

**DOCKET NO. 317-SE-0820**

<b>STUDENT, B/N/F PARENT and PARENT,</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioner</b>	§	
	§	
v.	§	<b>HEARING OFFICER FOR</b>
	§	
<b>HUTTO INDEPENDENT SCHOOL</b>	§	
<b>DISTRICT,</b>	§	
<b>Respondent</b>	§	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

Student, by next friends Parent and Parent (Student, Parents, or collectively, Petitioner) brings this action against the Hutto Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations. The main issue in this case is whether Respondent denied Student a free appropriate public education (FAPE).

The Hearing Officer concludes that the District provided Student with a FAPE during the 2019-20 school year and therefore denies Petitioner’s request for private placement. The Hearing Officer also finds that: (1) the District did not fail to properly identify Student with an additional category of eligibility in the area of autism; and (2) it did not violate procedural requirements of the IDEA.

**II. PROCEDURAL HISTORY**

**A. Legal Representation**

Student was represented throughout this litigation by Student’s advocate, Virginia Spencer, with Lumen Advocacy, LLC. The School District was represented throughout this litigation by its

legal counsel, Heather Rutland and Tyler Ezell, with Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

### III. DUE PROCESS HEARING

The due process hearing was conducted on January 12 and 13, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's advocate, Virginia Spencer. In addition, \*\*\* and \*\*\*, Student's parents, attended the due process hearing.

Respondent continued to be represented by its legal counsel, Heather Rutland and Tyler P. Ezell. In addition, Dr. \*\*\*, the Executive Director of Special Education for the District, attended the hearing as the party representative. Both parties timely filed written closing briefs. The Decision in this case is due March 19, 2021.

### IV. ISSUES

#### A. Petitioner's Issues

Petitioner raised the following issues arising under the IDEA from the 2019-20 school year for decision in this case:

#### FAPE:

1. Whether Respondent denied Student a FAPE by failing to consider and provide related services;
2. Whether Respondent denied Student a FAPE by failing to provide services to Student in a collaborative manner involving key stakeholders;
3. Whether Respondent denied Student a FAPE by failing to develop and implement an appropriate individualized education program (IEP) based on Student's assessment and performance;

4. Whether Respondent denied Student a FAPE by failing to develop and implement an IEP that provided Student with academic and nonacademic benefits;
5. Whether Respondent denied Student a FAPE by failing to consider and provide extended school year services (ESY);
6. Whether Respondent violated the IDEA by failing to provide Petitioners with notice of their rights under the IDEA; and

IDENTIFICATION:

7. Whether Respondent denied Student a FAPE by failing to identify the Student as a student with autism.

**B. Respondent's Legal Position and Additional Issues**

Respondent generally denied the allegations stated in the Complaint and contends that it provided Student with FAPE during the relevant time period.

The District also raised the following issues:

1. Whether any IDEA claims accruing prior to August 24, 2019, should be dismissed as outside the one-year statute of limitations applied in Texas; and
2. Whether the hearing officer has jurisdiction to resolve claims arising under any laws other than the IDEA, and whether such claims should be dismissed.

**V. REQUESTED RELIEF**

**A. Petitioner's Requested Relief**

Petitioner requested the following items of relief:

1. Private placement in a day school program for students with dyslexia at District expense;
2. Compensatory education for occupational therapy, speech therapy, and social skills;

3. Reimbursement for out-of-pocket expenses related to educational services; and
4. Such other relief as may be just and proper consistent with the hearing officer's authority under the IDEA.

## **B. Respondent's Requested Relief**

Respondent requested the following relief:

1. An order dismissing any claims accruing more than one year prior to the filing date of the Complaint; and
2. An order dismissing all claims arising outside the IDEA. Any such claims were dismissed prior to hearing pursuant to Order No. 3 entered in this matter on September 23, 2020.

## **VI. FINDINGS OF FACT**

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1. Student is currently \*\*\* years old and in \*\*\* grade. Student lives with Student's family within the jurisdictional boundaries of the District. Student attended \*\*\* from \*\*\* in 2016-17 until the fall of 2020—Student's \*\*\* grade year.<sup>1</sup>
2. Student was initially evaluated for special education services in February 2016. Student received speech services for a speech impairment prior to and upon enrollment in \*\*\* with the District for the 2018-19 school year.<sup>2</sup>
3. The District convened a meeting of the Admission, Review, and Dismissal (ARD) committee on October \*\*\*, 2018, to review existing evaluation data (REED) for the Student. During the REED, the ARD committee determined that further evaluation was needed in the areas of speech, emotional/behavioral, intellectual and adaptive behaviors, academic achievement and functional performance, and related/instructional services. The District received written consent from Student's Parents the same day. It performed the evaluation and completed its written Disability Report (Report) on the Full and Individual Evaluation (FIE) on December \*\*\*, 2018.<sup>3</sup>

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<sup>1</sup> Joint Stipulations of Fact.

<sup>2</sup> Joint Exhibit ("Jt. Exh.") 23 at 225; Jt. Exh. 25 at 229.

<sup>3</sup> Jt. Exh. 23; Jt. Exh. 23 at 226-27; Jt. Exh. 25 at 229-30.

4. Student's social-pragmatic skills fell within normal limits for Student's age. Student demonstrated the following strengths: eye contact, social greetings and manners, questions for clarification, topic initiation, maintaining topic relevance, conversational turn-taking, extending language for discussion, positive affirmation of others, varying intonation, use of facial expressions to enhance communication, and logical reasoning skills.<sup>4</sup>
5. Student's overall adaptive skills were within the average range, indicating that Student adapted to new situations similar to others Student's age. Student possessed sufficient social skills and generally did not experience debilitating or abnormal social difficulties. Student demonstrated a typical level of creativity and was able to work under pressure. Student generally exhibited adequate organizational and study skills. Student, however, exhibited difficulty performing simple daily tasks in a safe and efficient manner at home.<sup>5</sup>
6. Student's speech rate and prosody, pitch, volume, and voice quality were within normal limits. Student made substitution errors and demonstrated a \*\*\*. Student's articulation skills fell within the average range when compared to same age and gender peers, and Student's error patterns were developmentally appropriate. Student demonstrated average to high average receptive and expressive language skills, and as such, did not demonstrate a language disorder.<sup>6</sup>
7. Student exhibited a pattern of strengths and weaknesses in the cognitive assessment portion of the FIE. Specifically, Student showed weaknesses in working memory as well as visual spatial and auditory processing. These weaknesses are often associated with deficits in basic reading skills and listening comprehension and may be indicative of an SLD. A Cross Battery Assessment analysis of Student's cognitive and achievement abilities also showed a statistical likelihood of an SLD.<sup>7</sup>
8. Student was evaluated by a doctor on December \*\*\*, 2018, and diagnosed with attention deficit hyperactivity disorder (ADHD). This diagnosis was included in the Report. Student's ADHD directly affected Student's academic performance. In addition to certain behaviors associated with executive functioning tasks such as planning and prioritizing, ADHD can negatively impact other areas, including listening comprehension and cognitive processing speed. A student's needs in this area can be addressed through accommodations.<sup>8</sup>
9. The Report included the following recommendations to address Student's deficits in working memory: keep oral directions short and simple; provide visuals for directions;

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<sup>4</sup> Jt. Exh. 25 at 233.

<sup>5</sup> Jt. Exh. 25 at 251.

<sup>6</sup> Jt. Exh. 25 at 234-37.

<sup>7</sup> Jt. Exh. 25 at 255.

<sup>8</sup> Jt. Exh. 25 at 238, 255; Tr. at 228:23-229:15, 229:17-19, 229:20-23.

check for understanding by having Student restate or paraphrase directions; and provide overlearning, review, and repetition.<sup>9</sup>

10. The Report included the following recommendations to address Student's deficits in auditory processing: provide phonological awareness activities (e.g., rhyming, alliteration, imitation, songs); provide specific instruction in sound discrimination, blending, and segmentation; emphasize sound-symbol associations in teaching reading and spelling; accompany oral information with pictures; and sit student close to auditory information.<sup>10</sup>
11. The Report included the following recommendations to address Student's deficits in visual processing: use manipulatives; provide copying, tracing, and drawing activities; provide examples of completed work; and provide support for tasks requiring spatial organization.<sup>11</sup>
12. The Report included the following recommendations to address Student's attention deficits and executive functioning needs: draw attention to details; reduce distractions in the classroom; work on sequencing and main idea; model problem-solving strategies; and demonstrate organizational skills.<sup>12</sup>
13. The District also performed an occupational therapy (OT) evaluation in conjunction with the FIE. The OT evaluation included a sensory profile and a developmental test of visual-motor integration. Student's needs in this area included: development of fine motor, visual-perceptual, and visual-motor integration skills; development of a mature pencil grip; development of skills related to play and aspects of good sportsmanship; and accommodations and supports to address sensory needs in relation to touch and movement. Student's sensory profile was typical of a child that shows characteristics of ADHD.<sup>13</sup>
14. The District's occupational therapist recommended \*\*\* minutes of therapy provided directly to Student or on Student's behalf per grading period to support the development of fine motor, visual-perceptual, and visual-motor integration skills as well as Student's sensory needs in the general education classroom. Student's sensory needs were addressed through tactile sensory input, including seating accommodations, movement breaks, and fidgets. The occupational therapist consulted with Student's teachers and provided recommendations on appropriate accommodations to address Student's needs.<sup>14</sup>
15. Student's ARD committee convened an annual ARD meeting on January \*\*\*, 2019, to review the FIE. The ARD committee determined during this meeting that Student was

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<sup>9</sup> Jt. Exh. 25 at 255.

<sup>10</sup> *Id.*

<sup>11</sup> Jt. Exh. 25 at 255.

<sup>12</sup> Jt. Exh. 25 at 256.

<sup>13</sup> Jt. Exh. 25 at 260, 272-73; Tr. at 537:20-25.

<sup>14</sup> Jt. Exh. 3 at 39; Jt. Exh. 5 at 67, 76-77; Tr. at 500:14-501:11, 501:6-8.

- eligible for special education services under the IDEA as a student with an SLD in basic reading skills and listening comprehension and also for an OHI due to ADHD. Because Student no longer met the criteria for a speech impairment, Student was dismissed from speech therapy services. Parent was represented by an advocate at this meeting, and the meeting ended in agreement.<sup>15</sup>
16. The District assessed Student for characteristics of dyslexia at Parents' request on February \*\*\*, 2019. The assessment indicated that Student met the criteria for a student with dyslexia.<sup>16</sup>
17. Parents obtained an independent evaluation of Student from \*\*\* (\*\*\*) Evaluation) on April \*\*\*, 2019. The \*\*\* Evaluation indicated that Student struggled with phonological memory, written language, phonemic awareness, and reading and concluded that Student exhibited the presence of a literacy disorder and dyslexia. It also found that Student's articulation errors and phonological processes of \*\*\* were not age-appropriate. The evaluation recommended that Student receive speech and language therapy and that Student should have goals set for phonological memory, written language, phonemic awareness, and reading.<sup>17</sup>
18. A revision to the annual ARD meeting was held on April \*\*\*, 2019. The ARD committee reviewed the District's dyslexia evaluation and determined that Student was eligible for and would receive dyslexia services beginning in \*\*\* grade. In addition, the committee discussed the speech component of the \*\*\* Evaluation. The meeting ended in agreement. The SLP contacted Parents after the ARD meeting to further address concerns and/or questions related to Student's needs and evaluation results.<sup>18</sup>
19. Parents revoked their agreement to the April \*\*\*, 2019 ARD meeting, and the committee reconvened on May \*\*\*, 2019, to address areas of disagreement. These areas included issues related to dyslexia and further consideration of the \*\*\* Evaluation with respect to \*\*\*. Minutes of dyslexia instruction per week were increased to \*\*\* minutes in response to Parents' concerns regarding District compliance with Wilson dyslexia program protocols. Meanwhile, the District agreed to evaluate Student for \*\*\* at the beginning of the following school year based upon Parents' concerns that it had not given adequate consideration to the \*\*\* Evaluation results in this area. Parents requested that the ARD committee revisit Student's reading goals, the dyslexia program to be used, and minutes of instruction per week in the fall when school resumed. Parents were represented by an advocate at the meeting, and the meeting ended in agreement.<sup>19</sup>

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<sup>15</sup> Jt. Exh. 5 at 65, 79-81.

<sup>16</sup> Jt. Exh. 26; Jt. Exh. 6 at 85.

<sup>17</sup> Jt. Exh. 27; Jt. Exh. 27 at 300.

<sup>18</sup> Jt. Exh. 6 at 99, 86, 96; Jt. Exh. 14B.

<sup>19</sup> Petitioner's Exhibit ("Pet. Exh.") 6 at 56-57; Jt. Exh. 7 at 100, 111.

**\*\*\* Grade**

20. Student began receiving dyslexia instruction at the beginning of \*\*\* grade. Student received \*\*\* minutes per week of small group dyslexia instruction in the general education setting from the campus' certified dyslexia specialist. The District uses the Wilson \*\*\* program to provide dyslexia instruction to students in \*\*\* and \*\*\* grade. The Wilson \*\*\* program offers a curriculum that is explicit, sequential, cumulative, and evidence-based. \*\*\* lessons are provided in a multi-sensory format and focus on letter identification, letter sounds, decodable words, irregular words, letter formation, fluency, accuracy, and comprehension.<sup>20</sup>
21. The reading component of Student's dyslexia instruction began with \*\*\*. The dyslexia teacher adjusted lesson plans as necessary to focus on skills Student struggled with and provided strategies to help Student work through trouble spots. Student had access to audio books through Learning Ally, and Student \*\*\*.<sup>21</sup>
22. In accordance with Parents' request made in May of the previous school year, the District assessed Student for \*\*\* on September \*\*\* and \*\*\*, 2019, and completed its report on September \*\*\*, 2019. Student met the criteria for the condition of \*\*\*. The \*\*\* report recommended short sessions to work on specific handwriting skills using multisensory exercises. These recommendations were consistent with the services already being provided as a part of Student's occupational therapy. Accommodations were also added to Student's IEP, including the opportunity to respond orally in lieu of written response.<sup>22</sup>
23. The District convened an ARD committee meeting on October \*\*\*, 2019, and shared the results of the \*\*\* assessment with Parents. The committee determined that Student was eligible to receive \*\*\* services.<sup>23</sup>
24. The committee also reviewed and modified Student's IEP goals. Student's IEP included five \*\*\* goals and a writing goal. Student had mastered four of the five \*\*\* goals. Student's \*\*\* goals required Student to \*\*\*. Student's writing goal required Student to \*\*\*. The District agreed to collect data related to Student's needs in the area of executive functioning prior to Student's annual ARD meeting in January 2020.<sup>24</sup>
25. Student's IEP provided the following accommodations: directions given in a variety of ways with simplified vocabulary; support for general education teacher provided by special

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<sup>20</sup> Jt. Exh. at 38; Tr. 314:18-25, 343:5-23; Pet. Exh. 5; Tr. at 347:5-14, 353:11-354:2, 590:25-591:4, 346:14-18, 351:1-22.

<sup>21</sup> Tr. at 590:2-5, 325:8-17, 325:118-25, 326:1-21, 327:8-13, 321:22-25; 349:7-12; 362:5-8.

<sup>22</sup> Jt. Exh. 28 at 307-308; Tr. 479:6-12; Jt. Exh. 1 at 7; Tr. at 479:12-480:14.

<sup>23</sup> Jt. Exh. 1 at 9.

<sup>24</sup> Jt. Exh. 1 at 1-2, 4-6; Jt. Exh. 20.



- education staff; teacher check for understanding and reteach concepts as needed; use of picture representations for key words in verbal directions; visual aids.<sup>25</sup>
26. Student's IEP provided the following adapted or additional materials: overlearning, review, and repetition; seating next to auditory and visual source of instruction; teaching memory strategies; and use of manipulative materials when appropriate. Although the meeting initially ended in agreement, Parents later revoked their agreement on the grounds that an SLP was not present at the meeting.<sup>26</sup>
27. The ARD committee reconvened on October \*\*\*, 2019, to address Parent concerns regarding Student's speech-related needs and whether the ARD committee had given adequate consideration to the \*\*\* Evaluation. The District's newly-hired SLP was present at this meeting. She discussed the speech-related components of the \*\*\* Evaluation and compared them with the results of the speech assessment included in the 2018 FIE. On the same date, the ARD committee completed a REED and agreed that the SLP would conduct a new speech evaluation. The SLP agreed to complete the evaluation ahead of the statutory deadline and in time for Student's annual ARD committee meeting.<sup>27</sup>
28. The written report of the speech evaluation was completed on January \*\*\*, 2020. Student's articulation for purposes of this evaluation was formally assessed using the Arizona Articulation and Phonology Scale, Fourth Revision (Arizona-4). Student's Arizona 4 scores as interpreted by the SLP reflected a moderate to severe impairment in word articulation and a moderate impairment in sentence articulation. Student met the criteria for a speech impairment and direct speech therapy services were recommended.<sup>28</sup>
29. Student's annual ARD committee meeting convened on January \*\*\*, 2020. The ARD committee reviewed the speech evaluation and found Student eligible for special education services as a student with a speech impairment.<sup>29</sup>
30. The ARD committee also reviewed Student's present levels of academic achievement and functional performance (PLAAFP or present levels) in reading, dyslexia, occupational and speech therapy, written expression, math, and behavior. The PLAAFP statement indicated Student's present levels of performance, where Student was expected to perform by the end of the year, the areas in which Student struggled, and those in which Student showed improvement.<sup>30</sup>

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<sup>25</sup> Jt. Exh. 1 at 7.

<sup>26</sup> Jt. Exh. 1 at 7, 16.

<sup>27</sup> Jt. Exh. 2 at 13; Tr. at 399:19-400:2, 44:19-23, 399:3-6, 401:13-402:16, 419:21-420:3; Jt. Exh. 14B; Tr. at 47:19-25, 402:23-403:4.

<sup>28</sup> Jt. Exh. 30 at 317, 320; Jt. Exh. 3 at 23-24.

<sup>29</sup> Jt. Exh. 3 at 21, 41.

<sup>30</sup> Jt. Exh. 3 at 22-24.

31. Student showed improvement in the amount of support needed to participate in Student's education as compared to Student's \*\*\* year and demonstrated a decreased level of distractibility while in the classroom. Student displayed better positional tolerance, participating in whole classroom instruction while \*\*\*.<sup>31</sup>
32. As for fine motor skills, Student demonstrated progress with \*\*\*. Student required significantly less verbal prompting for \*\*\*. The occupational therapist continued to monitor Student's sensory differences and needs within the school setting and consulted with Student's general and special education teachers to compare writing samples and provide guidance on issues such as \*\*\*.<sup>32</sup>
33. With respect to behavior, Student would become frustrated when Student felt a task was too difficult for Student, rush to complete tasks, and not always produce Student's best work. Student would also speak out at inappropriate times. The ARD committee determined that these behaviors impeded Student's learning or that of others.<sup>33</sup>
34. The District implemented a behavior chart for Student after winter break. \*\*\*. The behaviors identified in the chart were developmentally appropriate for a \*\*\* grade student.<sup>34</sup>
35. The behavior chart addressed Student's needs in the area of executive functioning, and Student demonstrated progress in the behaviors identified.<sup>35</sup>
36. At the time of Student's annual January 2020 ARD meeting, Student was reading below grade level, and Student's reading level had not changed since the end of \*\*\*. The District did not have data related to Student's oral reading fluency. Student's ability to read fluently and the District's ability to collect related data were impeded by Student's deficits in \*\*\*.<sup>36</sup>
37. The District, however, was able to collect data on Student's basic reading skills. Student demonstrated progress in the dyslexia program and in the skills assessed through the Texas Primary Reading Inventory (TPRI). At the beginning of the 2019-20 school year, Student's scores on this assessment indicated that Student was "developed" in \*\*\* areas measured as a part of the inventory. By the middle of the year, Student was developed in \*\*\* of those areas. Student was also able to \*\*\*.<sup>37</sup>

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<sup>31</sup> Jt. Exh. 3 at 23.

<sup>32</sup> Jt. Exh. 3 at 23-24; Tr. 489:18-490:18.

<sup>33</sup> Jt. Exh. 3 at 24, 25.

<sup>34</sup> Jt. Exh. 3 at 24; Tr. at 252:22-24; Jt. Exh. 37; Tr. at 256:14-16, 276: 8-13, 277:8-17.

<sup>35</sup> Jt. Exh. 3 at 48; Jt. Exh. 37; Tr. at 252:7-15, 255:12-22, 256, 277:18-279:16, 381:2-24.

<sup>36</sup> Jt. Exh. 3 at 22; Tr. at 50:14-17; Jt. Exh. 3 at 48.

<sup>37</sup> Jt. Exh. 3 at 22; Tr. at 50:19.

38. Student progressed through four units in the \*\*\* program by the middle of the school year. Student was making steady progress. Students in the dyslexia program progress at their own pace, and it can be slow growth.<sup>38</sup>
39. Although Student did not always independently use newly learned skills when reading unfamiliar text, Student showed increased confidence overall in reading and was demonstrating success with familiar text.<sup>39</sup>
40. The ARD committee also considered assistive technology and determined that Student was able to participate in the educational program, accomplish expected tasks, and make reasonable progress toward mastery of Student's IEP goals and objectives with typically available supports and services. Student had access to the following assistive technology in the classroom: a computer, audio books, speech-to-text and word prediction software; and keyboarding. Student used Student's computer and keyboard on a daily basis. Student's access to these forms of assistive technology continued through the District's transition to virtual learning.<sup>40</sup>
41. Parent requested intensive one-on-one reading services for Student. The District, however, recommended changing Student's inclusion support to small group pull-out in a special education resource setting using the \*\*\* program. Student's dyslexia services would remain the same. The \*\*\* program is research-based and includes components of instruction related to reading comprehension, increased fluency through repeated readings and patterned text, the opportunity to generalize word-level skills that have been mastered in isolation to continuous text and to supplement those skills with other strategies (such as the use of context clues).<sup>41</sup>
42. Shortly after Student's 2020 annual ARD committee meeting was convened but before it concluded, Parents obtained an evaluation of Student's foundational literacy skills from \*\*\*, a certified academic language therapist (CALT) and licensed dyslexia therapist (LDT). Ms. \*\*\* conducted an initial assessment and provided a report of her findings dated February \*\*\*, 2020. Student was able to \*\*\*. Ms. \*\*\* concluded that the passage was too difficult for Student, explaining that students must achieve a certain skill level in their decoding abilities before a teacher can assess their oral fluency rate. Student had not yet reached the decoding skill level necessary for obtaining a meaningful fluency rate. Some students take longer than others to grasp the decoding and other concepts taught through dyslexia instruction. A language therapist may anticipate working with a student for two years, but it can turn out to be six years sometimes. Ms. \*\*\* concluded that Student would benefit from explicit instruction in phonemic and phonological awareness in a small group

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<sup>38</sup> Jt. Exh. 3 at 43; Tr. at 588:22-589:3.

<sup>39</sup> Jt. Exh. 3 at 43.

<sup>40</sup> Jt. Exh. at 25; Tr. 481, 511.

<sup>41</sup> Tr. at 56:3-7; Jt. Exh. 3 at 43; Tr. at 54:3-8, 260:9-14, 264: 4-11, 266:3-267, 359:7-360:10.

setting. Ms. \*\*\* further opined that there are many programs that can meet a student's needs as long as the instructor is knowledgeable and the program is research-based.<sup>42</sup>

43. The ARD committee reconvened again on February \*\*\* and March \*\*\*, 2020, in an attempt to reach consensus. It reviewed Student's previous goals and recommended continuing goals that Student had not yet mastered. The committee members also worked together to modify previous goals and revise proposed goals to address Parents' concern as to whether the goals were appropriate in light of grade-level standards for students in the middle of \*\*\* grade.<sup>43</sup>
44. Student's \*\*\* writing goal was revised to require Student to \*\*\*. The committee also added a comprehension goal requiring Student to \*\*\*. Student's \*\*\* goal was revised to require Student to, \*\*\*. The fluency goal was revised to require Student to \*\*\*.<sup>44</sup>
45. At the February \*\*\*, 2020 reconvened ARD meeting, the ARD committee proposed \*\*\* minutes of small group speech services per grading period. The committee also developed four speech goals to address deficits identified in the speech evaluation. The goals focused on Student's production of /s/ and /z/ sounds with correct tongue placement, devoicing and omission of certain consonant sounds, and proper production of CH sounds in all word positions and /tr/ sounds in the initial and medial positions.<sup>45</sup>
46. The ARD committee added the following accommodations to the IEP: Direct student attention to specific information; support for general education teacher by special education staff; behavior chart implementation; clearly defined limits; positive reinforcement; reminders to stay on task; access to keyboarding; and access to text-to-speech and speech-to-text software.<sup>46</sup>
47. The committee considered but did not recommend extended school year (ESY) services. Student's progress reports dated May \*\*\*, 2019, and October \*\*\*, 2019, indicated that Student made progress in four of Student's five \*\* goals and did not show regression in the fifth. Parent proposed compensatory education for speech services and a specific program for Student's dyslexia instruction other than the one adopted by the District. The District rejected Parents' proposals. The meeting ended in disagreement.<sup>47</sup>

### **Spring 2020**

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<sup>42</sup> Tr. at 151-154:21; Pet. Exh. 1 at 3; Tr. 155:22-156:3, 169:15-22, 154:16-20, 171:17-19.

<sup>43</sup> Jt. Exh. 3 at 44; Tr. 194:16-195:4, 196:24-197:5; Jt. Exh. 14E; Jt. Exh. 3 at 26-28.

<sup>44</sup> Jt. Exh. 3 at 26-28.

<sup>45</sup> Jt. Exh. 3 at 43, 23-24, 29-32.

<sup>46</sup> Jt. Exh. 3 at 33.

<sup>47</sup> Jt. Exh. 3 at 45; Jt. Exh. 18 at 146-171; Tr. at 578; Jt. Exh. 3 at 48, 49.

48. School closures due to COVID-19 went into effect after spring break in March 2020. Students did not return to campus for in-person instruction before the end of the school year. Student received dyslexia services synchronously through remote instruction during this period. Student struggled with the on-line learning environment and the demands it placed on Student's ability to focus on instruction and remain on task. Student initially received 30-minute dyslexia lessons one to two times per week during virtual instruction, but those lessons were shortened to 15 minutes to accommodate Student's inability to focus over a longer period of time in the virtual setting. Student's dyslexia teacher worked with Parents during these lessons in an effort to keep Student engaged. Student continued to make progress, but not at the same rate Student had during in-person instruction.<sup>48</sup>
49. The District continued to provide speech services in a virtual format until the last day of the school year. Student received synchronous speech services during school closures and met with the SLP six times. Two of Student's four speech goals had been introduced at this time. The SLP was able to accurately collect data on one of them, but the other presented challenges in a virtual setting. The SLP was often unable to see Student's mouth, and audio quality was not ideal. Student progressed towards Student's speech goals during the 2019-20 school year.<sup>49</sup>
50. Student did not receive direct OT services during school closures because those services required hands-on therapy sessions which could not be conducted virtually. Tracking one of Student's \*\*\* goals also presented a challenge for this reason. It incorporated \*\*\* which is difficult to assess remotely. Student instead received indirect OT services during this time. The occupational therapist made videos and other resources available to Parents related specifically to \*\*\*, fine motor activities, and sensory tools to help with learning. Parents were concerned about possible regression and provided work samples. The occupational therapist proposed a schedule for practicing \*\*\* skills to address Parents' concerns and consulted with Student's classroom teacher. Student's \*\*\* improved over the course of the 2019-20 school year as measured by Student's \*\*\*.<sup>50</sup>
51. The ARD committee convened on May \*\*\*, 2020, at Parents' request to address issues related to ESY, data collection, possible regression, and continuity of Student's IEP in light of the school closures.<sup>51</sup>
52. The District did not agree to provide ESY services but, instead, offered Student small group and/or one-on-one compensatory services to be provided either remotely or in-person for two hours a day, Monday through Thursday, during the month of July 2020. The ARD committee discussed the nature of appropriate compensatory services, and the District proposed services focused on reading support and speech therapy. These services were

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<sup>48</sup> Tr. at 285:16-21, 409:9-10; Jt. Exh. 21; Jt. Exh. 4 at 59; Tr. at 58:15-59:3; Jt. Exh. 21 at 185; Jt. Exh. 14I; Tr. at 357:17-21.

<sup>49</sup> Jt. Exh. 4 at 59; Jt. Exh. 21 at 187; Tr. at 410-11; Jt. Exh. 23 at 255.

<sup>50</sup> Tr. at 511:21-512:1, 522:1-8; Jt. Exh. 21 at 184; Tr. at 520:21-25, 529:16-25, 521:2-7, 519:6-22.

<sup>51</sup> Jt. Exh. 4 at 58.

offered to address gaps in learning resulting from the change to remote instruction necessitated by school closures due to the pandemic. Parents rejected the District's offer of compensatory services due to concerns related to instructional methodology and potential exposure to COVID-19.<sup>52</sup>

53. Student received passing grades in all subjects throughout \*\*\* grade and was promoted to \*\*\* grade.<sup>53</sup>
54. Parents obtained a consultation report from \*\*\*, M.Ed., LDT, CALT-QI, on September \*\*\*, 2020. Ms. \*\*\* reviewed Student's previous assessments and educational history. Based on her review, Ms. \*\*\* recommended a structured literacy format that adheres to the guidelines set forth in *The Dyslexia Handbook* and opined that lessons should occur four to five times a week for 45-60 minutes per lesson. Ms. \*\*\* recognized that, in light of Student's other disabilities, Student may need more time to work through a dyslexia program with more repetition and practice of skills to show mastery. As for Student's \*\*\* needs, Ms. \*\*\* recommended speech-to-text features, spelling and grammar tools, online graphic organizers, use of lined paper, and keyboarding software to reinforce correct fingering. She also recommended that Student's IEP provide for limited auditory and visual distractions; computer access; and access to audio versions of books.<sup>54</sup>

### **Fall 2020**

55. Student returned to school in fall 2020 in an online environment. Student was unable to log on to the computer during synchronous learning without parent support. Student was able to remain on task for short periods of time, but disengaged during both small group and whole class instruction and also eloped from the home. Student required one-on-one support from Parents during online learning.<sup>55</sup>
56. The District developed and implemented the \*\*\* program in or around September 2020. Under this program, certified teachers and related service providers made weekly trips on a district school bus to the homes of special education students who were learning remotely to provide in-person support and hands-on learning to those students. Lesson plans were initially created by the District's Director of Special Education. The special education teachers of students being served through this program, however, eventually took over this task. Services provided on the \*\*\* did not supplant the minutes set forth in Student's IEP, but were provided in addition to those minutes. Lessons lasted for one hour once a week. Student participated in this program three or four times in the fall of 2020. The District's occupational therapist provided services to Student through the \*\*\* program. Student

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<sup>52</sup> Jt. Exh. 4 at 58, 59; Jt. Exh. 14I; Tr. at 409:25-410:7; Jt. Exh. 4 at 58.

<sup>53</sup> Jt. Exh. 33.

<sup>54</sup> Tr. at 95:12-17; Pet. Exh. 2 at 17-19.

<sup>55</sup> Jt. Exh. 36 at 647-48.

demonstrated writing skills similar to those observed in February and March 2020 before school closures.<sup>56</sup>

57. In the summer of 2020, Student's neurologist referred Student to a Board Certified Behavior Analyst (BCBA) for evaluation and treatment of mild autism. Parents contacted \*\*\*, BCBA, to conduct an evaluation. Mr. \*\*\* observed Student for six to eight hours outside the school setting and conducted the Social Responsiveness Scale-II and the Childhood Autism Rating Scale, second edition (High Functioning). Mr. \*\*\* completed a report of his findings on September \*\*\*, 2020. During these evaluations, Mr. \*\*\* determined that Student exhibited several behaviors that were consistent with autism and not necessarily attributable to Student's ADHD diagnosis. Mr. \*\*\* recommended that Student be formally evaluated for autism based on his findings.<sup>57</sup>
58. An ARD committee meeting was convened on October \*\*\*, 2020, to review Student's online learning and Mr. \*\*\*'s report. The District offered to evaluate Student for autism and provided a consent form to Parents. The parties also discussed the educational methodology used during, and the qualifications of the individuals providing, lessons on the \*\*\*.<sup>58</sup>
59. The October \*\*\*, 2020 meeting adjourned with the intent to reconvene. Parents did not return the consent form for the autism evaluation and withdrew Student from the District before the meeting could be reconvened. Student was earning \*\*\* in Student's classes before Student withdrew from the District.<sup>59</sup>
60. The District is engaging in continual efforts to assess students for regression due to school closures and remote learning caused by COVID-19. These assessment efforts include students learning virtually and in-person—although assessments of students in a virtual setting is more difficult and may not be as accurate.<sup>60</sup>
61. The District provided Notice of Procedural Safeguards to Parents at Student's annual ARD committee meeting on March \*\*\*, 2018, and at each annual meeting since then as well as the revision ARD committee meeting on October \*\*\*, 2018, when the committee recommended another FIE and on September \*\*\*, 2020. Petitioner also received Prior Written Notice at each meeting in which the ARD committee made a decision to propose or refuse to initiate or change the identification, evaluation, educational placement, or the provision of a FAPE to Student.<sup>61</sup>

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<sup>56</sup> Tr. at 522:12-523, 587, 588:2-7, 523:11-524:6.

<sup>57</sup> Pet. Exh. 15; Tr. at 130:16-20; Pet. Exh. 14; Tr. at 131:11-134:17; Pet. Exh. 14 at 101; Tr. at 144:1-4.

<sup>58</sup> Jt. Exh. 36 at 647, 648; Tr. at 80.

<sup>59</sup> Jt. Exh. 36 at 648; Jt. Exh. 34.

<sup>60</sup> Tr. at 580:14-19.

<sup>61</sup> Jt. Exh. 1 at 9; Jt. Exh. 3 at 48, 49; Jt. Exh. 8 at 128; Jt. Exh. 9 at 136; Jt. Exh. 36 at 652; Jt. Exh. 2 at 17; Jt. Exh. 4 at 62; Jt. Exh. 5 at 82; Jt. Exh. 6 at 97.

## VII. DISCUSSION

Petitioner alleged that the District denied Student a FAPE by failing to develop and implement an appropriate IEP; failing to consider and provide appropriate related services, assistive technology, and ESY; failing to provide required notice to Parents; and failing to identify Student with autism under the IDEA. Petitioner seeks an order awarding compensatory services in occupational and speech therapy and social skills; reimbursement of out-of-pocket expenses; and placement in an at-home day school.

### A. Burden of Proof in an IDEA Case

There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Accordingly, Petitioner bears the burden of showing that the District failed to provide Student a FAPE.

In this case, the District raised the affirmative defense of the statute of limitations and bears the initial burden to present sufficient facts of the accrual date. *Matter of Hinsley v. Boudloche*, 201 F.3d 638, 645 (5th Cir. 2000). If the District meets its initial burden, the burden of proof then shifts to the Petitioner to prove by a preponderance of the evidence one of the enumerated exceptions to the one-year statute of limitations. *G.I. v. Lewisville Indep. Sch. Dist.*, 2013 WL 4523581, at \*8 (E.D. Tex. 2013). *See also* Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46706 (2006). The District contends here that any claims arising prior to August 24, 2019, are time-barred.

### B. The Statute of Limitations in Texas

Under the IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of



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

The two year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2). Texas has adopted an alternative time limitation, and state regulations require a parent to request a hearing within one year of the date he or she knew or should have known of the alleged action(s) forming the basis of the petition. 19 Tex. Admin. Code § 89.1151(c). That is, the limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

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

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

19 Tex. Admin. Code § 89.1151(d).

The evidence here shows that Student qualified for special education services as a student with a speech impairment in 2016. Student met Student's speech goals and was dismissed from speech services in January 2019 by the ARD committee when it reviewed the December 2018 FIE. The FIE indicated that Student's articulation errors were age-appropriate and that Student no longer met the criteria for a speech impairment. Although Petitioner did not plead either of the two exceptions to the statute of limitations, Parents testified that they had no way of knowing Student was still making developmentally inappropriate articulation errors at the time of dismissal. This testimony establishes that—even if Parents had pled and been able to prove an exception to the statute of limitations—Parents knew of the facts giving rise to any claim they might have had for Student's dismissal from speech as of April \*\*\*, 2019. As such, Petitioner would have had to file a due process request related

to such a claim by April \*\*\*, 2020. Petitioner did not do so—the Complaint in this matter was not filed until August 24, 2020.

In addition, the evidence shows that Parents received a Notice of Procedural Safeguards at Student’s annual ARD committee meetings on March \*\*\*, 2018, and January \*\*\*, 2019. The District also provided notice at the committee meeting on October \*\*\*, 2018, during which the parties agreed to conduct another evaluation of Student. The evidence thus supports the reasonable inference that Parents had either actual or constructive knowledge of their procedural rights, including the right to file a due process complaint, when they received the \*\*\* Evaluation. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 944-46 (5th Cir. 2008). Therefore, the one-year statute of limitations bars any claims for relief by Petitioner related to Student’s dismissal from speech services in January 2019. It does not, however, bar consideration of any speech-related claims alleged in the Complaint accruing on or after August 24, 2019.

### **C. Duty to Provide FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The District has a duty to provide FAPE to all children with disabilities between the ages of 3 and 21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The District is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student’s unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student’s IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

**D. FAPE****The Four Factors Test**

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

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Whether positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997). Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

**1. Student's Education Program Must Be Individualized on the Basis of Assessment and Performance.**

In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided.

34 C.F.R. §§ 300.22, 300.320(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic 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, 999 (2017).

The school district's obligation when developing a student's IEP is to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. §§ 300.320(a)(1)(i); 300.324(a)(1). For a student, whose behavior impedes Student's learning and that of others, a school district must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir.2012).

Student's education program was individualized on the basis of assessment. From October 2018 through December 2019, the District evaluated Student in the areas of speech (twice), emotional and behavioral needs, intellectual and adaptive behaviors, academic achievement and functional performance, and related and instructional service needs as well as for dyslexia and \*\*\*. The District also conducted an occupational therapy evaluation which included a sensory profile and a developmental test of visual-motor integration.

Based on the results of these evaluations and a medical diagnosis of ADHD, the ARD committee determined that (1) Student was eligible for special education as a student with an SLD in basic reading skills, listening comprehension, and written expression, and under OHI due to ADHD; (2) Student was eligible for speech therapy due to a speech impairment in articulation; (3) occupational therapy was necessary to support the development of Student's fine motor, visual-perceptual, and visual-motor integration skills as well as Student's sensory needs in the general education classroom; and (4) Student was eligible for dyslexia and \*\*\* services.

Student's program was further individualized on the basis of Student's performance. An IEP must include a statement of the students' present levels of academic achievement and functional performance describing how Student's disability affects Student's involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1). The evidence in this case shows that Student's IEP included detailed PLAAFPs in reading, dyslexia, occupational and speech therapy, written expression, math, and behavior. The PLAAFPs state Student's current level of performance, where Student is expected to perform by the end of the year, the areas in which Student struggles, and those in which Student showed improvement. The ARD committee used this information to aid in drafting Student's goals and to provide necessary accommodations and supplementary services and supports.<sup>62</sup>

**a. Basic Reading Skills and Dyslexia**

**i. Program Goals and Accommodations**

Student's needs in basic reading skills and dyslexia were addressed through IEP goals, accommodations, dyslexia instruction, and inclusion support in the general education classroom. The ARD committee met in October 2019 to review and revise Student's IEP goals from the previous school year. The committee included five \*\*\* goals in Student's IEP to address the areas in which Student was struggling. These goals required Student to produce \*\*\*.

The ARD committee reviewed and revised these goals during Student's annual ARD in January 2020. The PLAAFP statement indicated that Student was able to \*\*\*. Student also continued to struggle with reading fluency as well as \*\*\*. The committee revised Student's

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<sup>62</sup> Petitioner argues that the PLAAFP statement included in the January 2020 IEP was insufficient because it did not include information on sensory issues, baseline data for OT services, or baseline and PLAAFP statements for listening comprehension and executive functioning. *Parents' Closing Brf.* at 12, 16. Petitioner thus seems to suggest that some sort of numerical or statistically-driven baseline is required for each area of need or academic subject in the PLAAFP. This is not the case. Meanwhile, information related to sensory issues was embedded in the statement related to OT services. And although there was no PLAAFP statement specifically for executive functioning, Student's needs in this area were reflected through data collected in connection with Student's behavior (which was addressed in the PLAAFP statement). In short, the PLAAFP statement included in the January 2020 IEP was sufficient to meet regulatory requirements.

phonics goal and added a fluency goal. The phonics goal still required Student to \*\*\*, but Student was now also required to \*\*\*. The fluency goal required Student to \*\*\*. Although Petitioner's Complaint and closing brief focus on a fluency rate that measures the words correctly read per minute in continuous grade-level text, the fluency goal included in Student's IEP more appropriately sought to build upon the foundational skills Student needed to master first.<sup>63</sup>

Student's accommodations to meet Student's needs in this area included teaching memory strategies and providing over-learning, review, and repetition of concepts.

## ii. Dyslexia Services

The Texas Administrative Code requires each school district in the state to purchase or create its own reading program for students with dyslexia that is aligned with the critical, evidence-based components set forth in *The Dyslexia Handbook*. 19 Tex. Admin. Code § 74.28(e). *See also The Dyslexia Handbook* at 88, q.47. These components include explicit instruction in phonological awareness (segmenting words into their component phonemes); sound-symbol association; the six syllables types; spelling patterns; reading comprehension, and reading fluency. Delivery of dyslexia instruction must be, among other things, multisensory, systematic and cumulative, explicit, diagnostic, and analytic. *The Dyslexia Handbook* at 41-42.

The District in this case purchased \*\*\* (a research-based program) to meet the needs of students in \*\*\* and \*\*\* grade with dyslexia. Student's IEP required \*\*\* minutes of instruction in this program per week, and Student's lessons included the critical components identified above. Specifically, each lesson began with \*\*\*. The dyslexia teacher adjusted lesson plans as necessary to focus on skills Student struggled with and provided strategies to help Student work through trouble spots.<sup>64</sup>

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<sup>63</sup> Ms. \*\*\* explained during the hearing that students must achieve a certain skill level in their decoding abilities before a teacher can assess their oral fluency rate. Here, Student had not yet reached the level necessary for obtaining a meaningful measurement.

<sup>64</sup> Notably, the services and accommodations provided to address Student's needs in dyslexia and \*\*\* are consistent with the recommendations made by Ms. \*\*\*, one of Petitioner's literacy consultants.

The evidence thus supports the conclusion that the District provided research-based dyslexia instruction that included the critical components required by *The Dyslexia Handbook* and that it was delivered in a manner that was multisensory, systematic and cumulative, explicit, diagnostic, and analytic.

Parents argue, however, that the \*\*\* program was inappropriate for Student because it is an intervention intended for the general education setting—not special education. This argument though is not supported by *The Dyslexia Handbook* which establishes that students may receive the type of instruction provided by the District in either the general or special education setting. “Whether the content, methodology, and/or delivery of the dyslexia instruction must be adapted to meet the student’s unique needs determines whether the instruction is specially designed—not where the instruction is delivered . . .” *The Dyslexia Handbook* at 39-40. *See also* 34 C.F.R. § 300.39 (defining specially designed instruction as instruction that is adapted, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from Student’s disability). The evidence here shows that the dyslexia teacher slowed down the pace of instruction in order to reteach concepts and provide opportunities for repetition and that she supplemented the lessons with phonological awareness exercises, thereby supporting the conclusion that the District provided specially designed dyslexia instruction to accommodate Student’s needs.

### **iii. Small Group Leveled Literacy Instruction**

The District also recommended that Student receive pull-out small group reading instruction in the resource setting rather than the inclusion support Student had been receiving in the general education classroom. The special education teacher uses the \*\*\* program for providing leveled literacy instruction. The record reflects that this program is also research-based and includes components of instruction for reading comprehension, increased fluency through repeated readings and patterned text, and the opportunity to generalize word-level skills that have been mastered in isolation to continuous text and to supplement those skills with other strategies such as using context clues to create meaning.

**b. Occupational Therapy and \*\*\***

Student's program included \*\*\* minutes of occupational therapy. The occupational therapist supported Student directly in the classroom as well as indirectly through services provided on Student's behalf. Student's program included writing goals that required Student to \*\*\*. In an effort to address Parents' concerns that Student's goals were not appropriately ambitious, Student's writing goal was revised to require Student to \*\*\*. The occupational therapist provided support for these goals. Student also received support through a multisensory \*\*\* program—\*\*\*. This program provided short, consistent sessions of explicit instruction on \*\*\*. In addition, the occupational therapist worked with Student on prerequisite skills related to Student's fine motor needs. Student's sensory needs were addressed through tactile sensory input, including seating accommodations, movement breaks, and fidgets.

Petitioner contends that the District should have completed an Assistive Technology evaluation. A preponderance of the evidence, however, indicates that such an evaluation was not necessary. The ARD committee considered assistive technology and determined that Student was able to participate in the educational program, accomplish expected tasks, and make progress toward mastery of Student's IEP goals and objectives with technology that was generally available. Student had access to and commonly used a Chromebook in the classroom as well as speech-to-text, spelling and grammar check, word prediction, and keyboarding applications. Student also had access to online graphic organizers and different types of lined paper for writing activities. These were the same forms of assistive technology recommended in Ms. \*\*\*'s report, and Student's access to this technology continued throughout the District's transition to virtual learning.

Petitioner also asserts that the minutes of occupational therapy services provided should have increased after Student was identified with \*\*\*. *Parent's Closing Brf.* at 16. Special education services, however, must be based on a student's needs and not on the label related to Student's disabilities. *See Lauren C. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 377 (5th Cir. 2018) (reasoning that 'the IDEA concerns itself not with labels, but with whether a student is receiving a FAPE') (citation omitted). The evidence here shows that the recommendations made in the \*\*\* report were consistent with the services already being provided as a part of Student's occupational



therapy and that appropriate accommodations were added to Student's IEP to further address Student's needs in this area. Petitioner thus failed to show that additional OT services were necessary to provide Student with a FAPE.

**c. Listening Comprehension, Attention, Behavior and Executive Functioning**

Student's program was individualized to meet Student's listening comprehension, attention, behavior, and executive functioning needs. Student's January 2020 IEP included a comprehension goal which required Student to \*\*\*. Evidence in the record establishes that this goal simultaneously addressed Student's listening comprehension and executive functioning needs. Meanwhile, Student's accommodations also addressed Student's needs in this area by requiring teachers to use picture representations for key words in verbal directions; give directions in a variety of ways with simplified vocabulary; direct Student's attention to specific information; check for understanding and reteach as needed; and provide visual aids, reminders to stay on task, and preferential seating next to auditory and visual sources of instruction. In addition, Student had access to noise-canceling headphones to help minimize distractions.

In response to Parents' concern that Student's executive functioning needs were not being addressed, the District collected data on Student's behavior in the classroom and proposed a Daily Behavior Report Card (behavior chart). The data showed that Student would become frustrated when Student felt a task was too difficult for Student, rush to complete tasks, and would not always produce Student's best work. Student would also speak out at inappropriate times. Based on this data, the behavior chart included two goals: (a) raising Student's hand and talking when appropriate; and (b) doing Student's best work. The evidence indicates that the behaviors identified in the chart were developmentally appropriate for a \*\*\* grade student.

**d. Speech Therapy**

Student's program included \*\*\* minutes of speech therapy per grading period and four articulation goals to address deficits identified in the January \*\*\*, 2020 speech evaluation and

summarized in the January 2020 PLAAFP statement. These goals focused on Student's production of /s/ and /z/ sounds with correct tongue placement, devoicing and omission of certain consonant sounds, and proper production of CH sounds in all word positions and /tr/ sounds in the initial and medial word positions.

**e. Extended School Year Services**

Petitioner argues that Student should have received ESY services during summer 2020. ESY services must be provided when a student has "exhibited, or reasonably may be expected to exhibit, severe or substantial regression" in one or more critical areas addressed in Student's IEP "that cannot be recouped within a reasonable period of time." 19 Tex. Admin. Code § 89.1065(2). "Severe or substantial regression means that the student will be unable to maintain one or more acquired critical skills in the absence of ESY services." *Id.* The reasonable period of time for recoupment must be determined on the basis of needs identified in each student's IEP, but in any case, must not exceed eight weeks. 19 Tex. Admin. Code § 89.1065(3). The record reflects that the ARD committee considered ESY services, but did not recommend them. There is no evidence in the record to suggest the ARD committee made this recommendation in error. In fact, rather than showing severe and substantial regression or an inability to recoup critical skills, Student's progress reports that spanned the previous summer showed that Student made progress towards four of Student's \*\*\* goals (and no regression in the fifth) during the first eight weeks of the 2019-20 school year.

Notably, Petitioner's argument on this issue seems to confuse compensatory education with ESY services and is ultimately unpersuasive. *See Parents' Closing Brf.* at 17. As discussed below, an award of compensatory education is intended to provide prospective relief for *previous* services determined to be deficient. Meanwhile, ESY decisions are based on student regression and recoupment of critical areas addressed in the student's *current* IEP after a break from instruction (such as winter, spring, or summer breaks). The speech evaluation and \*\*\* report cited by Petitioner on this issue did not assess Student performance specific to Student's IEP or provide longitudinal data related to the likelihood of regression and recoupment, but rather provided an overall assessment of Student's skills and deficits in speech and literacy.

Accordingly, the evidence does not support a finding that the District denied Student a FAPE by failing to provide necessary ESY services during the relevant timeframe.

#### **f. Conclusion**

In sum, the District provided Student with specially designed instruction and accommodations individualized to meet Student's needs in basic reading skills and dyslexia. Student received occupational therapy services to address Student's fine motor skills, visual-perceptual and visual-motor deficits, and Student's sensory and \*\*\* needs. Student's program further supported Student's needs in this area through accommodations and access to generally available assistive technology. Student received small group speech services to address articulation errors as well as support for Student's behavior and executive-functioning needs through a behavior chart and positive behavior support strategies. Student's executive functioning needs, along with Student's deficits in listening comprehension and attention, were also addressed through accommodations and an IEP goal related to sequencing. Taken as a whole, this program was individualized on the basis of Student's performance and assessment. *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F.3d 390, 400 (5th Cir. 2012).

#### **2. Least Restrictive Environment**

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

To determine whether a school district is educating a student with a disability in the LRE, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

*Daniel R.R. v. State Bd. of Ed.*, 874 F. 2d 1036, 1048 (5th Cir. 1989).

The record supports the conclusion that Student's program was offered in the LRE. Student received most of Student's instruction in the general education classroom with nondisabled peers as well as small group pull-out services for dyslexia and speech. The District also recommended additional time devoted to reading support in the special education resource setting. The evidence establishes that these pull out services were necessary to meet Student's unique needs and that the District mainstreamed Student to the maximum extent appropriate.

Petitioner contends, on the other hand, that Parents' request for one-on-one services and the Student's alleged lack of progress should have resulted in more intensive services and thus a more restrictive setting. *Parents' Closing Brf.* at 16. The District, however, did consider more intensive services: as noted above, it recommended replacing inclusion minutes with small group pull-out services in the resource setting. Moreover, the record reflects that Student was the only one in Student's dyslexia group until another student joined the group sometime later.

Analysis of this factor thus weighs in favor of finding that the District provided Student with a FAPE in the LRE during the relevant timeframe.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657-58 (8th Cir. 1999). The right to meaningful input does not mean a

student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence establishes that services were provided in a coordinated, collaborative manner by key stakeholders. The District collaborated with Parents. The ARD committee met approximately nine times from October 2019 through May 2019. Parents actively participated in each of these meetings. The District revised goals and implemented behavior supports to incorporate Parents' input and to address their concerns regarding Student's education. It also purchased the curriculum of one-minute phonological activities requested by Parents and incorporated them into the beginning of Student's dyslexia lessons. The District conducted evaluations of Student at Parents' request—including evaluations for dyslexia, \*\*\*, and a second speech evaluation—and further agreed to evaluate Student for autism before Student was withdrawn from the District. Between April 2019 and October 2020, Parents obtained and shared at least four outside evaluations with the District. The District took these evaluations into consideration when it agreed to further evaluate Student to determine whether the deficits identified in them were accompanied by educational need. Student's dyslexia teacher worked closely with Parents during school closures in an effort to keep Student engaged during virtual instruction.

District staff members collaborated with one another to provide instruction and related services to Student. The occupational therapist consulted with Student's teachers and provided recommendations on appropriate accommodations to address Student's needs, while special education staff provided inclusion support in the general education setting. The classroom teacher, related service providers, administrative staff, and the campus dyslexia specialist worked together and with Parents to create appropriately ambitious goals for Student based on Student's levels of performance and achievement.

The District also collaborated with staff members and Parents to provide Student with services through its \*\*\* program, implemented in September 2020 to address the needs of special education students who were learning remotely due to the pandemic. Under this program, a certified teacher along with the District's occupational therapist made weekly trips on a district school bus to Student's home to provide in-person support and hands-on learning. Lessons lasted for one hour, once a week. Lesson plans were created by the Director of Special Education and, later, by Student's special education teacher, and the services provided were in addition to the services identified in Student's IEP. Student participated in this program three to four times before Student withdrew from the District.

Conversely, Parents argue that services were not provided in a collaborative manner, contending instead that the District offered services based on availability and that this amounted to predetermination. *Parents' Closing Brf.* at 16. This argument appears to stem from Parents' concerns relating to the methodology of instruction used for dyslexia, compensatory services, and services provided through the \*\*\* program. Parent's position on this issue, however, is not supported by caselaw which establishes that the choice of educational methodology falls within the discretion of the school district. *See Board of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-08 (1982) (holding that once a court determines that the requirements of the act have been met, questions of methodology are for resolution by the states); *Fairfax County Sch. Dist. v. Knight*, 261 Fed. Appx. 606 (4th Cir. 2008) (unpublished) (finding that a student with learning disabilities did not require a specific program to obtain a meaningful educational benefit). Even if a parent prefers a specific methodology, a district is not obligated to carry out that program. *Matthews v. Douglas County Sch. Dist. RE*, 2018 WL 4790715 (D. Colo. 2018) (holding that a district did not violate the IDEA when it used the Wilson program to provide instruction to a student with dyslexia and other disabilities since some educational methodologies share the same core instructional approach). In short, Parents' disagreement with the District over methodology does not establish predetermination or a lack of collaboration.

Because the weight of credible evidence shows that services were provided in a coordinated, collaborative manner, this factor also weighs in favor of a determination that the District provided Student with a FAPE during the relevant timeframe.

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

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012). The evidence here shows that Student received both academic and nonacademic benefits from Student's program.

##### a. Nonacademic Benefits

Student showed improvement in the amount of support needed to participate in Student's education during \*\*\* grade as compared to Student's \*\*\* year and demonstrated a decreased level of distractibility while in the classroom. Student displayed better positional tolerance, participating in whole classroom instruction while \*\*\*. As for fine motor skills, Student demonstrated progress with \*\*\*, and Student required significantly less verbal prompting for \*\*\*. Student also demonstrated progress in the behaviors tracked by Student's behavior chart.

##### b. Academic Benefits

Student made progress in the dyslexia program and in the skills assessed through the TPRI. At the beginning of the 2019-20 school year, Student's TPRI scores indicated that Student was "developed" in \*\*\* areas measured as a part of the inventory. By the middle of the year, Student was developed in \*\*\* of those areas. Student was also able to \*\*\*. Student had progressed through four units in the \*\*\* program by the middle of the school year and five by the end of the year.<sup>65</sup> Although Student did not always independently use newly learned skills when reading unfamiliar text, Student showed increased confidence overall in reading and was demonstrating success with familiar text.

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<sup>65</sup> Student's rate of progress through the program slowed down after spring break when Student switched to remote learning in a synchronous format due to school closures.

Student's report cards reflect progress in the general education curriculum. Student received passing grades in all subjects throughout \*\*\* grade and was promoted to \*\*\* grade. Student started \*\*\* grade with high marks—receiving a \*\*\*—before Student withdrew from the District. Meanwhile, Student's progress reports from January 2019 to January 2020 show that Student mastered each of Student's IEP goals by October \*\*\*, 2019—the date upon which the ARD committee met to revisit those goals and revise them as appropriate.

Parents argue, however, that the progress Student made in the dyslexia program was inadequate, and they point to program literature that lays out a scope and sequence of lessons to be provided over the course of a school year. Parents' argument is unavailing. The scope and sequence they rely on is not individualized to meet Student's unique needs and the evidence indicates that some students take longer than others to grasp the decoding and other concepts taught through dyslexia instruction. In fact, the record reflects that a language therapist may end up working with a student for significantly longer (several years in some cases) than originally anticipated for this reason.

Parents also rely on grade-level TEKS and fluency charts to support their position that Student's program was deficient because Student was not reading or writing at grade level and Student's annual goals were not being developed in such a way as to bring Student up to grade level before Student's next annual ARD. Parent's position, however, is at odds with relevant caselaw. Overall educational benefit, not solely disability remediation, is the IDEA's statutory goal. *Klein Independent School District v Hovem*, 690 F.3d 390, 398 (5th Cir. 2012) (rejecting the argument that a student's IEP was insufficient because it failed to enable Student to write and spell better where Student earned passing marks and advanced from grade to grade). The evidence here shows that—even though Student was reading below grade level—Student was making passing grades and advancing from grade to grade. These factors indicate that Student was receiving a meaningful educational benefit. *Id.*

## **5. Conclusion**

Based on the evidence presented, the hearing officer concludes that Student's program was



individualized on the basis of assessment and performance and that it was provided in the least restrictive environment in a coordinated, collaborative manner among key stakeholders. The hearing officer also concludes that Student received both academic and nonacademic benefits. In sum, Student's program was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

#### **E. Identification of Autism**

The IDEA places upon school districts the obligation to identify, locate, and evaluate each student with a disability who needs special education services as a result of that disability. 34 C.F.R. §§ 300.111(a)(1), 300.201. Parents contend that the District violated this provision because it should have suspected Student had autism and a corresponding need for special education when it conducted the 2018 FIE. *Parents' Closing Brf.* at 17. The evidence does not support Parents' position.

Under the IDEA, "autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction . . . that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i). Other characteristics include engagement in repetitive movement, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. *Id.*

The District conducted several assessments as a part of the 2018 FIE. The results of these assessments demonstrated that Student's social-pragmatic skills fell within normal limits for Student's age. Student's strengths in this area included eye contact, social greetings and manners, topic initiation, conversational turn-taking, positive affirmation of others, and use of facial expressions to enhance communication. Student's overall adaptive skills also fell within the average range, indicating that Student adapted to new situations similar to others Student's age. Student possessed sufficient social skills and generally did not experience abnormal social difficulties. These results are inconsistent with an autism determination under the IDEA. Moreover, the District offered evidence that Student's behavior and sensory needs were typical of students diagnosed with ADHD. It therefore had no reason to suspect an additional area of

eligibility—particularly since it was already addressing Student’s behavior and sensory needs through Student’s current program and Student was making progress.

Nonetheless, upon receipt of Mr. \*\*\*’s report (which recommended further evaluation), the District agreed to evaluate Student for autism as an additional area of eligibility. Parents, however, failed to sign written consent for the evaluation and, shortly thereafter, withdrew Student from the District. The District cannot be held responsible for the Parents’ failure to cooperate in the evaluation and identification process.

Because the District had no reason to suspect autism or a related educational need beyond those already being addressed and because the District was willing and ready to conduct further evaluation upon receipt of written parental consent, the hearing officer concludes that the District did not violate the IDEA’s identification requirement.

#### **F. Procedural Requirements**

Petitioner alleges that the District failed to comply with certain notice requirements under the IDEA and to provide appropriate progress reports for the period spanning school closures. Liability for a procedural violation only arises if the procedural deficiency impeded Student’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). *See also Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

Petitioner asserts that the District failed to provide Parents with Prior Written Notice after the October \*\*\*, 2020 ARD meeting and Notice of Procedural Safeguards after Parents requested evaluations for dyslexia and \*\*\* in February and May 2019 respectively. The evidence shows, however, that the District provided both Prior Written Notice and Notice of Procedural Safeguards to Parents upon all occasions required under the IDEA during the relevant time period. 34 C.F.R. §§ 300.503(a), 300.504(a). As such, the hearing officer concludes that the District did not commit a procedural violation of the notice requirements under the IDEA as alleged by Petitioner.

Petitioner also claims that the District violated its obligation to collect data for progress reports

during school closures due to COVID-19 and that it did not ask Parents to do so on its behalf. First, the District is not legally required to ask Parents to take on this responsibility and Petitioner offers no authority or guidance to suggest otherwise. Second, although the hearing officer is unaware of (and the parties did not offer) any federal or state guidance related specifically to data collection for purposes of progress reporting during the pandemic, the U.S. Department of Education disseminated guidance in March 2020 which required school districts to make every effort to provide services, recognized the need for flexibility, and encouraged collaboration and creativity. U.S. Dept. of Education (USDE), *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 2020) (*Questions and Answers*), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>; U.S.D.E., *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>. The state provided similar guidance but required school districts to make reasonable efforts with respect to various obligations under the IDEA. Texas Education Agency, *COVID-19 FAQ: Special Education in Texas* (May 27, 2020), [https://tea.texas.gov/sites/default/files/covid/covid19\\_special\\_ed\\_qa\\_updated\\_may\\_7.pdf](https://tea.texas.gov/sites/default/files/covid/covid19_special_ed_qa_updated_may_7.pdf).

The weight of credible evidence establishes that the limitations imposed by the virtual environment impaired the District's ability to collect data on speech goals and goals that incorporated adaptive technology and OT support. It also shows that Student struggled with remote learning, rendering data collection difficult at best. Nonetheless, the SLP provided as much data as she could on the two speech goals introduced, and the dyslexia teacher enlisted the aid of Parents in an effort to help keep Student on task. Applying the principles articulated above, the hearing officer concludes that—although the District struggled with data collection during spring 2020—its efforts to do so were in compliance with federal and state guidance.

Nonetheless, even if the District had committed a procedural violation either through a failure to provide appropriate notice or through its data collection efforts, Petitioner did not prove that such a violation resulted in a substantive denial of a FAPE. Parents were active participants in ARD committee meetings, the District was responsive to input from Parents, and Student received an

educational benefit from the program that was designed and implemented.

## **G. Relief**

### **1. Compensatory Education**

Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 35, 374 (1996). This includes the power to award compensatory education—an award of services to be provided prospectively in order to compensate the student for a deficient educational program provided in the past. See *Letter to Kohn*, 17 IDELR 522 (OSERS 1991); *G. ex. rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295 (4th Cir. 2003); see also *D.A. v. Houston Ind. Sch. Dist.*, 716 F. Supp. 2d 603, 612 (S.D. Tex. 2009), *aff'd* 629 F. 3d 450 (5<sup>th</sup> Cir. 2010) (upholding hearing officer’s decision that student failed to prove amount of compensatory reimbursement student was entitled to for school district’s failure to timely evaluate). The purpose of the award is to place the student in the position Student would have been in had the District provided the required services. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516, 523 (D.C. Cir. 2005). A compensatory award requires a “corresponding finding of an IDEA violation.” *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 800 (5th Cir. 2020).

Petitioner in this case seeks an award of compensatory education for speech and occupational therapy and social skills. We turn first to Petitioner’s request for compensatory education in social skills. The basis for this request is unclear. The hearing officer finds no evidence in the record related to Student’s needs or deficits in this area and, as such, interprets this request to be based on Petitioner’s claim that the District failed to identify Student with autism. Because the hearing officer concludes that the District did not violate the identification requirement of the IDEA, Petitioner’s request for compensatory education in social skills is denied.

Next, we consider Petitioner’s request for compensatory education in speech and occupational therapy. As a threshold matter, any request for compensatory speech services resulting from Student’s dismissal from speech in January 2019 is barred by the applicable statute of limitations. Accordingly,

Petitioner's request for compensatory education must be limited in scope to the relevant time period confirmed by Petitioner during the course of these proceedings—the 2019-20 school year. The relevant time period must then be divided into those services provided prior to school closures due to COVID-19 and those provided after. Because the hearing officer concludes that the District provided Student with a FAPE during the relevant timeframe prior to school closures, Petitioner's request for compensatory speech and occupational therapy related to program deficiencies alleged during this period is also denied.

Finally, we turn to the question of whether compensatory education should be awarded for any speech and occupational therapy services in the Student's IEP that the District was unable to provide in spring 2020.<sup>66</sup> As noted above, the District was required to make every effort to provide the special education and related services identified in Student's IEP after school closures. *Questions and Answers* at 2.

The evidence shows that Student received six sessions of synchronous speech therapy between spring break and the end of the school year. Student did not receive direct OT services during school closures because those services require hands-on therapy sessions which could not be conducted virtually. Student instead received services indirectly (a method of service delivery contemplated in Student's IEP). Specifically, the occupational therapist made videos and other resources available to Parents related to \*\*\*, fine motor activities, and sensory tools to help with learning. She also proposed a schedule for practicing \*\*\* skills to address Parents' concerns related to possible regression and consulted with Student's classroom teacher. Moreover, the occupational therapist provided direct services to Student through the \*\*\* program when school resumed in the fall. These minutes were provided in addition to the minutes required under Student's IEP.

Notably, Parents do not argue that these services—or the other services provided by the District during school closures—failed to comply with federal and state guidance. Nor do they offer any evidence as to the nature and scope of the compensatory speech and occupational therapy

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<sup>66</sup> The dyslexia and other services provided by the District during school closures are not addressed in this analysis because Petitioner made no claim related to and seeks no compensatory education for those services in these proceedings.

services necessary to place Student in the position Student would have been in had the District been able to provide the required services.

Parents' request for compensatory education is further undermined by the fact that the District offered compensatory education in reading and speech therapy—either in-person or remotely—during the summer of 2020. Parents declined these services. The District also offered evidence of its intent and willingness to assess Student's needs upon re-enrollment in the District and provide the compensatory education determined to be appropriate by Student's ARD committee.

Based upon the compensatory services offered by the District and the lack of expert testimony from the Petitioner regarding the nature and scope of compensatory services necessary, this hearing officer concludes that Petitioner did not meet Petitioner's burden of proof for entitlement to compensatory education. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

#### **H. Private Placement**

Private placement is justified when a student's needs cannot be met in the public school and the private placement is "essential" for the Student to receive the requisite educational benefit. *See Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299-300 (5th Cir. 2009). Petitioner did not meet Petitioner's burden of proof on this issue. The preponderance of the evidence showed that the program and placement met Student's needs.

### **VIII. CONCLUSIONS OF LAW**


1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127 (5th Cir. 1993).
2. The District provided Student a FAPE during the relevant time period, and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Board of Educ. Of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

3. Petitioner did not meet Petitioner's burden of proving that Respondent denied Student a FAPE by failing to identify Student as a student with autism. *Schaffer*, 546 U.S. at 62; 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.8(a)(1), 300.111(a).
4. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comply with student and parental procedural rights under the IDEA related to the provision of Prior Written Notice or Notice of Procedural Safeguards. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a); 300.504(a).
5. Petitioner did not meet Petitioner's burden of proving entitlement to compensatory education for speech therapy, occupational therapy, or social skills. *Schaffer*, 546 U.S. at 62; *O.W.*, 961 F.3d at 800.
6. Petitioner is not entitled to private placement at District expense. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).
7. All of Petitioner's claims arising under any laws other than IDEA are outside the jurisdiction of a special education hearing officer in Texas. 20 U.S.C. § 1415(b)(6); 34 C.F.R. §§ 300.507, 19 Tex. Admin. Code § 89.1151(a).

### IX. ORDERS

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

**SIGNED March 18, 2021.**

  
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Stacy May  
Special Education Hearing Officer  
For the State of Texas

### X. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent

jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a) (b).