

DOCKET NO. 212-SE-0320

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, by next friend Grandparent (Student or, collectively, Petitioner), brought this case against the Killeen 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 March 3, 2020, with notice issued by the Texas Education Agency (TEA) the next day. Respondent filed an Objection for Insufficiency, Plea to the Jurisdiction, and Response on March 13, 2020. Petitioner filed an Amended Complaint on March 31, 2020.

Hearing Officer David Berger presided over the case until TEA issued Notice of Reassignment of Special Education Hearing Officer on June 15, 2020, assigning Kathryn Lewis the same day.

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 convened on June 23-25, 2020, and was recorded and transcribed by a certified court reporter.

Petitioner was represented by Devin Fletcher of the Cuddy Law Firm. Student's grandparent attended the hearing.

Respondent was represented by Jessica Witte, assisted by co-counsel Ashley Addo and Hailey Janecka. *** participated as the party representative for the District.

III. ISSUES

A. Petitioner's Issues

The Amended Complaint challenged Student's educational program for the 2019-20 school year, and raised the following legal issues for decision:

FAPE: Whether the District denied Student a FAPE by failing to respond to Student's changing academic and behavioral needs.

FAPE: Whether the District denied Student a FAPE by failing to develop an IEP reasonably calculated to enable Student to make academic progress.

NON-IDEA CLAIMS: Whether the District violated Student's rights under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

B. Petitioner's Requested Relief

1. An order finding the District denied Student a FAPE during the 2019-20 school by:
 - failing to develop an IEP reasonably calculated to enable academic and nonacademic progress consistent with Student's unique circumstances;
 - failing to re-evaluate Student appropriately in response to changing behaviors and ***;
 - failing to provide specialized instruction and related services tailored to Student's

- unique needs;
 - using disciplinary measures, including a general education disciplinary hearing, to punish Student for behaviors which are manifestations of Student's disability;
2. An order directing the District to conduct a Functional Behavior Analysis (FBA) performed by a masters or doctoral level Board Certified Behavior Analyst;
 3. An order directing the District to convene an Admission, Review, and Dismissal (ARD) Committee meeting to develop an appropriate program addressing Student's identified academic and non-academic needs, including but not limited to, an IEP:
 - accurately reflecting present levels of academic achievement and functional performance (PLAFFPs);
 - with appropriate goals and short-term objectives to address academic and behavioral needs;
 - with appropriate related services, including but not limited to, a reading program based in the Orton-Gillingham method to address Dyslexia;
 - providing services in Student's appropriate least restrictive environment (LRE), as recommended by Student's physician to safeguard health; and
 - includes comprehensive Behavior Intervention Plan (BIP) and behavior support services;
 4. An order directing the District to develop and implement a Safety Plan to protect Student from antagonism and bullying by peers;
 5. An order directing the District to provide and/or fund compensatory services, including for services to which Student was entitled, but did not receive, during the 2019-20 school year; and
 6. Any other appropriate relief.

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 defenses:

PLEA TO THE JURISDICTION: Whether a hearing officer has jurisdiction over claims arising under statutes other than the IDEA.

PLEA TO THE JURISDICTION: Whether a hearing officer has jurisdiction to award certain requested remedies.

IV. FINDINGS OF FACT

1. Student is a *** year-old *** grader who lives with Student's ***grandparent in ***, Texas. Student has attended school in the District since *** grade. Student's interests include ***. Student has friends, enjoys school, and is eager to learn.¹
2. An August 2011 parentally-obtained private psychological evaluation sought to address academic difficulties, and determine whether Student had Attention Deficit Hyperactivity Disorder (ADHD) or a developmental delay. The evaluation diagnosed Student with ADHD, Combined Type, and a Reading Disorder/Dyslexia. A 2016 Full and Individual Evaluation (FIE) and 2017 Independent Educational Evaluation (IEE) confirmed continuing eligibility under the IDEA as a student with an Other Health Impairment (OHI) due to ADHD. Student ***.²
3. Student continues to be eligible for special education under the OHI classification due to ADHD based on the August 2011 diagnosis and report. With few exceptions, this report is the extent of the medical information Student's grandparent has shared with the District. Student also meets criteria to receive Dyslexia services, but is not identified as a student with a Specific Learning Disability (SLD) under the IDEA.³
4. ADHD impacts Student's academic performance and success. Student's behaviors also impact Student's educational progress. The District implemented a BIP beginning in August 2016. Student has difficulty staying focused and on task, and is easily distracted by peers. Student may ***, and can be impulsive. Student, however, responds well to redirection at school.⁴
5. Student had *** disciplinary referrals for *** in the 2016-17 school year. Student's ARD Committee requested a counseling evaluation in 2016, Student's *** grade year, after several disciplinary referrals, and instances of verbal and ***towards peers and class disruption. The evaluation recommended counseling as a related service for ***-minute sessions per nine weeks to assist with developing positive coping strategies and managing negative emotions at school.⁵
6. The ARD Committee also requested a psychoeducational evaluation at the beginning of the 2016-17 school year to explore Student's eligibility for special education under another classification. A September 2016 report concluded Student did not qualify as a student with an Emotional Disturbance. It confirmed continuing eligibility as a student with an

¹ Petitioner's Exhibit (PE) 2 at 4; PE 5 at 1, 3; Transcript (Tr.) at 215, 357-58, 384.

² PE 1 at 1, 4; PE 6 at 7; Tr. at 308-09.

³ PE 6 at 19; Respondent's Exhibit (RE) 12 at 14; PE 8 at 4; Tr. at 170, 214-15, 262-63.

⁴ PE 2 at 3; PE 5 at 3, 6, 7; PE 8 at 5; PE 9 at 6; RE 7 at 25, 27; Tr. at 219.

⁵ PE 2 at 6; PE 5 at 8.

OHI due to ADHD. Counseling as a related service was not necessary at the time.⁶

7. District special education students are each assigned a case manager to work with them throughout ***. Student's case manager during the 2018-19 and 2019-20 school years was a special education teacher at Student's school. She was responsible for communicating with Student to ensure Student understood Student's IEP and accommodations, and with Student's grandparent, with whom she spoke two or three times a week. The case manager spoke with Student's teachers about Student's IEP and trained individual teachers on its content. She also sought and received feedback from Student's teachers and grandparent in developing Student's IEP and prepared a draft IEP incorporating this input before ARD Committee meetings.⁷
8. Student's grandparent is actively involved in Student's education, regularly communicates with Student's case manager and teachers, and attends all ARD Committee meetings. Grandparent also provides private supports and services, including private tutoring and outside counseling.⁸
9. The ARD Committee developed a behavior tracking form specific to Student to monitor behaviors targeted in Student's BIP, as reported on a daily basis by Student's teachers and captured in a spreadsheet. The case manager provided the weekly behavior tracking data to Student's grandparent at the end of the week. The FBA serving as the basis of Student's BIP was conducted in September 2016. Behaviors included class disruption, noncompliance, and***, including horseplay. The BIP targeted: (1) negative peer interactions, including ***; (2) not following directions, including refusal and arguing; and (3) ***. Student had no disciplinary referrals in the 2018-19 school year.⁹
10. Student's ARD Committee convened on December ***, 2018. The Committee conducted a Review of Existing Evaluation Data (REED) to include previous cognitive and academic achievement testing results, a cross-battery assessment finding Student did not meet criteria for services as a student with an SLD. The REED also featured oral language testing, and current social, emotional, and behavioral information. The Committee noted Student no longer received counseling as a related service because it was not needed, and Student attended private counseling.¹⁰
11. The December 2018 ARD Committee referred Student for a Dyslexia assessment, and an evaluation was completed in January 2019. Dyslexia is a disorder of phonological awareness and oral reading fluency, and/or oral reading fluency. The District uses Dyslexia

⁶ PE 4 at 10.

⁷ RE 19; Tr. at 148, 172, 425-27, 428, 440-41, 495.

⁸ PE 4 at 10; PE 5 at 2; PE 8 at 1; PE 9 at 1; PE 10 at 1; PE 11 at 1; RE 7 at 1; RE 8 at 1, RE 9 at 1 RE 10 at 1; Tr. at 358, 495-96.

⁹ PE 9 at 24-31; RE 8 at 24-31; Tr. at 112-13, 438, 496, 532.

¹⁰ RE 7 at 2-5.

assessors to test and identify students with Dyslexia, and uses the Wilson Reading Program with students with identified Dyslexia needs. The District supports Dyslexia instructors with initial training, and annual refresher courses. The Dyslexia assessor gave several tests, and considered Student's Match 2019 FIE, State of Texas Assessment of Academic Readiness (STAAR) testing, and District assessments, including Measures of Academic Progress (MAP) testing results.¹¹

12. On the Comprehensive Test of Phonological Processing, Second Edition, which assesses phonological awareness and memory and rapid naming, Student received scores from the *** to as high as the *** percentile. The Woodcock Reading Mastery Tests, Third Edition, assesses word identification, word attack, passage comprehension, listening comprehension, and oral reading fluency. Student showed particular deficits in passage comprehension and listening comprehension. On the Gray Oral Reading Tests, Fifth Edition, which tests reading rate, accuracy, fluency, and comprehension, Student performed in the low range. On the Test of Written Spelling, Fifth Edition, which assesses written spelling, Student scored in the average range.¹²
13. The January 2019 Dyslexia assessment revealed scattered scores, meaning Student's scores ranged from low to average, with specific weaknesses in comprehension. The assessment concluded Student has Dyslexia, but did not meet criteria under the IDEA as a student with Dyslexia. The assessor recommended direct Dyslexia services, so Student would attend class in the *** classroom for ***, and have access to the Dyslexia lab at any time. Student was placed on *** status due to receiving Dyslexia services previously. At the ARD Committee meeting where the evaluation was reviewed, Student's grandparent expressed concern Student did not meet criteria as a student an SLD and would give up *** to attend a class in the *** classroom.¹³
14. The Dyslexia Handbook provides guidelines for school districts to follow as they identify and provide services for Texas students with Dyslexia and related disorders. The purpose of The Dyslexia Handbook is to provide procedures for school districts, campuses, teachers, students, and parents/guardians in serving students with Dyslexia, including evaluation procedures.¹⁴
15. The District uses a cross-discipline approach for the delivery of special education services so students with learning disorders can access the services they need, even if identified as a student with an OHI. The District used the Wilson Reading Program as a Dyslexia

¹¹ RE 13; Tr. at 321, Tr. at 399-401.

¹² RE 13; 403, 405-07.

¹³ Tr. at 407-410, 412, 415-16, 419, 460, 507-08.

¹⁴ Texas Education Agency, The Dyslexia Handbook 2018 Update: Procedures Concerning Dyslexia and Related Disorders (Dyslexia Handbook) at x. Available at <https://tea.texas.gov/sites/default/files/2018-Dyslexia-Handbook-Approved-Accommodated-12-11-2018.pdf>.

intervention for all students, and Student continues to receive Dyslexia services under the Texas Dyslexia program.¹⁵

16. In December 2018, Student's grandparent requested further testing, and the District provided a Notice of Evaluation. Grandparent consented to testing in all areas, except emotional and behavioral. The FIE, completed in March 2019, was conducted by an experienced District diagnostician.¹⁶
17. On the Woodcock-Johnson IV Achievement Testing (WJ-IV), which measures academic achievement, Student received scores in the low or low average ranges in basic reading skills, reading comprehension, and reading fluency. These results indicate reading would be difficult for Student. Student performed in the low to low average ranges in math calculation and math problem solving, indicating Student would likely have difficulty with age-level math tasks even though Student's grades do not reflect these deficits. In written expression, Student scored in the average range, indicating average written sentence quality and fluency. The diagnostician did not find Dyslexia impacted Student's performance on the WJ-IV.¹⁷
18. On WJ-IV Test of Oral Language, Student received scores in the low range in oral language, oral expression, and listening comprehension. Each area of testing indicated Student would have significant difficulty succeeding on grade-level tasks. Student's oral language proficiency scores also suggested Student expresses ***self and listens at approximately the same level as Student's cognition, even if negatively impacted by ADHD. Scores on certain tests indicate ADHD and attentional issues are a concern. These results, and previous testing, reinforced the diagnostician's conclusion Student has an executive functioning problem with attentional issues caused by ADHD.¹⁸
19. Student's scores on the WJ-IV Test of Oral Language indicate Student's ability to understand instruction should be impacted. However, Student's actual performance in class indicates Student understands instruction well.¹⁹
20. Student was given the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), which tests cognitive abilities. Student received low average scores in the areas of verbal comprehension, visual spatial, and fluid reasoning. Student scored in the low range in working memory and processing speed. Student's Full Scale IQ, as measured by the WISC-V, was *** and in the very low range. That is consistent with the results in 2016.²⁰

¹⁵ Tr. at 251-52, 413.

¹⁶ PE 6 at 1-3; Tr. at 170, 244, 247.

¹⁷ PE 6 at 9-10; RE 12 at 4-5; Tr. at 215-16.

¹⁸ PE 6 at 10-11, 19; RE 12 at 5-6, 14; 217, 249.

¹⁹ Tr. at 217-18.

²⁰ PE 6 at 12-13, 17; RE 12 at 7-8, 12; Tr. at 219.

21. On the Woodcock-Johnson IV (WJ-IV), a comprehensive assessment of cognitive abilities, Student scored in the low average range on the concept formation subtest, a test of fluid reasoning. On the phonological processing subtest, a test of speed and long-term retrieval, Student received average scores. On the non-word repetition subtest of phonological processing, a test of auditory processing and short-term memory, Student performed in the low end of the average range. On the story recall subtest, which tests recollection of details, Student performed in the low range. Each area of cognitive assessment on the WJ-IV indicated Student would have difficulty with age level tasks.²¹
22. The WJ-IV's visual-auditory learning subtest tests long-term storage and retrieval, and Student performed in the average range. Each other area of visual-auditory learning assessment again indicated Student would have difficulty with age level tasks. On the auditory processing subtest, which tests ability to encode, synthesize, and discriminate auditory stimuli, Student performed near the lower end of the average range. Long-term retrieval is the ability to encode and retrieve information, and Student scored in the low average range on this subtest.²²
23. Student's adaptive skills were measured with the Adaptive Behavior Assessment System, Third Edition (ABAS-3), with both Student's grandparent and teachers reporting low average to average skill levels across adaptive domains, including conceptual, social, and practical. ABAS-3 results showed Student's adaptive skills appear higher and more developed than Student's measured cognitive ability, indicating age appropriate functioning commensurate with expectations.²³
24. Student performs better in school than Student's cognitive ability scores reflect, and Student's classroom progress and homework reflect understanding of the content. Student's classroom performance and performance on exams also differ, and Student does comparably poorer on timed exams, even with modifications and accommodations. The March 2019 FIE results indicated Student's attentional issues are significant enough to impair Student's working memory and ability to take in information, and also impair processing speed and performance, including on tests/exams. The District diagnostician opined ADHD may impact Student's performance to the extent it lowered Student's Full Scale IQ test results. The results, and average adaptive functioning, also confirmed Student does not have an intellectual disability.²⁴
25. The March 2019 FIE considered Student's eligibility under the IDEA as a student with an SLD, and again found Student was not eligible. Testing showed normative deficits in academic achievement in Basic Reading, Reading Comprehension, Reading Fluency, Math Calculation, Math Reasoning, Oral Expression, and Listening Comprehension. Student

²¹ PE 6 at 14-15; RE 12 at 9-10.

²² *Id.*

²³ PE 6 at 15-17; RE 12 at 10-12.

²⁴ PE 6 at 19; RE 12 at 14; Tr. at 217-19, 220, 221-22, 249-50, 261-62.

- met exclusionary factors, and did not display both cognitive/academic strengths and weaknesses, have an overall cognitive normative ability, and/or there was not a link between cognitive deficits and academic weaknesses.²⁵
26. Student's cognitive profile was also not indicative of a learning disability, because it shows pervasive weaknesses, rather than a pattern of strengths and weaknesses. Based on Student's below average cognitive skills, which are too low to show a learning disability, Student's learning difficulties are likely the result of a general cognitive weakness, or attention difficulties, or both. The March 2019 FIE showed continued need for services due to ADHD.²⁶
27. The March 2019 FIE did not specifically assess Student using executive functioning measures, but testing indicated ADHD impacts Student's ability to achieve in the classroom. An assessment generates a cognitive profile, and Student's cognitive profile has been consistent throughout Student's educational history, with scores indicating Student has low processing speed and working memory. Scores also reveal working and short-term memory deficits, impacting Student's ability to take new information, retain it for a short time, and then use it, which impacts academic achievement. ADHD, and attentional deficits, are the primary factors explaining why Student struggles in school.²⁷
28. Student's grandparent disagreed with the March 2019 evaluation and requested an IEE. Grandparent later withdrew the request.²⁸
29. Student took the *** assessment to get *** in April 2019, near the end of Student's ***. Student passed the writing and essay components, but did not pass either reading subtest. The District diagnostician theorized Student's relative success on the *** at Student's age may suggest Student's Full Scale IQ of *** is not accurate.²⁹
30. The ARD Committee convened on June ***, 2019 to discuss *****, Student's IEP, ***, and Extended School Year services. The Committee considered Student's State of Texas Assessment of Academic Readiness (STAAR) results, which measure a student's ability to comprehend grade level material. Student achieved passing scores in ***. Student did not pass ***, and understood and analyzed informational texts correctly *** times, with specific difficulty understanding and analyzing informational text. As a result, Student was invited to participate in *** tutoring sessions aimed at helping students pass end of course exams.³⁰

²⁵ PE 6 at 17-18; RE 12 at 12-13.

²⁶ PE 6 at 17-19; RE 12 at 12-14; Tr. at 251.

²⁷ Tr. at 323-25, 329-30.

²⁸ PE 9 at 41; RE 8 at 41; Tr. at 193, 253.

²⁹ PE 14 at 2; Tr. at 254.

³⁰ PE 9; PE 9 at 2; RE 8; RE 8 at 2; Tr. at 97-98, 173-74, 454-45, 522-23.

31. Student's grandparent requested ***** information, and the District provided several resources. Student's grandparent conveyed Student's interest in ***. A student survey indicated *** interests in***.³¹
32. The June ***, 2019 ARD Committee considered Student's Present Levels of Academic Achievement and Functional Performance (PLAAFPs). For academic performance, the Committee reviewed progress toward achieving goals in ***. Weekly progress data on behavior goals targeting following directions, *** was reviewed. Teachers reported Student was friendly and helpful in class, but at times had difficulty managing emotional needs at school. The District reviewed Student's accommodations. In functional domains, it was noted Student is persistent and tries to complete work. Student could also be easily distracted by peers and became upset, leading to classroom disruption if continuously distracted. A review of adaptive behavior needs showed Student needed for specialized instruction on social and interpersonal skills. Strengths included helping other students, and intrinsic motivation.³²
33. IEP goals should help a student grow in areas in which he or she has deficits, have a baseline, and be measurable. An ARD Committee can recommend from between 70% and 100% mastery of a particular goal, with 70% mastery most common in academic areas. Student's goals, required 85 to 95% mastery because Student was already performing above 70% in certain classes.³³
34. In June 2019, Student's IEP had academic goals and objectives in Science, English, Math, Social Studies. Each academic goal included summative and formative assessments. Formative assessments are short-term assessments after learning a particular series of information, and summative assessments occur at the end of a unit. Student's baseline based on previous performance was established, with mastery expectations exceeding Student's current baseline. In Science, Student's baseline was ***, with mastery level at ***% and in English, Student's baseline was 84%, with a mastery level of ***%. Student's baseline in Math was 70%, with a mastery level of ***%, and Student's baseline in Social Studies was 80%, with a mastery level of ***%.³⁴
35. The June 2019 ARD Committee considered Student's behavior. The FBA forming the basis of Student's BIP was conducted in September 2016, and recommended continuing the BIP developed August 2016. The BIP targeted negative peer interactions, including ***. Each identified behavior was coupled with prevention, teaching, and reinforcement strategies for Student's educators to implement. During the 2018-19 school year, Student did not have any disciplinary referrals.³⁵

³¹ PE 9 at 2; RE 8 at 2.

³² PE 9 at 6-8; RE 8 at 6-8.

³³ Tr. at 314, 446-50.

³⁴ PE 9 at 11-12, RE 8 at 11-12.

³⁵ PE 9 at 24-31; RE 8 at 24-31.

36. The June 2019 IEP included four behavioral goals. The first goal targeted positive verbal interactions with peers, with goals of ***. Student's second behavioral goal targeted following directions, with a goal for classroom rules and one for classroom expectations. A third goal targeted ***. Student's baseline on each goal was eight of nine weeks, and the ARD Committee set a mastery level of nine of nine weeks, or 100%. A fourth behavior goal targeted***, with a goal of following the Student Code of Conduct. Student's baseline on this goal was nine of nine weeks, and the ARD Committee set a mastery level of nine of nine weeks.³⁶
37. The June 2019 IEP called for extensive accommodations with some accommodations carried over from Student's *** grade year, and others developed during *** grade year. STAAR exam specific accommodations included ***. Whether Student uses a particular accommodation, and implementation of accommodations in the classroom, is based on teacher report to the case manager.³⁷
38. Student's schedule of services for the 2018-19 and 2019-20 school years called for English Language Arts, Math, Science/Health, and Social Studies in the general education classroom with no modified curriculum. Student also attended ***, a small group setting staffed with a special education instructor or aide, which Student utilized *** minutes each week.³⁸
39. Student's educational placement has remained consistent throughout Student's schooling – the general education classroom, with inclusion supports. Inclusion support pairs a special education staff member with a certified teacher in a particular subject who work together to implement accommodations. A resource setting is available to certain District students with disabilities, and modifies the curriculum to below grade level standards. Student's scores indicate Student may benefit from a resource classroom. Student's placement is the general education classroom with supports, rather than a resource classroom. This placement is appropriate for Student because Student can do grade level work.³⁹
40. Student's ARD Committee, to include Student's grandparent, convened for Student's annual meeting on October ***, 2019. The ARD Committee considered goal data, grades, teacher input, the March 2019 FIE, student and parent input, behavior logs, and attendance record. The Committee considered Student's March 2019 FIE, and reviewed 2018-19 school year STAAR results. Student did not pass the *** STAAR ***test in spring of 2019, achieved a scaled score of a ***, and a raw score of ***, or ***% correct. Student showed growth on a second administration, but fell short of passing when Student retook the test during the summer, achieving a scaled score of ***, and a raw score of ***, or ***%

³⁶ PE 9 at 13-14; RE 8 at 13-14.

³⁷ PE 9 at 37; RE 8 at 37; Tr. at 456, 498.

³⁸ PE 9 at 34-35; RE 8 at 34-35.

³⁹ Tr. at 473-75, 476, 622-23.

correct.⁴⁰

41. Student's performance on District wide assessment results. In fall 2018, on the Reading 6+ Measure of Academic Progress (MAP) test, Student's score was a *** (in the *** percentile, with ***% of questions correct). In winter 2018, the same test yielded a score of *** (*** percentile, with ***% of questions correct). MAP testing in the fall of 2018 in ***, Student achieved a score of *** (*** percentile, with ***% of questions correct). In winter of 2018, the same test yielded a score of *** (*** percentile, with ***% of questions correct.⁴¹
42. The October 2019 ARD Committee considered Student's PLAAFPs. For academic performance, the Committee reviewed MAP testing showing growth between administrations, STAAR and EOC testing results in ***. The ARD Committee considered grades during the first marking period of the 2019-20 school year. ***. The Committee reviewed progress on academic goals during the first marking period, finding sustained success on formative tasks, and continued difficulty on summative tasks. Accommodations and behavior were reviewed. Student made progress in behavior goals related to ***, noting progress but not mastery in each area. Student had no incidents of *** to that point in the 2019-20 school year.⁴²
43. The October 2019 ARD Committee considered Student's accommodations, adding ***. The accommodation was not utilized during the 2019-20 school year because Student did not fail more than once, and instead came in for corrections, or to retest. Certain accommodations were subject specific, and other available in all academic classes. *** was available to, and used by, Student.⁴³
44. Student's case manager and Student's four core content teachers in English, Math, Science, and Social Studies reviewed Student's strengths and needs and developed proposed IEP goals before the October 2019 ARD Committee meeting. Student's IEP goals for the 2018-19 school year tracked summatives and formatives in one goal. The October 2019 ARD Committee proposed modifications to Student's academic goals to address identified long-term retrieval deficits with one set of goals for short-term formative assessments, and one for long-term summative assessments.⁴⁴
45. The October 2019 ARD Committee reviewed Student's progress on behavioral goals and objectives. Student did not master, but performed relatively well in, the targeted areas of positive verbal interactions with peers, following directions, and***. Student met Student's *** goal in each of four marking periods in the 2018-19 school year.

⁴⁰ PE 10 at 1, 2; RE 9 at 1, 2; Tr. at 442.

⁴¹ PE 10 at 2; RE 9 at 2.

⁴² PE 10 at 7-11; RE 9 at 7-11.

⁴³ RE 18; Tr. at 456-57, 458-59, 475.

⁴⁴ PE 10 at 14-22; PE 9 at 14-22; Tr. at 445, 462-64, 465.

Discontinuation of this goal was recommended by District members of the ARD Committee, but remained in Student's IEP Student's grandparent's request.⁴⁵

46. The ARD Committee considered Student's discipline record and teacher and parent input in considering Student's BIP. The October 2019 IEP included a BIP targeting the same behaviors, including verbal and***, following directions, and***. Student had no disciplinary referrals to date in the 2019-20 school year, and no revisions were made to Student's BIP.⁴⁶
47. Student is *****. A ***** should take into account a student's strengths, preferences, and interests, and courses a student takes should be generally aligned with what he or she ***. District students take***.⁴⁷
48. In September 2019, Student and Student's case manager completed a *** survey, an annual computer-based interest survey to aid ***** planning and *** plan development. Student's *** survey indicated interests in the *** areas. The October 2019 ARD Committee used this information to develop an appropriate course schedule. The Committee did not recommend ***** services because Student is high functioning, and has good parental support. Student instead received "***** support," or indirect ***** services.⁴⁸
49. Student is comparably self-sufficient to Student's peers and is***. Student's ***. Student met with a counselor to confirm Student's ***. Student's educational goal is to ***. Student's ***** goals were developed with Student's input. An *** goal stated Student would pursue *** in ***. An education goal was ***. An ***. The ***** goals did not include objectives.⁴⁹
50. Student's October 2019 IEP again called for inclusion support in the general education classroom in ***.⁵⁰
51. Student did not receive counseling or another related service during 2019-20 school year. Student was assigned to the same school counselor Student's *** and *** grade years, who saw Student as needed. The District counselor used a processing sheet to help Student calm down and process feeling that way, including a discussion of different ways to handle such situations. Student would typically return to class after these conversations.⁵¹

⁴⁵ PE 10 at 4; RE 9 at 4; Tr. at 473.

⁴⁶ PE 10 at 35; RE 9 at 35; 579.

⁴⁷ Tr. at 75, 87, 141.

⁴⁸ PE 10 at 29-30; RE 9 at 29-30; Tr. at 443-45, 467-68, 527-31, 558, 575-76.

⁴⁹ PE 10 at 32; RE 9 at 32; Tr. at 142, 143-44, 154, 470-72, 527.

⁵⁰ PE 10 at 45; RE 9 at 45.

⁵¹ PE 10 at 56; PE 9 at 56; Tr. at 520-21, 532-536.

52. Student's case manager provided Student's grandparent progress reports, the purpose of which is to inform the parent about a student's progress on his or her IEP goals. The District provided progress reports at the end of each marking period for the 2019-20 school year. Progress reports were provided for only the first and third marking periods because Student was not enrolled in the District for the second marking period. Student's progress reports for the marking period are based on Student's transfer grades.⁵²
53. The progress report for each marking period lists the annual goal and status of that goal (introduced, progressing, or mastered). Student's status on each objective included the same information. Each goal included a narrative progress report, and any recommendation for changes due to mastery, and the date the ARD Committee last revisited Student's progress, and updated Student's IEP. Student's progress on behavioral goals was also captured in the progress reports.⁵³
54. Student met the objective targeting *** nine out of nine weeks the final marking period of the 2018-19 school year. The ARD Committee discussed removing this goal due to mastery, but it remained in Student's IEP at Student's grandparent's request.⁵⁴
55. The October 2019 ARD Committee, including Student's grandparent, again set mastery thresholds between 80% and 95% on IEP goals based on Student's baseline and progress.⁵⁵
56. Student received ***. On ***. This was not typical behavior at school for Student. The District provided notice of a *** day out of school suspension, and Student's eligibility to return to school on ***, 2020.⁵⁶
57. On ***, 2019, the District gave notice of a campus level review of Student's conduct scheduled for ***, 2019. Student's grandparent was given Student's statement, and the statements of the students involved, the disciplinary referral form, and viewed the video the day of the hearing. A campus-level administrator conducted the campus level review to determine whether Student's conduct violated the District's Student Code of Conduct. The incident was considered ***, and resulted in a recommendation for a ***-day placement in the District's Disciplinary Alternative Education Program (DAEP). Student's grandparent attended the campus level hearing, and disagreed with the outcome.⁵⁷
58. The District convened a Manifestation Determination Review (MDR) with Student's ARD Committee on ***, 2019 to discuss ***, 2019 incident. The District reviewed Student's disability status, assessments, attendance, BIP, processing sheets, and the alleged conduct.

⁵² RE 14; 133, 477-78, 481.

⁵³ RE 14; RE 14 at 1-9.

⁵⁴ Tr. at 451-52.

⁵⁵ PE 10 at 10-21; PE 9 at 10-21.

⁵⁶ RE 21 at 2; Tr. at 361, 486, 536.

⁵⁷ RE 21 at 3, 5-10; RE 28 at 1; Tr. at 280, 282.

- Student's grandparent participated, and disagreed with the ARD Committee's conclusion the conduct alleged was not cause by, or had a direct and substantial relationship to Student's disability of ADHD because the alleged conduct was not impulsive. The ARD Committee also found the behavior was not due the District's failure to implement Student's IEP, and concurred with the campus-level hearing officer's recommendation of a DAEP placement for *** days. This recommendation was later reduced to *** days by a district-level hearing officer.⁵⁸
59. The District conducted an investigation of the incident, which did not support Student's allegation of ***. Student was ***. ***. Student was ***. Student ***.⁵⁹
60. Student withdrew from the District on December ***, 2019. Student's grandparent attributes Student's need for *** to recent events at school. Student also ***.⁶⁰
61. Student's educational records contain reports of bullying by peers, including in the 2016 counseling evaluation where Student reported past bullying by peers, and parent reports in the 2017 Independent Educational Evaluation and March 2019 FIE. The counselor was aware of bullying and harassment by other students. A processing sheet from April 2019 reports ***. Incidents of harassment of Student by other students were discussed at the October 2019 annual ARD Committee meeting. Student's grandparent requested the District implement a "safety plan" because grandparent's *** reported bullying by other ***, and feeling unsafe at school. Student's *** records from ***2019 contain a report from Student's grandparent another student bullied Student. Student also reported low self-esteem due to bullying at school, and school-related anxiety.⁶¹
62. The District investigated an allegation ***, and issued a *** on October ***, 2019. ***.⁶²
63. Student did not attend the DAEP placement, and instead re-enrolled in the District on ***, 2020, ***. Student's case manager met one-on-one with each core subject instructor to review Student's IEP. After Student returned, a district level hearing officer recommended Student not attend the DAEP at all. Student received full credit for the *** marking period while enrolled at the ***, but Student is no longer eligible for *** because of the District's decision to change Student's placement to a DAEP. *** participation guidelines are set by federal law, not an ARD Committee. Student selected ***.⁶³
64. Student's grandparent provided documentation of three visits with a therapist in December 2018 and November 2019. The ARD Committee would likely benefit from consideration

⁵⁸ PE 11; PE 11 at 52; RE 10; RE 10 at 52; Tr. at 365, 487-88, 538-39, 606-07.

⁵⁹ PE 23 at 2-3, 5, 6; PE 24 at 1, 15, 18; RE 16 at 1-2; Tr. at 188, 371.

⁶⁰ PE 24 at 1, 15, 18; Tr. at 187-88, 371.

⁶¹ PE 2 at 4; PE 5 at 2; PE 23 at 6; PE 24 at 20; Tr. at 564, 567, 568-69, 635-36.

⁶² Tr. at 588-89, 614-15.

⁶³ RE 31 at 4, 6; Tr. at 127, 153, 189-90; 372, 379, 490, 491, 540-41, 555, 601.

of Student's medical records related to *** to ensure Student is getting appropriate services at school. Student's grandparent has not provided this information to the District except through counsel in this litigation.⁶⁴

65. After re-enrolling in the District on ***, 2020, Student attended school for *** days before spring break and extended school closure due to COVID-19 beginning on March 16, 2020. Student participated in distance learning from that date until the end of the 2019-20 school year.⁶⁵
66. Student achieved passing grades in Student's classes during the 2019-20 school year.⁶⁶

V. DISCUSSION

Petitioner challenges Student's educational program for the 2019-20 school year, and alleges the District denied Student a FAPE by failing to respond to Student's changing academic and behavioral needs, and failing to develop an IEP reasonably calculated to enable Student to make academic progress.

The Amended Complaint also alleged the District violated Student's rights under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. These claims are outside a hearing officer's jurisdiction, and therefore not proper subject matters for a due process hearing under the IDEA. 34 C.F.R. §§ 300.503(a)(1-2); 300.507(a); 19 Tex. Admin. Code § 89.1151(a).

A. 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

⁶⁴ PE 20, 21, 22; Tr. at 327, 387, 623-24.

⁶⁵ RE 6 at 8-10.

⁶⁶ RE 15.

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 failed to provide Student a FAPE.

B. Free, Appropriate Public Education

Students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs, and prepare for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). School districts, including Respondent, 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).

These students must receive specially designed, personalized instruction with sufficient support services to meet their unique needs, and confer educational benefit. Instruction and services must be at public expense, and comport with the IEP developed by the student's 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, 188-89, 200-01, 203-04 (1982).

C. Free, Appropriate Public Education Analysis

The Fifth Circuit applies a four-factor test to determine whether a school district's program provides a FAPE to a student, 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

First, the evidence showed Student's program was individualized on the basis of assessment and performance.

a. Individualized Education Program Requirements

To meet the obligation to provide students with disabilities 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, designate staff, and include duration, frequency, and location. 34 C.F.R. §§ 300.22; 300.323(a).

In developing an IEP, the ARD Committee must consider 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).

An IEP does not need to be the best possible one or designed to maximize a student's potential. However, a school district must provide a student with meaningful educational benefit – and 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 inquiry here is whether the IEP developed and implemented by the District during the 2019-20 school year 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).

2. 2019 Full and Individual Evaluation

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).

As a component of any reevaluation, the ARD Committee may conduct a REED, and 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 need 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).

The December 2018 ARD Committee conducted a REED to include previous cognitive and academic achievement testing results, a cross-battery assessment finding Student did not meet criteria for services as a Student with an SLD, oral language testing results. The Committee also considered current social, emotional, and behavioral information, noting Student no longer receives counseling as a related service because it did not appear needed, and Student attended private counseling.

Student received services as a student with an OHI due to ADHD beginning in 2011. A 2016 FIE and a 2017 IEE confirmed eligibility under the IDEA as a student with OHI due to ADHD.

Student continued to have behavioral issues in ***. The ARD Committee requested a psychoeducational evaluation at the beginning of the 2016-17 school year, when Student was in *** grade, to determine eligibility for special education services under another classification. The September 2016 report did not find eligibility as a student with an Emotional Disturbance, and confirmed continuing eligibility as a student with ADHD and Dyslexia served with existing accommodations. District testing in September 2016 and March 2019, and Student's adaptive functioning strengths, ruled out eligibility due to an intellectual disability.

Student's most recent FIE occurred in March 2019 following a parental request in December 2018 for additional information about Student's educational needs. Academic achievement testing showed low to low average reading skills, and indicated Student would experience difficulty with grade level reading tasks. These results are consistent with Student's performance. Student's math skills were also in the low to low average range, yet inconsistent with Student's grades. The diagnostician found Student's performance on academic and cognitive testing did not appear to be impacted by Dyslexia.

The March 2019 FIE evaluated Student's cognitive abilities. Consistent with previous testing, Student's Full Scale IQ was ***, and in the very low range, and Student had working memory and processing speed deficits. However, attentional issues incident to ADHD could impact Student's performance on cognitive testing, and result in depressed IQ testing scores. Oral language skills testing yielded scores in the low range, indicating Student expresses ***self and listens consistent with Student's cognitive abilities, even if negatively impacted by ADHD, and would have difficulty with grade level tasks. The District LSSP who conducted the FIE, and previous testing, reinforced the LSSP's conclusion Student has an executive functioning problem with attentional issues caused by ADHD.

The District's assessments indicated Student's attentional issues are significant enough to impair working memory and the ability to take in information, and impair Student's performance and processing speed, including on tests/exams. Even with accommodations, Student performs relatively poorly on exams, and under timed conditions. Student's grades, however, reflect Student understands the content presented well, and Student performs better on academic tasks than Student's cognitive ability scores reflect. The ARD Committee consistently recommended placement in the general education classroom without content modification based on Student's ability to comprehend the general education curriculum consistent with accommodations and supports.

The March 2019 FIE concluded Student has a normative deficit, meaning Student is behind same-aged peers, in academic achievement in Basic Reading, Reading Comprehension, Reading Fluency, Math Calculation, Math Reasoning, Oral Expression, and Listening Comprehension. Student has accommodations to assist with attentional issues, but these accommodations do not raise Student's academic skill levels.

The March 2019 FIE determined whether the student has a disability, and Student's resulting educational needs. 20 U.S.C. §§ 1414(a)(1)(A); 1414 (a)(1)(C)(i)(I-II); (b)(2)(A-C).

3. 2019 Dyslexia Assessment

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).

State regulations require school districts to provide each student with Dyslexia or related disorder access to each program under which the student qualifies for services. 19 Tex. Admin. Code § 74.28(a). School districts must also implement approved strategies for screening,

individualized evaluation, and techniques for treating dyslexia and related disorders, as described in the Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders. 19 Tex. Admin. Code § 74.28(c). Screening and further evaluation can only be conducted by individuals trained in valid, evidence-based assessments and who are trained to appropriately evaluate students for dyslexia and related disorders. 19 Tex. Admin. Code § 74.28(d).

Student has had reading difficulties since Student began school. In addition to ADHD, an August 2011 private psychological evaluation diagnosed Student with a Reading Disorder/Dyslexia. The 2016 FIE did not find Student eligible under the IDEA as a student with an SLD. The March 2019 FIE also did not find Student meets criteria as a student with an SLD because Student did not show both cognitive and academic strengths and weaknesses, have an overall normal cognitive normative, and/or there was not a link between the cognitive deficits and academic weaknesses. The pattern of strengths and weaknesses in Student's overall cognitive ability also did not indicate a learning disorder. However, Student continued to receive Dyslexia services.

The December 2018 ARD Committee requested a Dyslexia assessment, which was completed in January 2019. The assessment was conducted by an experienced Dyslexia assessor, who also considered Student's performance on STAAR and MAP testing. Student received scattered scores, ranging from low to average, and showed specific weaknesses in comprehension. The January 2019 Dyslexia assessment concluded Student has Dyslexia, but again Student did not meet criteria under the IDEA as a student with an SLD. Due to previous receipt of Dyslexia services, Student remained on monitor status with continued Dyslexia services. Student's schedule of services for the 2019-20 school year called for class in the Dyslexia classroom for one period, and access to the Dyslexia lab at any time.

Here, while Student's OHI eligibility has remained consistent, Student did not meet eligibility requirements as a student with an SLD. The District, however, acknowledged Student had Dyslexia, and recommended and provided Wilson Reading program instruction. The January 2019 Dyslexia assessor was trained in evaluation of students with Dyslexia, and recommended continued services. Having identified continuing needs in this area, the District included Student

in Dyslexia programming from 2011 through the 2019-20 school year. 20 U.S.C. § 1412(a)(3)(A); 19 Tex. Admin. Code § 74.28(a), (d).

4. Related Services

Related services may be required to assist a student with a disability with benefitting from special education. 34 C.F.R. § 300.34(a). Counseling services are services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel. 34 C.F.R. § 300.34.

Student's ARD Committee requested a counseling evaluation in 2016, Student's *** grade year, after several disciplinary referrals, verbal and *** towards peers, and disrupting class. Counseling as a related service was recommended to assist with developing positive coping strategies to manage negative emotions at school.

The December 2018 ARD Committee conducted a REED, noting Student no longer receives counseling as a related service because it did not appear needed, and Student attended private counseling. Student did not receive counseling as a related service during the 2019-20 school year, but the District's counselor was also available to Student when needed. Student and the counselor completed processing sheets, an intervention that generally helped Student calm down and return to class. The evidence, in particular Student's extensive evaluation history and recent consideration of Student's needs for counseling at the December 2018 ARD Committee meeting, does not support the conclusion Student had related service needs not met by the District. 34 C.F.R. § 300.34(a).

5. The District's Response to Student's Behavior

Appropriate behavioral interventions are important components of FAPE. A student's need for special education and related services is not limited to academics, but includes behavioral progress, and learning appropriate social skills. *Venus Ind. Sch. Dist. v. Daniel S.*, 36 IDELR 185 (N.D. TX 2002). The ARD Committee also considered Student's behavior at school, and found it

impeded Student's learning or that of others. Student exhibited a need for a BIP and other behavioral supports, and the ARD Committee developed a BIP. 34 C.F.R. § 300.324(b).

Student had behavioral challenges in ***, and Student's ARD Committee developed a BIP targeting positive verbal interactions with peers, following directions, ***, and***. The ARD Committee also created a behavior tracking form specific to Student to monitor and capture teacher-reported behaviors targeted in Student's BIP. Student began *** in the 2018-19 school year, and Student's targeted behaviors improved. Student had no disciplinary referrals for during the 2018-19 school year, and met this behavioral goal each marking period.

The March 2019 FIE did not include evaluations of emotional and behavior concerns due to lack of parental consent, and therefore did not include an updated FBA or other psychological testing or information. However, the evidence showed Student did not develop new behaviors that were not included, and the BIP targeted the identified, and continuing, behaviors of ***, following directions, and ***.

The June 2019 ARD Committee reviewed Student's progress on behavioral goals and the appropriateness of Student's BIP. District members of the ARD Committee discussed modifying Student's goals due to mastery of the *** goal, and behavioral improvements the previous school year. Student's grandparent did not agree to these changes, and Student's October 2019 behavioral goals and BIP remained the same.

Student received a disciplinary referral for *** in October 2019. Student ***. This type of behavior was not typical of Student. The District conducted a campus-level hearing, and recommended *** days at the DAEP. At an MDR on December ***, 2019, District members of the ARD Committee supported this recommendation after finding the conduct was not related to Student's disability of ADHD because it was not an impulsive act. District members of the Committee also found the alleged conduct was not a result of the District's failure to implement Student's IEP.

The District perhaps had an obligation to reconsider Student's behavior goals and BIP after the ***. However, the obligation ended when Student withdrew on ***, 2019. After receiving services *** for several months, Student re-enrolled in the District on ***, 2020. The District developed a ***** plan to assist with meeting behavior expectations going forward. In the *** Student was enrolled before spring break and extended school closure due to COVID-19, the District did not report behavioral concerns.

The District met its obligation to develop an IEP with positive behavioral interventions and supports and other behavioral strategies, and met Student's behavioral needs. 34 C.F.R. § 300.324(a)(2)(i); 300.324(b).

a. *** Services**

***.

***** services consist of a ***. *** services must be based on the student's needs *** Services may include instruction, related services, ***. *** services can be provided in a special education classroom if provided as specially designed instruction or a related service, and if needed to assist a student with benefiting from special education. ***.

- ***

The evidence showed Student's ARD Committee considered *** services beginning at ***. Student's ***. Student attended the October 2019 ARD Committee meeting, and helped ***. Student ***. These choices were guided by Student's grandparent, and made after speaking with the school counselor about ***.

A student survey indicated *** and related support services. Student and Student's case manager completed a *** survey, which indicated ***.

The October 2019 ARD Committee used this information to develop an appropriate *** schedule, and indirect, rather than direct, *** services because Student is high functioning, and has good parental support. Student instead received “*** support,” or indirect *** services. Student met with a counselor to confirm Student's ***. Student's *** goals were developed with Student's input, and targeted ***, education, and ***.

The District assessed Student's ***. However, Student's *** goals in the areas of ***. The goals have no objectives, as required for ***, and are overly broad and conclusory. Student's IEP was deficient in this regard. *** Moreover, while the IDEA does not draw a distinction between direct and indirect *** services, the regulations do not draw a distinction between a student's level of functioning, and receipt of *** services. ***

6. Least Restrictive Environment

The evidence showed Student was educated in the least restrictive environment.

a. Inclusion of Students with Disabilities

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*, 580 F.3d at 292.

b. Least Restrictive Educational Environment

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).

c. Student's Educational Placement

Student has Dyslexia and qualifies for Dyslexia services, but Student's primary disabling condition is ADHD. ADHD presents with attentional deficits impacting academic achievement, particularly on exams. Student's performance on short-term assessments and grades, however, indicated Student understands, and can perform, grade level work. The nature and severity of Student's disabilities, and Student's ability to understand unmodified instructional content, do not present such significant deficits in academic achievement to warrant a resource classroom placement with modified content. Student had behavioral concerns, but these concerns do not impact academic performance, or present a need for a more restrictive educational setting.

Student's educational placement during the 2019-20 school year was the general education classroom with inclusion supports. Grade-level curriculum is taught, and Student receives instructional support from a certified special education teacher who work together to implement Student's accommodations. With these supplementary aids and services, to include accommodations, removal from the general education classroom is unwarranted. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(1)(2)(i)-(ii).

Student's cognitive and academic scores indicate Student may benefit from a resource classroom. However, because Student can perform grade-level work, the modified instructional content presented to students in resource classroom does not meet Student's needs. For Student, placement in a resource classroom runs counter to the IDEA's principle of an included education. Balancing the competing factors, Student was included to the maximum extent appropriate. The

evidence shows Student was educated in the least restrictive setting, and Petitioner did not meet the burden of showing the educational setting in Student's IEP was inappropriate, or that Student requires a different educational setting. *Daniel R.R.*, 874 F.2d at 1049; 34 C.F.R. § 300.114.

7. 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.

A school district must convene ARD Committee meetings consisting of the parents, a regular education and special education teacher, school district representative, an individual who can interpret instructional implications of evaluations, and other as appropriate, including the student. 34 C.F.R. § 300.321(a)(1-7). Student's grandparent was present at all ARD Committee meetings, and one or more teachers participated. The March 2019 FIE, reviewed at the June 2019 ARD Committee meeting, was attended by the diagnostician who conducted the FIE, and a District Dyslexia assessor attended the meeting where the results of the January 2019 Dyslexia assessment were reviewed.

Student's June 2019 and October 2019 IEPs each included PLAAFPs developed by relevant ARD Committee members or other personnel familiar with his performance at school, and this discussion resulted in modifications to Student's IEP at the October 2019 meeting. 34 C.F.R. § 300.320(a)(1)(i).

The District assigns a case manager to work with special education students throughout ***. Student's case manager during the 2018-19 and 2019-20 school years was an experienced special education teacher. The case manager was responsible for communicating with Student's grandparent, and spoke with grandparent several times a week. She sent Student's grandparent weekly behavior tracking data based on the behaviors targeted in Student's BIP. The case manager captured daily feedback from Student's teachers in a spreadsheet. This level of communication helped Student's grandparent stay informed about school.

The case manager assisted with developing Student's IEP, and ensured Student understood Student's accommodations. She spoke frequently with Student's teachers, and trained individual teachers on the content of Student's IEP. She received feedback from Student's teachers and grandparent for Student's IEP, and prepared a draft before ARD Committee meetings. Whether Student uses a particular accommodation, and implementation, is based on teacher report to the case manager. Student's case manager and Student's four core content teachers in *** review Student's strengths and needs and developed proposed IEP goals in advance of the October 2019 annual meeting.

The coordinated and collaborative manner Student's case manager worked with Student's grandparent and kept grandparent apprised of Student's performance at school met the District's obligation as to this element.

8. 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).

a. Academic Benefits

Student has a longstanding ADHD diagnosis. The associated attentional issues, combined with Student's cognitive profile, create academic challenges, and Student receives specialized instruction in English, Math, Science, and Social Studies. Student's academic goals for the 2019-20 school year reflect Student's ability to access and understand grade level curriculum. The ARD Committee revised academic goals, which previously included formative and summative assessments after the March 2019 FIE to account for identified issues with comprehension to target deficits with summative subject matter. While mastery targets above 70% were ambitious, the ARD Committee set mastery targets based on previous performance.

Student performs more poorly on exams, and under timed circumstances, even with accommodations. However, with numerous classwork accommodations, Student understands grade level content, as reflected in passing grades in each marking period during the 2019-20 school year. Student's IEP included an extensive list of accommodations for both academic work, and exams.

Periodic reports to parents of students with disabilities on the progress he or she is making on goals are required under IDEA, such as through the use of quarterly reports, other periodic reports, or concurrently with report cards. 34 C.F.R. § 300.320(a)(3)(ii). The purpose of a progress report is to inform the parent as to the Student's progress on his or her IEP goals.

Here, the case manager provided Student's grandparent progress reports reflecting the goal and objective, progress thereon, and narrative status including whether performance led to a revision to Student's IEP. Progress reports were maintained and provided for each marking period, except the *** one, because Student was enrolled in *** for the *** marking period. Student's progress reports for that marking period are based on transfer grades.

The evidence showed Student received academic benefits from Student's educational program. See, *Houston Indep. Sch. Dist. v. Bobby R.*, 328 F.3d 804 (5th Cir. 2003).

b. Non-Academic Benefits

Student received non-academic benefits as well during Student's enrollment in the fall of 2019. Student had progressed on each of Student's behavioral goals such that District members of the ARD Committee recommended eliminating a behavioral goal on *** at the October 2019 meeting due to mastery. The weekly behavioral data, which captured real time behaviors as reported by teachers in narrative format, advised Student's on progress on behavioral goals. Between August 2019 and November ***, 2019, Student had one disciplinary referral for ***.

Student's *** was atypical behavior, and unanticipated by District staff. Student appears to have been significantly impacted by events with other students at school, and did not believe Student's side of the story was fairly considered when the District proposed the DAEP placement. Student's grandparent sought treatment, and withdrew Student from school on ***, 2020. Student re-enrolled in the District on ***, 2020, and did not have behavioral incidents at school in the short time Student attended in-person classes before spring break, and extended school closure due to COVID-19.

9. Conclusion

"Parentally-placed private school children with disabilities" means are students with disabilities enrolled by their parents in private schools or facilities. 34 C.F.R. § 300.130. Student withdrew from the District, and was parentally-placed in *** from ***, 2020 until ***, 2020. Student's withdrawal from the District relieved its obligation to provide a FAPE until Student re-enrolled in *** 2020. While Student was enrolled, even with deficient *** goals, the District met its FAPE obligation to Student.

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, 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. *Hovem*, 690 F.3d 397.

D. 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 may lead to a denial of a FAPE if school personnel were deliberately indifferent, 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.

Student's educational records contain references to bullying and harassment by peers. The school counselor and vice principal were aware of bullying and harassment by other students, and discussed at the October 2019 ARD Committee meeting. Student's grandparent requested a "safety plan" because grandparent *** reported bullying by other ***, and feeling unsafe at school. Allegations included a report ***, and the District investigated an allegation ***, and issued a *** agreement on October ***, 2019. Grandparent's concerns about peer interactions at school at least in part contributed to a need for ***.

School districts must take reasonable steps to prevent bullying of a student with a disability. Here, the alleged actions against Student were significant, and the District responded to reports with an investigation, and implemented *** agreements to restrict contact between the students involved. Student's ARD Committee discussed Student's grandparent's concerns at the October 2019 ARD Committee meeting, and did not recommend a safety plan.

Student's educational performance, however, also did not appear to be impacted by these events. Student continued to achieve passing grades both while enrolled in the District, and while parentally-placed in ***. The weight of the credible evidence does not support the allegation the bullying resulted in educational regression, or substantially restricted Student's access to Student's educational program. *T.K.*, 779 F. Supp. 2d at 317.


VI. CONCLUSIONS OF LAW

1. Petitioner did not meet the burden of proof as the party challenging a student's IEP and educational placement. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. The District provided Student a FAPE during the 2019-20 school year, 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 August 14, 2020.



Kathryn Lewis
Special Education Hearing Officer
For the State of Texas

VIII. NOTICE TO PARTIES

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