial regression that cannot be recouped in a reasonable period of time. 19 Tex. Admin. Code §89.1065(2). Petitioner complains Student was denied ESY services. Student made academic progress during the 2019-20 school year, and ESY was not necessary for Student to access Student's educational program, or achieve academically. 34 C.F.R. §300.103; 19 Tex. Admin. Code §89.1065

## **2. Least Restrictive Environment**

The evidence showed Student was educated in the least restrictive environment. The IDEA expresses a strong preference for inclusion of students with disabilities, and requires them to be educated with students without disabilities to the maximum extent appropriate and in the least restrictive environment appropriate to meet their needs. Special classes, separate schooling, or other removal from the regular educational environment may occur only when the nature or severity of a student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(1)(2)(i)-(ii); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009).

Students with disabilities must be educated with students without disabilities to the fullest extent possible, and consideration of a student's least restrictive environment includes an examination of the degree of benefit the student will obtain from an inclusive education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). A presumption in favor of the educational placement established by an IEP exists and the party challenging it bears the burden of showing why the educational setting is not appropriate. *Christopher M.*, 933 F.2d at 1291.

The IDEA's regulations require a school district to ensure availability of a continuum of instructional placements to meet the needs of students with disabilities, including instruction in regular classes, special classes, special schools, homes, hospitals, and institutions. 34 C.F.R. § 300.115. State regulations require school districts make available a continuum of instructional arrangements to meet the individualized needs of students with disabilities, including mainstream classes, homebound services, hospital classes, resource room and/or services, self-contained-regular campus (mild, moderate, severe), nonpublic day school, and residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

A two-part test with a presumption in favor of inclusion of students with disabilities determines whether removal from the general education setting is appropriate. First, whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. If not, second, whether the school district included the student to the maximum extent appropriate. *Daniel R.R.*, 874 F.2d at 1045. Consideration of several factors is required to resolve these inquiries, including:

- The nature and severity of the student's disabilities;
- Student's academic achievement;
- The non-academic benefits of regular classroom placement;
- The overall experience in the mainstreamed environment balancing the benefits of regular education and special education to the student; and
- The effect of the student's presence on the regular class, specifically whether the student's behavior so disruptive in the regular classroom that the education of the other students is significantly impaired and whether the student requires so much attention the needs of other students will be ignored. *Id.* at 1048-49.

No single factor in this non-exhaustive list is dispositive. *Id.* at 1048. The analysis must instead be an individualized, fact-specific inquiry that requires careful examination of the nature and severity of the student's disabilities, his or her needs and abilities, and the school district's response to those needs. *Id.* The issue of whether an IEP was implemented in the least restrictive environment is a relevant factor in making the overall determination whether the school district's

program provided the student FAPE. *Daniel R.R.*, 874 F.2d at 1049; *Michael F.*, 118 F.3d at 253; *R.H. v. Plano Ind. Sch. Dist.*, 607 F. 3d 1003, 1012-1013 (5th Cir. 2010).

The nature and severity of Student's disabilities impact Student's ability to be educated entirely in the general education classroom. Student requires specially designed below grade level instruction in \*\*\* classroom. Student is otherwise included in the general education classroom with Student's peers, including for \*\*\*. 34 C.F.R. §300.114.

Student is multiple grade levels behind in ELAR and Math, Student continued to require modified content in a \*\*\* setting to make progress. Student was placed in the general education classroom for \*\*\* classes, with behavior support, to allow Student to access the curriculum. The evidence showed that for the beginning of the 2019-20 school year, the District attempted to meet the IDEA's preference for mainstreaming children with disabilities with non-disabled peers to the maximum extent appropriate. 34 C.F.R. §300.114.

The evidence also showed that following a significant behavioral incident, the District considered the appropriateness of Student's placement, offering the parent a tour of the \*\*\*. Student's behavioral needs were no longer being effectively met under Student's current educational plan, even with continued behavior support, accommodations, and a BIP. The benefits of Student's placement in the resource and general education classroom were now outweighed by the disruptive nature of Student's behavior to Student's learning and the learning of Student's classmates. *Daniel R.R. v. El Paso Indep. Sch. Dist.*, 874 F. 2d 1036, 1049 (5th Cir. 1989). As to this factor, while placement in the resource and general education classroom was initially Student's least restrictive environment, the proposed change in placement to a \*\*\*, self-contained behavioral placement was reasonable when Student's needs changed over the course of the 2019-20 school year. To date, however, the parties have not convened to discuss the proposed placement change due to ongoing litigation.

Balancing the competing factors, Student was included to the maximum extent appropriate and Petitioner did not meet Petitioner's burden of showing the educational setting in Student's IEP was inappropriate, and Student requires a different educational setting. *Daniel R.R.*, 874 F.2d at

1049; 34 C.F.R. § 300.114.

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

Third, the evidence showed Student's services were provided in a coordinated and collaborative manner by key stakeholders.

The District met its obligation to convene an annual ARD Committee meeting from August 2015 to September 2019. These meetings were attended by the requisite members, including Student's Special Education teacher, a General Education teacher, a behavior coach, a speech therapist, an occupational therapist, and at least one of Student's parent. 34 C.F.R. § 300.321(a)(1)-(7).

Student's parent or parents attended all ARD Committee meetings in person, save for the November \*\*\*, 2019 ARD Committee meeting when they cancelled the meeting. They were routinely invited to share parental concerns, participated in the discussions, and asked questions of District personnel.

In December 2018, Student's parent first raised concerns regarding Student's \*\*\* in the classroom as written in Student's IEP. Staff explained Student was allowed \*\*\*. Student's parent requested the \*\*\*, and this was provided.

Petitioner argues the District predetermined a placement change before new evaluations were completed. However, the District began to consider a more restrictive placement only following \*\*\* incident. This significant behavioral event spurred appropriate discussion about whether Student's placement met Student's needs, and the parents were invited to tour \*\*\*. Student's parent responded via email to inquire about \*\*\*, and did not specifically object to the potential placement. The weight of the credible evidence supports the conclusion that Student's parents were able to access and participate in the IEP development process. 34 C.F.R. § 300.324(a)(1)(i-iv)



#### 4. Academic and Non-Academic Benefits

Fourth, the evidence supports the conclusion Student's program was reasonably calculated to provide meaningful educational benefit. *Rowley*, 458 U.S. at 206-207. The evidence also showed Student's program was appropriately ambitious in light of Student's unique circumstances. *Andrew F.*, 137 S. Ct. at 992.

The IDEA does not require an IEP to guarantee a certain level of accomplishment. It must instead be reasonably calculated to meet the student's educational needs given his or her unique circumstances. *Id.* A school district is not required to provide a student the best possible education, and improvement in every academic and non-academic area is not required to show benefit. The issue is thus not whether a school district could have done more, but whether the student received an educational benefit. *V.P.*, 582 F. 2d at 590. Importantly, whether a student demonstrates positive academic and non-academic benefits is 'one of the most critical factors in this analysis.' *Renee J. v. Houston Indep. Sch. Dist.*, 913 F.3d 523, 529 (5th Cir. 2019).

Academic benefit is not always the proper measure of progress, particularly for a student, like Student, with a cognitive impairment and other complex needs. Academic benefit, however, can be shown by progress on IEP goals and objectives. Student's goals and objectives reflect that Student's IEP was reasonably calculated to meet Student's needs given Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. at 999. Student received academic benefits from Student's educational program. See, *Houston Indep. Sch. Dist. v. Bobby R.*, 328 F.3d 804 (5th Cir. 2003).

The evidence showed the IEPs implemented during the 2019 spring semester until the beginning of March 2020 provided meaningful academic benefits. Although Student exhibited increased behaviors during this period, specifically during the fall of 2019, Student responded fairly well to \*\*\* implemented when Student becomes frustrated. While at the DAEP, Student had one behavioral incident where Student \*\*\*, but no further incidents of \*\*\* occurred. Progress reports reflect Student had mastered all of Student's speech therapy goals, all of Student's reading goals, and most of Student's math goals while making progress on the remaining goals in March

of 2020. Student did not master Student's behavioral goals, but made meaningful progress, even without a more restrictive placement, new BIP, and psychological services that the School District sought to propose at the ARD meeting in November 2019.

Student received non-academic benefits as well. Student mastered all of Student's speech therapy and OT goals. Student made so much progress in speech therapy, the frequency in service was reduced during the 2019-20 school year. While at the DAEP Student had one behavioral referral, Student did not have any more significant behavior incidents during the 2019-20 school year.

The basic floor of opportunity standard set forth in *Rowley* does not require a district to remediate a student's disability. When the four requirements set forth in *Cypress-Fairbanks v. Michael F.*, are met, a District satisfies its FAPE obligation. The weight of the credible evidence shows Student's program was individualized on the basis of assessment and performance, was delivered in the least restrictive environment, services were provided in a coordinated, collaborative manner by the key stakeholders, and Student made academic and non-academic progress. When Student's program is considered as a whole, Student was provided a FAPE by the District. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

#### **E. Evaluation and Identification**

Either a parent of a child or a school district may initiate a request for an evaluation to determine if the child is a child with a disability. 34 C.F.R. § 300.301 (b). The parent must provide consent for the evaluation. 34 C.F.R. § 300.300. Public agencies must ensure children are assessed in all areas related to the suspected disability including, if appropriate, social and emotional status. 34 C.F.R. § 300.304(c)(4).

Petitioner contends the District failed to identify and appropriately evaluate Student for eligibility as a student with Autism, because Student exhibited certain characteristics that can be attributed to Autism. The IDEA regulations define autism as a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident

before age three, that adversely affects a student's educational performance. 34 C.F.R. § 300.8(c)(1)(i). The LSSP who conducted the November 2019 PSE noted certain characteristics that could be related to Autism, but these characteristics are also present in students with ED. District staff also did not suspect Student may have Autism.

Other characteristics often associated with Autism include engaging in repetitive activities and stereotypical movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. *Id.* The evidence does show Student exhibited some of these characteristics, such as verbal communication issues, sensory processing issues and adaptability issues.

However, these characteristics are fully explained by Student's disability of ED. Under the IDEA, an ED is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (iii) inappropriate types of behavior or feelings under normal circumstances; (iv) a general pervasive mood of unhappiness or depression; or (v) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8 (c)(4)(i)(A-E).

Furthermore, a child should generally not be identified as a student with Autism if his or her educational performance is adversely affected primarily due to an ED. 34 C.F.R. §§ 300.8(c)(1)(ii), 300.8(c)(4).

A determination of whether a student was provided a FAPE also does not necessarily hinge on the student's eligibility classification. 20 U.S.C. § 1412(a)(3)(8); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997). *See also, Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). The purpose of categorizing a student with a disability is to attempt to meet his or her needs, but categorization is not an end to itself. *Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F. Supp. 2d 547, 557-558 (N.D. Ohio 2009).

Student was first evaluated and identified with a primary disability of ED in June 2015, and continued to meet ED eligibility criteria following the May 2018 FIE. The District attributed the Student's weaknesses in the area of receptive language, eye gaze, and social interactions to ED, and Petitioner failed to present sufficient evidence Student has Autism, and the District's programs accounted for these identified needs. Petitioner thus did not meet Petitioner's burden of proving the District should have suspected it, or needed to evaluate in this area.

Because the District did not fail to identify Student as a student with Autism, the hearing officer will not address whether the District denied Student a FAPE by failing to consider and implement the strategies required in 19 Tex. Admin. Code § 89.1055(e).

Petitioner next alleges the District failed to identify Student as a student with an SLD in reading and math. 34 C.F.R. § 300.8(c)(10)(i). The IDEA regulations define "SLD" as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. 34 C.F.R. § 300.8 (10).

Student's General Intellectual Ability fell in the below average range on the May 2018 FIE. The LSSP indicated that due to Student's inattentive behaviors due to ADHD, the General Intellectual Ability (GIA) scores are not believed to be accurate, and there is no evidence if it's likely higher or lower. The May 2018 FIE is outside the relevant time period, and did not find a learning disability explained Student's below grade level performance in reading comprehension, math calculation skills, and math problem skills. The weight of the credible evidence did not demonstrate eligibility for services as a student with a learning disability. 34 C.F.R. § 300.309(a)(3). Petitioner therefore did not meet Petitioner's burden on this claim.

#### **F. Related Services**

Related services mean whatever support services the student needs to assist the student in benefitting from the educational program. Related services can include counseling services, occupational therapy, parent counseling and training (to assist parents in understanding the special

needs of their child, providing information about child development, and helping parents acquire social skills to support implementation of the student's IEP); psychological services, therapeutic recreation services, school health services, social work services, and transportation. 34 C.F.R. § 300.34.

The District has provided speech therapy as a related service to Student at every annual ARD Committee meeting since 2015. Additionally, the ARD Committee considered Student's outside OT evaluation and recommended OT as a related service to support Student in Language Arts and Behavior. The record also reflects that direct psychological services were proposed by the District to assist Student in progressing on Student's IEP goals. Petitioner therefore did not meet Petitioner's burden on this claim.

#### **G. 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>).

Petitioner alleged Student was bullied at school, and the District failed to take appropriate action to address these concerns. Specifically, Petitioner contends that Student was bullied \*\*\*." Petitioner failed to establish Student was bullied at school. The evidence showed the incident reported by Student's parent on \*\*\*, 2020 did not occur on school property. The allegation reported by Student's parent on September \*\*\*, 2019 was not substantiated following an investigation. Student reported conflicts between \*\*\*, but the reports did not involve complaints that were severe, persistent or pervasive. Tex. Educ. Code § 37.0832. Conflict with peers was well-documented in Student's IEP, and Student received social skills training in the resource classroom to help Student appropriately engage with peers.

A school district's failure to stop bullying may constitute a denial of 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). Petitioner would also need to show the bullying resulted in a deprivation of meaningful educational benefit. *Id.* 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 Dept. of Educ.*, 779 F. Supp. 2d 289, 316 (S.D. N.Y. 2011). The bullying need not be outrageous, but sufficiently severe, persistent, or pervasive to create a hostile environment for the student with a disability. Petitioner does not need to show the bullying prevented all opportunity for an appropriate education, only that it is likely to impact a student's opportunity for an appropriate education. *Id.* at 779 F. Supp. 2d at 317.

In this case, the \*\*\*, 2019 incident did not occur on school property, the District, with Student's parents input, agreed to \*\*\*. The District conducted a two-week investigation of the \*\*\*, 2019 incident, but did not substantiate the bullying allegations. Nonetheless, the District took actions to \*\*\*. Petitioner did not meet Petitioner's burden on this issue.

## VI. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proof as the party challenging a student's IEP and educational placement. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. Student was provided a FAPE during the relevant time period, and Student's IEPs were appropriately ambitious and reasonably calculated to meet 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 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).

## VII. ORDERS

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

**SIGNED July 24, 2020.**



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**Yvonne Patton**  
**Special Education Hearing Officer**  
**For the State of Texas**

### **VIII. NOTICE TO 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); 19 Tex. Admin. Code Sec. 89.1185(n).