

DOCKET NO. 318-SE-0820

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

v.

**HUTTO INDEPENDENT SCHOOL
DISTRICT,
Respondent**

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER FOR

THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. 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 denied Student a FAPE during the 2019-20 school year by failing to identify Student with a specific learning disability (SLD). The hearing officer further concludes that District did not violate the IDEA's procedural requirements and that Petitioner failed to meet Petitioner's burden of proving that a private placement is necessary in order for Student to receive a FAPE.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Student's non-attorney representative, Virginia Spencer with Lumen Advocacy, LLC. The 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 convened on February 2-3, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Virginia Spencer. In addition, *** and ***, Student's parents, attended the hearing.

Respondent continued to be represented by its legal counsel, Heather Rutland and Tyler 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 on April 16, 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 the District denied Student a FAPE by failing to consider and provide related services;
2. Whether the District denied Student a FAPE by failing to provide services to Student in a collaborative manner involving key stakeholders;
3. Whether the District denied Student a FAPE by failing to develop and implement an appropriate Individualized Education Program (IEP) based on assessment and performance;
4. Whether the District denied Student a FAPE by failing to develop and implement an IEP that provided academic and nonacademic benefit;

5. Whether the District denied Student a FAPE by failing to consider and provide extended school year (ESY) services;
6. Whether the District violated the IDEA by failing to provide Petitioner with notice of Student's rights under the IDEA;

EVALUATION:

7. Whether the District denied Student a FAPE by failing to conduct an assistive technology (AT) assessment; and

IDENTIFICATION:

8. Whether the District denied Student a FAPE by failing to identify Student as a student with an SLD.

B. Respondent's Legal Position and Additional Issues

Respondent generally and specifically denied the allegations stated in the Complaint and contended that it provided Student a FAPE during the relevant time period.

The District also raised the following issues:

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

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner seeks the following items of requested relief:

1. In-home private placement at District expense;
2. Compensatory education for occupational therapy (OT), ***, and executive functioning;
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 in Order No. 3.

VI. FINDINGS OF FACT

2018 FIE and FBA

1. Student enrolled in the District when Student was in *** grade. Student is now *** years old and in *** grade. Student lives with Student's parents ***. Student enjoys ***.¹
2. The District conducted an initial Full and Individual Evaluation (FIE) in May 2018, the end of Student's *** grade year. The FIE assessed Student for suspected disabilities in the areas of autism, speech, and other health impairment (OHI) due to attention deficit hyperactivity disorder (ADHD). The District completed the FIE Disability Report on June ***, 2018.²
3. Student's receptive and expressive language skills were in the average range according to the Clinical Evaluation of Language Fundamentals-5 (CELF-5). Student's articulation was assessed through informal measures and indicated that Student's articulation skills were

¹ Joint Exhibit (Jt. Exh.) 30 at 277; Transcript (Tr.) at 53.

² Jt. Exh. 30 at 265.

within normal limits when compared to same age peers. Based on these results, Student did not meet the criteria for a speech impairment.³

4. The FIE measured characteristics of inattention and hyperactivity-impulsivity using the Attention Deficit Disorders Evaluation Scale-Fourth Edition, School and Home Version (ADDES4-SV/HV). The evaluation noted that Student rushed through Student's work, made careless mistakes, was impulsive in Student's decision-making, and was at risk for hyperactivity-impulsivity in the school setting. Student also had a medical diagnosis of ADHD. The FIE concluded that Student met the criteria for an OHI due to ADHD.⁴
5. The FIE also included the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2). Student demonstrated characteristics typical of a person with autism, including limited spontaneous use of gestures, minimal sense of reciprocity, poor modulated eye contact, limited range of facial expressions, failure to initiate conversation, repetitive behaviors, and echolalic responses (the repetition of a word, noise, or phrase). The results of the Autism Spectrum Rating Scales (ASRS) and the Childhood Autism Rating Scale 2 High Functioning Version (CARS-2 HF) supported the conclusion that Student demonstrated mild to moderate symptoms of autism. Although the FIE found that Student demonstrated symptoms of autism and that the symptoms impaired Student's social, communication, and academic functioning, it concluded that Student did not meet eligibility criteria for this disability.⁵
6. The FIE also assessed Student's adaptive behaviors. Adaptive behavior refers to the effectiveness with which a person copes with the natural and social demands of Student's environment and includes the age-appropriate behaviors necessary for people to live independently and to function safely and appropriately in daily life. Student's adaptive behavior was statistically within the normal range.⁶
7. Student's intellectual functioning was measured with the Woodcock Johnson IV Tests of Cognitive Abilities (WJIV). This instrument is standardized so that the average or mean is a standard score of 100. The standard deviation is 15 points. This means that the majority of the population (approximately 68%) falls between the standard scores of 85 and 115. Scores under 85 are below average, and those higher than 115 are above average. Student scored as follows in the cognitive domains assessed:
 - General Intellectual Ability: *** (average);
 - Crystallized Intelligence (Gc): *** (high average);
 - Fluid Reasoning (Gf): *** (superior);
 - Auditory Processing: *** (average);

³ Jt. Exh. 30 at 266-72.

⁴ Jt. Exh. 30 at 275-76, 279, 301.

⁵ Jt. Exh. 30 at 279-80, 282, 300.

⁶ Jt. Exh. 30 at 290-92.

- Long-Term Retrieval: *** (average);
 - Processing Speed: *** (average);
 - Short-Term Working Memory: *** (average); and
 - Visual-Spatial Thinking: *** (average).⁷
8. ***, M. Ed., Licensed Dyslexia Therapist (LDT), Certified Academic Language Therapist (CALT), and Educational Diagnostician, provided a Consult Report and Review of Evaluation Data for Parents in January 2021. As a part of her report, Ms. *** reviewed the WJIV score reports and protocols from the 2018 FIE. Ms. *** explained that Gf-Gc comparisons predict how students are expected to score in certain cognitive or achievement areas based on their measured abilities in Fluid Reasoning and Crystallized Intelligence. Student's Gf-Gc composite score on the 2018 FIE measured in the superior range at ***. The composite scores in Short-Term Memory, Auditory Processing, Long-Term Retrieval, and Visual Processing were at or more than one standard deviation (15 points) away from their predicted value in comparison to the Gf-Gc composite, indicating that Student was not performing as expected in these areas.⁸
9. The 2018 FIE used the Cross Battery Assessment Software System (XBASS) to interpret Student's cognitive scores. One of the first steps in XBASS is to ensure cohesive test scores within cognitive domains to fully understand a student's capabilities. Cohesive scores occur when test scores are reasonably close together (typically within one standard deviation or 15 points). Additional testing and analysis is required when scores are not cohesive in order to ensure an accurate interpretation of the student's capabilities. A score should be identified as a strength or a weakness only after a cohesive standard score has been generated within a domain. The 2018 FIE failed to find cohesive subtest scores in the areas of Long-Term Retrieval, Processing Speed, and Fluid Reasoning.⁹
10. The FIE reviewed Student's academic performance levels. This review included Student's grades and data related to Student's performance on curriculum-based assessments and standardized testing. Student made passing grades during the 2017-18 school year, but failed several local and District assessments as well as the State of Texas Assessments of Academic Readiness (STAAR) in ***.¹⁰
11. The FIE also included the Woodcock Johnson IV-Tests of Achievement (WJIV ACH). This assessment is a comprehensive set of individually administered tests to measure achievement in the areas of reading, mathematics, written language, oral language, academic skills, fluency, and applications. Student scored in the average range in each of the achievement domains assessed, including reading, broad reading, basic reading skills, reading comprehension, reading fluency, written expression, academic skills, academic

⁷ Jt. Exh. 30 at 284-90.

⁸ Petitioner's Exhibit (Pet. Exh.) 27 at 1033; Tr. at 71-72; Jt. Exh. 30 at 284.

⁹ Pet. Exh. 27 at 1033; Tr. at 62-64.

¹⁰ Jt. Exh. 30 at 292-99; Jt. Exh. 38.

fluency, and academic applications. Student, however, scored below average in the *** subtest and low average in the passage comprehension subtest.¹¹

12. The WJIV ACH written expression composite included two subparts. The first subpart consisted of four writing samples, and the second required Student to continue to write for fluency (which provides a measure of Student's stamina). The evaluator did not administer the writing fluency subtest. This information is important in analyzing a student's written expression, and the failure to include it in the assessment renders the interpretation of Student's written expression invalid.¹²
13. The District considered Student's emotional and behavioral needs as a part of the FIE. Neither the assessment results nor information from home or school suggested Student had any serious emotional problems that should have been investigated further or that interfered with Student's ability to learn. As for behavior, the District conducted a Functional Behavior Assessment (FBA). The June 2018 FBA showed Student exhibited the following problematic behaviors: ***. The evaluator recommended two behavior goals—one to increase on task behavior (rather than rushing through work) and another to use coping skills, peer modeling, and self-monitoring to cooperate and engage with others appropriately. The evaluator also recommended skills and strategies to increase and reinforce desired behaviors.¹³
14. The District convened an initial Admission Review, and Dismissal (ARD) committee meeting on June ***, 2018, to review the FIE and FBA. The meeting did not last long, however, before Parents asked to reconvene the meeting at a later date.¹⁴

***** grade (2018-19 school year)**

15. The ARD committee reconvened on August ***, 2018. Parents questioned why Student did not meet the eligibility criteria for autism. The meeting was tabled once again. Shortly thereafter, on August ***, the evaluator prepared an addendum to the FIE, concluding that Student met the eligibility criteria for autism after all.¹⁵
16. The ARD committee reconvened on August ***, 2018, and determined that Student was eligible for special education services as a student with autism in addition to OHI. The committee also reviewed the FBA. Parents expressed concern that the FBA did not accurately reflect their input. Nonetheless, the District and Parents worked together to

¹¹ Jt. Exh. 30 at 296-97.

¹² Tr. at 71.

¹³ Jt. Exh. 30 at 278; Jt. Exh. 29; Jt. Exh. 29 at 260.

¹⁴ Jt. Exh. 7 at 145-46.

¹⁵ Jt. Exh. 7 at 146; Jt. Exh. 32 at 311.

develop Student's Behavior Intervention Plan (BIP). The BIP addressed off-task behavior, self-regulation, and development of appropriate coping strategies.¹⁶

17. The ARD committee met again on October ***, 2018. The committee discussed the *** curriculum and services provided to Student. Student received *** minutes per grading period of *** services. Due to concerns with the District's FBA, Parents requested an independent FBA by behavior analyst ***. The ARD committee then reconvened on October ***, 2018, and Parents requested an occupational therapy (OT) assessment.¹⁷
18. The ARD committee reviewed the independent FBA on January ***, 2019. Ms. *** observed Student on five separate occasions. She did not see any of the problematic behaviors identified in the District's FBA and therefore could not collect Antecedent, Behavior, Consequence (ABC) data. The ARD committee determined that Student had mastered the behavior and *** goals in Student's IEP, and it discontinued those goals along with Student's BIP. The committee further agreed to address any behavior needs through accommodations and to communicate through email or folder notes if Student displayed behaviors of concern.¹⁸
19. The ARD committee reconvened on January ***, 2019, for a Revision to the Annual ARD and reviewed the OT evaluation that was completed on January ***, 2019. Student demonstrated strengths in the following areas: ***. Student exhibited the following obstacles to learning: ***.¹⁹
20. The occupational therapist recommended consultation services for *** per grading period to assist staff in ***. The OT services were accepted at the January ***, 2019 meeting.²⁰
21. Student has a family history of dyslexia. Student's *** all have dyslexia. Student also received private speech services for a speech impairment from 2013-2016 to address deficits in phonemic production of age appropriate sounds and inappropriate phonological processes.²¹
22. The District screened Student for dyslexia in 2016 when Student was in *** grade and agreed to rescreen Student in January 2019 at Parents' request. The evaluation was performed by the campus dyslexia specialist, and her written report was completed on February ***, 2019.²²

¹⁶ Jt. Exh. 7 at 146; Jt. Exh. 7 at 135, 140; Pet. Exh. 1b.

¹⁷ Jt. Exh. 8; Jt. Exh. 8 at 156-57; Jt. Exh. 13; Jt. Exh. 8 at 169.

¹⁸ Jt. Exh. 15; Jt. Exh. 9 at 162-63; Jt. Exh. 7 at 137; Tr. at 154.

¹⁹ Jt. Exhs. 9, 33; Jt. Exh. 33 at 332-33.

²⁰ Jt. Exh. 33 at 333; Jt. Exh. 9 at 163.

²¹ Jt. Exh. 32 at 311; Pet. Exh. 8 at 39.

²² Jt. Exh. 9 at 45, 163; Jt. Exh. 34.

23. The evaluation assessed Student for the primary characteristics of dyslexia and deficits in phonological and phonemic awareness. It then sought to determine whether any weaknesses identified were unexpected in light of Student's other abilities. The primary characteristics of dyslexia include letter-word identification, sight word efficiency, decoding unfamiliar words, and spelling. The assessment noted that previous effective instruction in phonological and phonemic awareness may remediate phonological skills and that average phonological awareness scores alone do not rule out dyslexia. The evaluation also asked if there was a family history of dyslexia.²³
24. The ARD committee convened on March ***, 2019, to review the dyslexia evaluation. With respect to the primary characteristics of dyslexia, Student scored below average in *** and in the low average range in sight word efficiency. Overall, Student scored in the low average range for phonological awareness, scoring below average in phoneme isolation. Student's deficits in these areas were unexpected in light of Student's strengths in listening comprehension, reading comprehension, oral comprehension, and math reasoning. The District attributed Student's deficits in these areas to ADHD and determined that Student was ineligible for dyslexia services. In reaching this conclusion, the District failed to consider Student's family history of dyslexia as well as the remedial effect of Student's prior speech services on Student's scores in phonological awareness.²⁴
25. In May 2019, Student was struggling one day with Student's Chromebook and getting Student's work completed. Student told Student's teacher that Student "****." Student was referred to the school counselor who implemented the "ASK" protocol in a one-on-one conference. The ASK protocol is an approach implemented by the District to assess risk to a student and determine appropriate next steps either through discussing coping strategies to help regulate emotions or more serious interventions to ensure Student safety. The guidance counselor determined from her conversation with Student that Student was not in danger, Student's statement was born out of frustration, and Student did not require further screening for depression or anxiety.²⁵
26. Student passed the *** grade STAAR tests for ***, but not ***. Student earned passing grades during the 2018-19 school year and was promoted to *** grade.²⁶

***** grade (2019-20 school year)**

27. On August ***, 2019, Dr. *** provided a note indicating Student had been diagnosed with ***. She recommended that Student receive in-class support as needed and *** groups that included Student's peers.²⁷

²³ Pet. Exh. 34; Pet. Exh. 1f; Jt. Exh. 34 at 338-39.

²⁴ Jt. Exh. 9; Jt. Exh. 34 at 339; Pet. Exh. 1f.

²⁵ Pet. Exh. 29 at 1090-91; Tr. at 331.

²⁶ Jt. Exh. 1 at 5; Jt. Exh. 39; Jt. Exh. 24.

²⁷ Pet. Exh. 10 at 68.

28. In addition, Parents obtained a Social, Emotional, and Behavioral Evaluation (SEB Evaluation) from ***, Board Certified Behavior Analyst (BCBA), on August ***, 2019. According to this evaluation, Student exhibited challenging behaviors that impaired Student's relations with others, including Student's ***. Student struggled with *** in both the home and school environments. The evaluation made the following recommendations for areas of intervention and skill acquisition: ***. It also identified the following areas of focus for *** development: ***.²⁸
29. The SEB Evaluation recommended the following treatment and interventions: individualized instruction on the *** (a cognitive-behavioral approach to regulating emotions and sensory needs); pairing or peer-mentoring; parent/staff training; and social groups or social outings. It also endorsed the following school-specific interventions: training for school personnel on the *** and coordination and communication between school personnel and caregivers.²⁹
30. Student's annual ARD convened on August ***, 2019. The ARD committee reviewed Student's present levels of academic achievement and functional performance (PLAAFP or present levels) in reading, OT, written expression, math, and behavior. The PLAAFP statements specified Student's present level of performance, the areas in which Student struggled, and those in which Student showed improvement.³⁰
31. By the end of Student's *** year, Student was reading on a Developmental Reading Assessment (DRA) level ***. Students are expected to be reading on this level in *** grade. Student struggled with writing and needed prompting and guidance from the teacher in order to write more than the bare minimum.³¹
32. As for behavior, Student was more successful when ***, but tended to talk at inappropriate times and was prone to ***. Mr. *** attended the August *** ARD committee meeting and recommended the use of *** to help address Student's sensory and attention needs in the classroom. The District implemented Mr. ***'s recommendation by *** for sensory input and installing ***. The District adopted the majority of Mr. ***'s recommendations. Although Student could become easily frustrated, Student no longer ***. Student was able to move on with redirection. Student still struggled, however, with empathy and peer interactions.³²
33. Student worked with the Licensed Specialist in School Psychology (LSSP) and school counselor on *** and executive functioning. Student received services individually and in small groups with Student's peers. Small group activities included *** and focused on

²⁸ Jt. Exh. 36 at 348; Tr. at 216-17.

²⁹ Jt. Exh. 36 at 348-49.

³⁰ Jt. Exh. 1 at 2-5.

³¹ Jt. Exh. 1 at 2, 5, 21.

³² Jt. Exh. 1 at 21; Tr. at 397; Tr. at 246-47; Jt. Exh. 1 at 5; Tr. at 36.

developing *** such as cooperation, turn-taking, and sportsmanship. Student also had access to the counselor and LSSP during the school day to address *** and related issues as needed. The District's services in this area were consistent with recommendations made by both Dr. *** and Ms. ***.³³

34. Although the District has a BCBA available to help address behavior needs and ***, Student did not demonstrate a need for those services. The District, however, agreed to allow Mr. *** to provide "****" behavioral therapy services to Student *** per week when Parents indicated their intent to take Student out of class in order to receive services from Mr. *** off-campus.³⁴
35. In addition to endorsing the ***, Mr. *** recommended other strategies that were implemented by the District. He suggested an *** system to help address some of Student's executive functioning needs and a behavior tracking system in which ***. If Student ***, If Student ***, Student would lose a privilege at home. If Student ***, Student would receive a reward or privilege. District staff collaborated with Mr. *** to collect data on Student's behavior in the classroom. The District trained staff and implemented this program in Student's general education classroom. Once this program was implemented with fidelity, Student's behaviors decreased considerably.³⁵
36. Student's August 2019 IEP included two language arts goals and a functional goal. The first language arts goal required Student to *** and OT support. This goal was the same goal included in Student's IEP from January of the previous year (Student's *** grade year), but required a higher level of accuracy. The second language arts goal required Student to ***. Finally, the functional goal required Student to *** Student and use an appropriate coping skill. This goal was scaffolded by five short-term objectives that addressed deficits identified in Mr. ***'s SEB evaluation and incorporated strategies from the *** framework recommended in his report.³⁶
37. Student's IEP called for small group *** instruction in the resource setting as well as inclusion support in the general education classroom. *** instruction included a ***. Student also had access to applications that would help Student identify vocabulary and misspelled words in Student's writing.³⁷

³³ Jt. Exh. 1 at 21; Jt. Exh. 2 at 50, 52; Tr. at 348; Tr. at 329, 332-34, 336, 338, 356-58; Jt. Exh. 8 at 43-44; Pet. Exh. 10 at 68; Pet. Exh. 29 at 1105.

³⁴ Tr. at 482-85; Jt. Exh. 1 at 22; Tr. at 210-11, 436-38.

³⁵ Tr. at 212, 241, 345-45, 430, 433; Pet. Exh. 29 at 1103; Tr. at 240. Jt. Exh. 2 at 51; Tr. at 212-13, 215, 346-47, 439.

³⁶ Jt. Exh. 1 at 7-9; Jt. Exh. 3 at 65; Jt. Exh. 9 at 165.

³⁷ Jt. Exh. 1 at 17, 22; Tr. at 269-71; Tr. at 276, 291; Jt. Exh. 26 at 215.

38. Student's IEP included the following accommodations: copy of teacher notes, scaffolding of multi-step activities, ***, positive reinforcement (including praise and preferred items), ***reminders to stay on task, ***, and ***.³⁸
39. The ARD committee considered ESY services, but did not recommend them because Student showed no likelihood of regression in critical skills and a corresponding inability to recoup them within a reasonable amount of time. The ARD committee also considered Student's need for AT. Student had access to and used generally available AT, including keyboarding, spelling and grammar checking tools, and word prediction and speech-to-text software. The ARD committee determined that Student did not need AT beyond what Student was already using in order to receive an educational benefit.³⁹
40. The August 2019 ARD committee considered the Autism Supplement and determined that Student was able to follow the general education schedule with little to no adjustment. In-home and parent training were not needed. Student received positive behavior support through *** services and related IEP goals and was making social and behavioral progress with the typical student-staff ratio in the general education setting. Student was able to communicate Student's needs without additional intervention and worked on *** with the campus counselor and LSSP. The ARD committee also considered teaching strategies grounded in research-based practices for students with autism and determined that the instructional strategies and accommodations used in the general education setting were sufficient for Student to make progress.⁴⁰
41. Parents attended the August ***, 2019 meeting with their advocate, and the meeting ended in agreement.⁴¹
42. Parents obtained two reports from ***, M.A., LDT, CALT, to assess Student's reading skills—one on August ***, 2019, and another on December ***, 2019. Most of the assessments were curriculum-based. On a measure of oral reading fluency, Student read *** words correct per minute (wcpm) in August and *** wcpm in December. Ms. *** also collected standard scores in written expression and ***. Both scores were below *** and considered normative weaknesses. Ms. *** recommended that Student receive explicit, systematic literacy instruction provided by an LDT or a CALT with a focus on writing and working with advanced phonemes.⁴²
43. After receiving Ms. ***'s August report, Parents revoked their agreement to certain decisions made by the August ***, 2019 ARD committee. The committee reconvened on September ***, 2019. Parents disagreed with the committee's decision not to identify

³⁸ Jt. Exh. 1 at 10-11.

³⁹ Jt. Exh. 1 at 17; Tr. at 499; Tr. at 393-96; Jt. Exh. 1 at 14; Tr. at 412.

⁴⁰ Tr. at 158; Jt. Exh. 1 at 26-27.

⁴¹ Jt. Exh. 1 at 23.

⁴² Jt. Exh. 37; Pet. Exh. 24; Pet. Exh. 8 at 38.

Student with dyslexia and its failure—based on that determination—to provide appropriate instruction, support, and IEP goals specific to Student’s deficits in reading, writing, and ***. In response, the ARD committee increased Student’s inclusion support in language arts, decreased Student’s reading support in the resource setting, and instead included *** per day of additional reading support through interventions provided during the class’ daily intervention block. The ARD committee also added a language arts goal to address Student’s *** needs. This goal required Student to ***.⁴³

44. The ARD committee convened again on December ***, 2019, for a revision to the annual ARD. The committee reviewed Student’s present levels of performance. Student showed mastery in all areas of the Phonological Awareness Skills Test (PAST) except for ***. The District reported that Student was reading *** wcpm which was above the *** grade expectation for the middle of the year. Student demonstrated reading comprehension skills, including summarizing, inferencing, and analyzing text, at or above grade level when Student thoughtfully completed Student’s assignments.⁴⁴
45. Student performed well on *** tests that covered recently studied concepts. However, Student was only able to *** which indicated Student needed to develop Student’s skills related to ***.⁴⁵
46. Student continued to struggle with writing and showed inconsistent progress during the first semester of *** grade, scoring *** on writing assignments for a semester average of ***. In behavior, Student demonstrated positive behaviors during grade level activities and assemblies, but still needed support with *** in the classroom.⁴⁶
47. The District reported that Student’s present levels reflected overall grade-level performance within normative limits in reading and ***. Parents, however, disagreed with the District’s data and expressed continued concerns regarding Student’s foundational literacy. The meeting adjourned in disagreement and reconvened on January ***, 2020. The ARD committee reviewed Student’s goals and revised Student’s language arts goal in *** at the January *** meeting. The new goal focused on developing phonological skills well below grade level expectations and required Student to ***. This meeting also ended in disagreement. Parents continued to dispute the District’s PLAAFPs and disagreed with its failure to include information related to Student’s deficits in foundational literacy skills identified in the *** reports.⁴⁷
48. In early March 2020 and in response to a writing prompt included in a classroom assignment, Student wrote ***. The school counselor spoke with Student about the

⁴³ Jt. Exh. 2 at 37, 50, 51.

⁴⁴ Jt. Exh. 3, Jt. Exh. 3 at 61-62.

⁴⁵ Jt. 3 at 62.

⁴⁶ *Id.*

⁴⁷ Jt. Exh. 3 at 63-65, 67-69, 74, 76; Tr. at 308, 466.

assignment. Student indicated that Student was ***. Student's demeanor was *** during Student's conversation with the counselor.⁴⁸

49. Student earned passing grades during the first three grading periods of the 2019-20 school year. The final grading period was measured on a pass/fail basis due to the disruption in education caused by the pandemic. Student passed each of Student's classes and was promoted to *** grade. The District administers Interim Assessments every nine weeks in ***. The majority of these assessments include questions and content from previous STAAR tests. Student scored a *** out of a possible 100 points on the first nine-week Interim Assessment in ***, and a *** on the 18-week Interim Assessment in the same subject.⁴⁹
50. Student's progress report for the grading period ending on May ***, 2020, included a progress code for each goal and comments from the teacher tracking Student's progress related to Student's performance during synchronous sessions and asynchronous activities. Student made sufficient progress towards meeting two of the annual goals in Student's IEP for the 2019-20 school year: (1) ***, and (2) ***. Student was not making sufficient progress towards mastering Student's language arts goals related to ***. The *** goal was introduced in January 2019 and the *** goal was introduced in January 2020. By May 2020, Student's skills in these areas were identified as emerging.⁵⁰

COVID-19 and School Closures

51. The ARD committee convened on May ***, 2020, to discuss Student's ***, Student's schedule of services and accommodations, and issues related to school closures resulting from COVID-19. The ARD committee again considered ESY services, but the District did not recommend them. The District, however, offered one-on-one compensatory services, either in-person or remotely, to compensate for services it was unable to provide during school closures. Other options were also available to students, including delivery of learning packets to and pick up from the students' homes. Parents declined these services. The committee also discussed the District's data collection for purposes of progress monitoring during school closures.⁵¹
52. Student struggled with the online learning environment and with Student's workload during school closures. In the process of fine-tuning its response to the needs of the remote learning environment, the District reduced the amount of material it required students to read asynchronously, providing links to pertinent resources and applications instead.⁵²

⁴⁸ Tr. at 35; Pet. Exh. 29 at 1105-06; Tr. at 331.

⁴⁹ Jt. Exh 23; Jt. Exh. 44 at 671.

⁵⁰ Jt. Exh. 26 at 216-20.

⁵¹ Jt. Exh. 4 at 82-83, 91; Tr. 41-42, 493-94.

⁵² Tr. at 42, 244-45, 248-51, 309.

53. Student continued to receive indirect OT services. The occupational therapist would observe how Student was participating in virtual sessions and consult with teachers when necessary. The occupational therapist reached out to Parents and created a Google Classroom with different resources.⁵³

***** grade (2020-21 school year)**

54. During the beginning of the 2020-21 school year, Student demonstrated sufficient progress towards meeting five of the six annual goals identified in Student's IEP for the 2020-21 school year. These goals included the *** behavior goals from the previous school year as well as (1) ***, and (2) ***. Student, however, made minimal progress towards ***. The *** goal from the previous school year was no longer included in Student's IEP even though there was no indication the goal had been mastered.⁵⁴
55. A Phonics Inventory conducted on August ***, 2020, showed that Student scored ***. Student was performing well-below proficient in these areas. As for reading fluency, Student read *** wcpm. At the beginning of *** grade, the average student is expected to read *** wcpm. With respect to written expression, Student continued to struggle with ***. The District again attributed these struggles to autism rather than a potential learning disability.⁵⁵
56. The District developed and implemented the *** program in 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. 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 in the fall of 2020. Student worked on developing appropriate *** and began to focus on academics when it became apparent that Student was struggling to complete Student's assignments.⁵⁶
57. Parents obtained a private psychoeducational evaluation from *** with the Dyslexia Center of Austin (DCA Evaluation) on January ***, 2021. The DCA Evaluation used XBASS and assessed Student in oral language, listening comprehension, cognitive abilities, and achievement. As with the 2018 FIE, scores on this evaluation falling below 85 and above 115 were at least one standard deviation from the average of 100 and considered statistically significant. Scores falling in these ranges were described as a normative weakness or a normative strength. Scores were categorized as follows: 121-130 (superior);

⁵³ Tr. at 395.

⁵⁴ Jt. Exh. 26 at 217, 221-24; Tr. at 517.

⁵⁵ Pet. Exh. 14 at 110; Tr. at 79; Jt. Exh. 5 at 96.

⁵⁶ Tr. at 42-43, 51-53, 494-95; Jt. Exh. 41 at 615.

111-120 (above average); 90-110 (average); 80-89 (below average); 70-79 (poor); and 69 and below (very poor).⁵⁷

58. Student had a composite score of *** in Oral Expression and performed in the average range when compared to same-aged peers. Student's composite score in Listening Comprehension was *** and is considered "****."⁵⁸
59. The DCA Evaluation assessed Student's cognitive abilities, and Student received the following scores:
- ***.⁵⁹
60. Student's results demonstrated normative weaknesses in Long-Term Retrieval, Visual-Spatial Thinking, Auditory Processing, Phonological Awareness, Phonological Memory, and Short-Term Memory. Student's deficits in Auditory Processing can result in difficulty acquiring phonics skills, sounding out words, and using phonetic strategies when reading text. These deficits can also result in writing difficulties, including trouble with spelling and quality of writing. Deficits in Short-Term Memory can cause issues with decoding multisyllabic words and also negatively impact writing through poor spelling. Finally, students with deficits in Long-Term Retrieval are slow to access phonological representations during decoding, have difficulty accessing words while writing, and struggle with idea generation.⁶⁰
61. The DCA Evaluation included achievement scores from the WJIV ACH. Student's Basic Reading Skills, Reading Fluency, Reading Comprehension, and Math Calculation measured in the average range. Student's performance in Math Reasoning fell within the high average range, but Student continued to perform lower than expected in phonological processing areas relative to Student's Crystallized Intelligence.⁶¹
62. The Basic Writing Skills composite included both an editing and a spelling measure. Student demonstrated weaknesses in ***, and Student's score on the *** measure was considered a normative weakness. Although Student performed in the average range on Student's writing samples subtest, this score only reflected Student's ability to express a complete, meaningful thought in a sentence. The mechanics of writing, such as spelling, handwriting, grammar, and rate were not measured.⁶²

⁵⁷ Pet. Exh. 9 at 48, 50, 52, 55, 61, 66.

⁵⁸ Pet. Exh. 9 at 48-49.

⁵⁹ Pet. Exh. 9 at 49-56.

⁶⁰ Pet. Exh. 9 at 62.

⁶¹ Pet. Exh. 9 at 56-61; Tr. at 112.

⁶² Pet. Exh. 9 at 60-61.

63. The DCA Evaluation observed that writing was difficult for Student. Legibility was an issue due to irregularity in ***. Throughout Student's writing, there was *** that impacted legibility. At the sentence level, ***. There were also frequent ***. A review of the writing samples from the 2018 FIE and the January 2021 DCA Evaluation indicated that Student's *** did not show improvement and looked very similar in both evaluations despite the fact that the DCA Evaluation took place approximately eighteen months after the 2018 FIE.⁶³
64. The DCA evaluation found Student displayed the characteristics of an SLD in basic writing skills, or ***, with secondary consequences that include deficits in *** and written expression. The results also indicate that Student displayed a profile consistent with a learning disability due to dyslexia. Student exhibited deficits in phonological processing, orthographic processing, basic writing skills, and ***. Student demonstrated normative weaknesses in phonological processing, phonological awareness, phonological memory, and ***.⁶⁴
65. Student displayed an inconsistent ability to ***, and Student consistently exhibited a weakness in ***. Student's deficits were unexpected in comparison to Student's present level of functioning in other curricular areas, such as math, in which Student performed at an average to above average level. In addition, scores in other cognitive areas (besides phonological processing) were average, thereby providing further evidence of a pattern of strengths and weaknesses. Student also struggled with written expression. Student will benefit from a reading program designed for students with dyslexia incorporating multi-sensory, systematic, and explicit instruction in reading, ***, and writing by a qualified teacher certified to provide dyslexia instruction.⁶⁵
66. The District provided Notice of Procedural Safeguards to Parents at ARD committee meetings on June ***, 2018; August ***, 2018, October ***, 2018; January ***, 2019; August ***, 2019; and August ***, 2020. Petitioner received Prior Written Notice on June ***, 2018; August ***, 2018; October ***, 2018; January ***, 2019; March ***, 2019; April ***, 2019; August ***, 2019; December ***, 2019; May ***, 2020; August ***, 2020. The District also provided Petitioner with Prior Written Notice and Notice of Procedural Safeguards in tandem with its responsive pleading in this matter filed on September 4, 2020.⁶⁶
67. Petitioner seeks an in-home private placement. ***, submitted a Proposal for Educational Services. The proposal promises to provide instruction based on state-approved grade level standards and indicates that services will be provided by a teacher who holds a special

⁶³ Pet. Exh. 9 at 61; Tr. at 70.

⁶⁴ Pet. Exh. 9 at 62.

⁶⁵ Pet. Exh. 8 at 40; Pet. Exh. 9 at 63.

⁶⁶ Jt. Exh. 7 at 0149; Jt. Exh. 8 at 160; Jt. Exh. 31 at 305; Jt. Exh. 2 at 59; Jt. Exh. 4 at 91; Jt. Exh. 5 at 120; Jt. Exh. 9 at 172; Jt. Exh. 10 at 177; Jt. Exh. 12 at 197.

education certification, has experience with autism, and who is (or who is willing to attend training to become) a CALT.⁶⁷

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, AT, and ESY services; failing to provide required notice to Parents; and failing to identify Student with an SLD under the IDEA. Petitioner seeks an order awarding compensatory services in OT, counseling, and executive functioning; reimbursement of out-of-pocket expenses; and in-home private placement.

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).

⁶⁷ Pet. Exh. 5.

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 the 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). 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).

Parents filed the Complaint in this case on August 24, 2020, and the District contends that any claims arising prior to August 24, 2019, are time-barred. Parents did not allege either of the two exceptions to the statute of limitations and confirmed during the initial prehearing conference that the relevant timeframe was the 2019-20 school year. In addition, the evidence shows that the District provided Parents with Notice of Procedural Safeguards and Prior Written Notice at all times

required by the IDEA. The evidence thus supports the reasonable inference that Parents have had either actual or constructive knowledge of their procedural rights, including the right to file a due process complaint, since Student became eligible for special education. *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 accruing prior to August 24, 2019.

C. Identification of an SLD

The ARD committee identified Student with an OHI due to ADHD in June 2018 and determined Student to be eligible for special education and related services. In August of the same year, the ARD committee added autism as an area of eligibility. Parents began voicing concerns with respect to dyslexia shortly thereafter and argue here that the District failed to identify Student with an SLD due to dyslexia. Notably, dyslexia is not one of the thirteen categories of disabilities identified under the IDEA. Rather, the IDEA defines an SLD as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to . . . read, write, [or] spell . . ., including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental dysphasia.” 34 C.F.R. § 300.8(c)(10).

A student may qualify with a SLD in one or more of eight areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving. 34 C.F.R. § 300.309(a)(1). Based on the evidence presented related to Student’s deficits, the hearing officer interprets Petitioner’s claim to be one for the failure to identify Student with an SLD in basic reading skills and written expression due to dyslexia.

Eligibility for services under the IDEA is a two-pronged inquiry: (1) whether the student has a qualifying disability, and (2) whether, by reason of that disability, the student needs IDEA services. 20 U.S.C. §§ 1401(3); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 208 (5th Cir. 2019). In making an eligibility determination, the ARD committee must “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher

recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.306(c)(1)(i).

The IDEA further provides that school districts must use state criteria in determining whether a student has an SLD. 34 C.F.R. § 300.307(b). According to the Texas Administrative Code, a student with a learning disability is one who:

(ii) does not achieve adequately for the student's age or meet state-approved grade level standards in . . . written expression, basic reading skill, [or] reading fluency skills . . . as indicated by performance on multiple measures such as in-class tests; grade average over time . . .; norm- or criterion-referenced tests; [or] statewide assessments . . .; **and** . . .

(II) exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, grade-level standards, or intellectual ability, as indicated by significant variance among specific areas of cognitive function, such as working memory and verbal comprehension, **or** between specific areas of cognitive function and academic achievement.

19 Tex. Admin. Code § 89.1040(c)(9); *see also* 34 C.F.R. § 300.309.

The evidence in this case establishes that Student has an SLD and a corresponding need for specially designed instruction beyond what Student is already receiving to address Student's currently identified disabilities. Student does not achieve adequately for Student's age or meet state-approved grade level standards in basic reading skills or written expression. Student did not meet or approach grade level expectations on the only statewide writing assessment Student has taken—the *** grade *** STAAR. Student also failed to make sufficient progress towards mastering the written composition goal in Student's IEP even though the same or substantially similar goal has been in place since January of Student's *** grade year and even though Student had been receiving pull out services in the resource setting for ***. Nor did Student master *** goal added to Student's IEP in January 2020 and removed the following August. In a similar vein, Student does not appear to have mastered Student's previous language arts goal related to *** before it was revised to focus on ***.

Eligibility for an SLD is also supported by the DCA Evaluation. According to this evaluation, Student demonstrated normative weaknesses in Long-Term Retrieval, Visual-Spatial Thinking, Auditory Processing, Phonological Awareness, Phonological Memory, and Short-Term Memory. These normative weaknesses are linked to deficits in ***, writing, and basic reading skills. The record reflects that these deficits were unexpected in comparison to Student's present level of functioning in other curricular areas, such as math. Meanwhile Student's scores in other cognitive areas (such as crystallized intelligence and fluid reasoning) were much higher and fell within the average range, thereby providing additional evidence of a pattern of strengths and weaknesses.

The evidence further establishes that writing was a difficult task for Student. *** all impaired legibility. At the sentence level, ***. There were also frequent ***. A review of the writing samples from the June 2018 FIE and the DCA Evaluation demonstrated that Student's *** showed little, if any, improvement and looked very similar in both evaluations despite the fact that the DCA Evaluation took place approximately eighteen months after the FIE.

The District's reliance on the 2018 FIE and the dyslexia screener it performed in February 2019 to support its position on this issue is misplaced. As a practical matter, neither the FIE nor the District's dyslexia evaluation included a discussion or any analysis of the factors identified above that are necessary for an SLD determination under the IDEA. But even if they had, the weight of credible evidence establishes that certain scores included in these evaluations were not cohesive and, therefore, were not an accurate indication of Student's abilities.

The District's dyslexia evaluation merits further discussion. In concluding that Student did not have dyslexia, the District failed to consider Student's family history and the possible remedial effects of the speech services Student received from 2013-2016. With respect to the latter, the dyslexia evaluation explicitly states that certain interventions may normalize phonological awareness scores and cautions that "average phonological awareness scores do not rule out dyslexia." This concern was reiterated by Ms. ***. Student scored *** in this area which—for purposes of the dyslexia evaluation—falls in the lower end of the average range. These facts further

undermine the District's conclusion that Student did not have a disability related to or resulting from dyslexia.

In sum, a preponderance of the evidence establishes that Student has an SLD and, as a result, needs specially designed instruction, including a program designed specifically for students with dyslexia incorporating multi-sensory, systematic, and explicit instruction in reading, ***, and writing by a qualified teacher certified to provide dyslexia instruction.

D. Duty to Provide FAPE

Once a student is determined to be eligible for special education, an IEP must be developed. The District's mandate to design and deliver an IEP falls under its broader statutory obligation to furnish a FAPE that emphasizes special education and related services designed to meet Student's unique needs and prepare Student for further education, employment, and independent living. 20 U.S.C. § 1400(d); *Lisa M.*, 924 F.3d at 208. The District is responsible for providing, at public expense, the specially designed instruction and support services necessary to meet Student's unique needs and confer an educational benefit. 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).

E. 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 or 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 Educational Program Must Be Individualized on the Basis of Assessment and Performance.

In meeting the obligation to provide a FAPE, a 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 or one 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." *Endrew 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).

a. Behavior and ***

The evidence in this case establishes that Student's program was individualized to meet Student's behavior and *** needs. In August 2019, Parents obtained a Social, Emotional, and Behavioral, Evaluation (SEB Evaluation) from Mr. ***, BCBA, and shared the evaluation with the ARD committee. The SEB Evaluation observed that Student showed an ***. Student struggled with ***. The evaluation recommended interventions to address *** and *** development to address Student's ability to ***. It also recommended implementing the ***, social groups, and training for school personnel on the ***. Most of these recommendations were accepted by the ARD committee.

Meanwhile, Student's IEP included a goal requiring Student to ***. This goal was scaffolded by five short-term objectives that were closely aligned with the SEB Evaluation. The objectives required Student ***. Each of these objectives incorporated the ***, and the District trained staff on the program and implemented it in Student's classroom.

Student's IEP also included accommodations to address Student's behavior and attention needs, such as scaffolding multi-step activities, ***, positive reinforcement (including praise and preferred items), ***reminders to stay on task,**, and ***breaks. In addition to these accommodations, Mr. *** recommended the use of *** to help address Student's sensory and attention needs in the classroom. The District carried out this recommendation by ***.

As for *** development, the LSSP and school counselor worked with Student on *** and executive functioning. Student received these services individually and in small groups with Student's peers. The small group activities included *** and focused on developing *** such as cooperation, turn-taking, and sportsmanship.

The evidence thus establishes that Student's program was individualized on the basis of assessment and performance with respect to Student's behavior and *** needs.⁶⁸

b. Counseling as a Related Service

Parents argue that Student's program should have included counseling as a related service. Related services are supportive services required to assist a child with a disability to benefit from special education and may include counseling services provided by qualified psychologists or guidance counselors (among others). 34 C.F.R. §§ 300.34(a), (c)(2). Student was diagnosed with *** by one of Student's outside therapists who recommended that Student receive in-classroom support as needed as well as *** groups and curriculum. The evidence shows that the services provided by the District were consistent with these recommendations.

Parents point to two isolated incidents that occurred over the course of Student's *** and *** grade years to support their claim for counseling as a related service. On each of these two occasions, Student made troubling statements—***. Each time, Student's teachers contacted the guidance counselor who was trained in risk assessment protocols and student mental health issues. The counselor responded immediately to Student's needs and determined that further screening for *** was not necessary.

Parents thus failed to show that Student had an educational need for counseling services over and above what Student was already receiving from the District.

c. Assistive Technology

Parents contend that the District should have completed an AT evaluation. The federal regulations provide that the ARD committee "must [c]onsider whether the child needs assistive

⁶⁸ Petitioner makes a passing reference to the autism supplement in Petitioner's closing brief and asserts that Petitioner "never received a completed supplement." *Parents' Closing Brf.* at 3. The evidence indicates otherwise. The supplement is included in both the August 2019 and 2020 IEPs.

technology devices and services.” 34 C.F.R. § 300.324(a)(2)(v). The ARD committee considered AT and determined that Student was able to participate in the general education curriculum 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. As such, the District satisfied its obligations under the regulations with respect to assistive technology.

d. Extended School Year Services

Parents argue 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 because Student did not struggle to recoup skills in critical areas within a reasonable period of time after a break from instruction. There is no evidence in the record to suggest the ARD committee made this recommendation in error.

Notably, Parents’ argument on this issue seems to confuse compensatory education with ESY services and is ultimately unpersuasive. *See Parents’ Closing Brf.* at 9. 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 evaluations 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.

e. Basic Reading Skills, *, and Writing**

Student's program as it related to Student's needs in reading, writing, and *** was not individualized on the basis of assessment and performance. Numerous outside assessments and reports concluded that Student suffered from deficits in phonological awareness, ***, and written expression that were not attributable to ADHD or autism. These deficits speak to a specific need for a particular type of systematic, explicit literacy instruction that was not included in Student's program.

As for the District's assessments, the weight of credible evidence indicates that the results of those assessments were unreliable and failed to take into consideration important factors affecting Student's cognitive profile. To the extent these assessments identified deficits (such as ***), those deficits were not adequately addressed in Student's IEP. More specifically, Student's *** goal initially required Student to ***, and then the goal was revised to focus on ***. The special education teacher attempted to support these goals through a ***. While these practices may have helped Student with the short term retention needed for weekly ***, they did not translate into a deeper understanding of the structure of written language. Student's poor performance on the *** and Student's "well-below proficient" scores in *** are evidence of the IEP's shortcomings in this regard.

The District also attempted to address Student's struggles in *** and written expression through various accommodations. Student had access to lined paper, word prediction, spelling and grammar checking, and speech-to-text software, and Student received indirect OT support. Although these seem to be appropriate accommodations in light of Student's deficits, they were insufficient by themselves (or in combination with the instructional strategies implemented) to provide Student with a meaningful educational benefit.

In short, the District failed to identify Student as a student with an SLD. Because they did not identify Student as a student with an SLD, the District did not sufficiently address Student's deficits and, therefore, did not provide Student a FAPE.

2. Least Restrictive Environment

The IDEA requires that a student with a disability must 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 reading, writing, and ***. The evidence establishes that these pull out services were necessary to address Student’s needs and that the District mainstreamed Student to the maximum extent appropriate.

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 here shows that services were provided, in large part, in a coordinated, collaborative manner by key stakeholders. The District convened approximately fifteen ARD committee meetings since June 2018 to review Student's program, address Parents' concerns, and consider District and private evaluations. Parents actively participated in each of these meetings. When Parents approached the District with an outside SEB Evaluation, the District worked with Parents and their private BCBA to incorporate recommendations from that evaluation into Student's program through goals and accommodations. The District welcomed Parents' BCBA onto the campus and into the classroom for three hours every week. Teachers collected data using *** behavior tracking system created by the BCBA and shared their data with Student. Teachers also implemented *** system advocated by the BCBA to help address some of Student's executive functioning needs. The District trained staff and students on the *** (also recommended by the BCBA) and implemented it in Student's classroom.

The District collaborated with staff members and Parents to provide Student with services through its Magic School Bus 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 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.

The collaboration between Parents and the District broke down, however, when Parents continued to voice concerns regarding Student's reading, writing, and ***, and the District in turn refused to attribute Student's struggles to anything other than autism and ADHD. The District's

refusal in this regard appears to be based on the conclusions it drew from the 2018 FIE and the dyslexia evaluation. For the reasons stated above, the District's reliance on these evaluations was not well-founded.

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's behavior improved during the relevant time period. Although Student was still prone to frustration, Student no longer ***. Student was able to move on with redirection. Parents' private BCBA noted that Student's behavior improved considerably once the recommended behavior supports and interventions were in place.

Student continued to struggle, however, with basic reading skills, ***, and written expression. Student failed the *** grade *** STAAR, and Student has not yet mastered a language arts writing goal that Student has been working on since then. In fact, recent progress reports indicate that Student has made minimal progress towards this goal. Meanwhile, a comparison of Student's writing from the 2018 FIE and the DCA Evaluation demonstrate little progress over time. There is also no evidence in the record to suggest that Student mastered Student's *** goals before they were modified or removed from Student's IEP. While Student performed well on recently-studied *** concepts on weekly *** tests in the classroom, Student was only able to *** and performed well below proficiency on assessments of Student's ***.

There is also conflicting evidence regarding Student's reading fluency (which can be negatively impacted by deficits in basic reading skills). The District reported a reading fluency of *** wcpm in December 2019 while Ms. *** reported a much lower reading fluency of *** wcpm for the same time period. Meanwhile, Student's reading fluency score at the beginning of *** grade—*** wcpm—was more consistent with the score reported by Ms. *** almost nine months earlier and had fallen below expectations for the average *** grader.

The District argues in response that Student earned passing marks and was promoted from grade to grade and that this is sufficient to satisfy the academic benefit inquiry under the *Michael F.* analysis. *Respondent's Closing Brf.* at 23-25. Case law establishes, however, that passing grades are not dispositive and that a student's development must be measured with respect to Student's individual progress. *See Andrew F.*, 137 S. Ct. at 1000 n.2; *Rowley*, 458 U.S. at 203 n.5. The evidence here shows that Student was making minimal (if any) progress with respect to Student's IEP goals in *** and writing. Accordingly, the hearing officer concludes that Student's program failed to provide a meaningful educational benefit with respect to Student's needs in basic reading skills and written expression.

F. Alleged Procedural Violations

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 a 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 alleges here that the District failed to comply with various procedural requirements under the IDEA. Petitioner's procedural claims are denied for the reasons set forth below.

1. PLAAFP Statements

The regulations require the District to include in Student's IEP a statement of Student's present levels of performance, including how Student's disability affects Student's involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1). Petitioner argues that the District violated this provision by failing to develop data-intensive PLAAFPs that showed Student's strengths and weaknesses. There appear to be two arguments embedded in this allegation. First, it suggests that some sort of numerical or statistically-driven baseline is required. This is not the case. *Parents' Closing Brf.* at 9. The regulations do not require a particular type of data to drive PLAAFP statements included in an IEP.

Second, Petitioner's allegation requires a determination as to whether the PLAAFPs included in Student's IEP provided sufficient information related to Student's strengths and weaknesses. A preponderance of the evidence shows that they did: The PLAAFPs identified the areas in which Student was making progress and those in which Student was struggling. For example, they provided information on Student's reading level and fluency, noted the areas in which Student's behavior was improving and those in which Student still needed support; and observed that Student continued to struggle with writing. They indicated that Student performed poorly on the *** and that Student's *** had improved, but *** were still a challenge.

Thus, the hearing officer concludes that the District satisfied the procedural requirements related to PLAAFPs. The District's failure, however, to develop and implement an appropriate program to address the deficits identified in those PLAAFPs is another matter and is addressed in greater detail above in Sections VII(C)–(E).

2. Notice of Procedural Safeguards

Petitioner asserts that the District failed to provide Petitioner with the Notice of Procedural Safeguards before Petitioner filed Petitioner's Complaint. *Parents' Closing Brf.* at 8 ¶1. The regulations require the District to provide Parents with this notice once a year and upon receipt of the first due process complaint filed in a school year. 34 C.F.R. § 300.504(a). The evidence shows that the District provided a Notice of Procedural Safeguards to Petitioner at least six times since Student's initial ARD in June 2018. The District also provided the requisite notice in tandem with its responsive pleading in this matter. Thus, the District met its procedural obligations under the regulations.

3. Progress Reports

Petitioner contends that Respondent also committed a procedural violation of the IDEA by failing to include collected data points in Student's progress reports from February ***, 2020, to May ***, 2020. *Complaint* at 3. The regulations, however, only require an IEP to include a description of how the student's progress will be measured and when the reports will be provided. 34 C.F.R.

§ 300.320(a)(3). This provision does not mandate the level of detail sought by Petitioner. Moreover, the evidence showed that the District provided Petitioner with progress reports for each grading period of the 2019-20 school year. These progress reports included a progress code indicating Student's level of progress (for example, minimal, emerging skill, sufficient, or mastery) along with comments related to Student's performance. The District, thus, satisfied its progress reporting obligations under the regulations.

Finally, Petitioner argues 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. As a threshold matter, the District is not legally required to ask Parents to take on this responsibility, and Petitioner offers no authority or guidance to suggest otherwise. In any event, the District's efforts in this regard are consistent with federal and state guidance provided to school districts during campus closures. 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/memosdelttrs/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.

The evidence shows that, despite limitations imposed by the virtual environment, the District collected what data it could to track Student's progress. The progress reports for the relevant grading period (ending May ***, 2020) include a progress code for each goal and comments from the tracking

teacher related to Student's performance during synchronous sessions and asynchronous activities. Applying the principles articulated above, the hearing officer concludes that the District's efforts to collect data during this time period 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 and progress reporting, Petitioner did not prove that such a violation resulted in a substantive denial of a FAPE separate and distinct from that caused by the District's failure to identify Student with an SLD.

VIII. RELIEF

A. 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. 359, 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). 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).

1. Failure to Identify Student with an SLD

Petitioner filed Petitioner's Complaint on August 24, 2020, and confirmed the 2019-20 school year as the relevant time period for purposes of Petitioner's claims against the District. Having determined that the District violated the IDEA by failing to identify Student with an SLD, the hearing officer concludes that Petitioner is entitled to an award of compensatory services (as

set forth below) in the amount necessary to place Student in the position Student would have been in if the District had started providing appropriate services on August 24, 2019.

2. Occupational Therapy, *, and Executive Functioning**

Petitioner requested compensatory services for OT, ***, and executive functioning. To the extent Petitioner's request for compensatory services arises out of anything other than the District's failure to identify Student with an SLD in basic reading skills and written expression, Petitioner's request is denied. The program provided by the District in all other respects satisfied statutory requirements.⁶⁹

B. Out-of-Pocket Expenses

Petitioner presented no evidence of out-of-pocket expenses incurred by Parents, so the hearing officer cannot order reimbursement.

C. Private Placement

1. Denial of FAPE

Petitioner also seeks private placement at District expense. Parents are entitled to private placement when a school district fails to offer a FAPE and the private placement is appropriate. 34 C.F.R. § 300.148. *See also Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 299-300 (5th Cir. 2009); *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty.*

⁶⁹ It is unclear whether any part of Petitioner's request for compensatory education is based on services the District was unable to provide during school closures in the spring of 2020. To the extent this is the case, Petitioner was charged with the burden of establishing that the District failed to make every effort to provide those services. *See Schaffer*, 546 U.S. at 62; *Questions and Answers, supra*, at 2. Petitioner did not do so. Moreover, the District offered Petitioner compensatory services during the summer of 2020—either through in-person or virtual instruction or through learning packets delivered to and retrieved from the home. Petitioner declined the offer. Petitioner's decision to do so undercuts Petitioner's request for any such services at this time. *See Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 (5th Cir. 2000) (finding that district's offer of compensatory services remedies failure to provide those services in the first instance).

v. Carter, 510 U.S. 7 (1993). As discussed above, the District denied Student a FAPE when it failed to identify Student with an SLD in written expression and basic reading skills due to dyslexia. Having found a denial of FAPE, we turn next to the question of whether the private placement sought by Petitioner is appropriate.

2. Appropriateness of Private Program

A petitioner seeking private placement bears the burden of demonstrating that the placement is appropriate. Although Petitioner in this case requested an in-home private placement, the record does not support Petitioner's request. Petitioner failed to offer any testimony at the hearing regarding the placement—and while the record includes a Proposal for Educational Services from ***—the proposal lacks the information necessary to make a determination as to whether the program is appropriate. The proposal promises to provide instruction based on state-approved grade level standards and indicates that services will be provided by a teacher who holds a special education certification, has experience with autism, and who is (or who is willing to attend training to become) a CALT. But these conclusory statements are speculative and insufficient. The proposal does not provide Student with an education in the least restrictive environment, articulate how Student's attention and behavior needs will be met, or how OT, counseling, and *** services will be provided. In sum, Petitioner failed to meet Petitioner's burden on this issue, and Petitioner's request is denied.

IX. CONCLUSIONS OF LAW

- A. 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).
- B. The District denied Student a FAPE by failing to identify Student as a student with an SLD, and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188-189, 200-201, 203-204; *Endrew F.*, 137 S. Ct. at 999; 34 C.F.R. §§ 300.8(c)(10), 300.309(a).
- C. 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 and Notice of Procedural Safeguards. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a); 300.504(a).

- D. Petitioner did not meet Petitioner's burden of proving entitlement to compensatory education for OT, executive functioning, and ***. *Schaffer*, 546 U.S. at 62; *O.W.*, 961 F.3d at 800.
- E. Petitioner is not entitled to private placement at District expense. *Burlington Sch. Comm.*, 471 U.S. at 370; *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).


X. ORDERS

Given the broad discretion of the hearing officer in fashioning relief, the hearing officer makes the following orders:

1. The District must convene an ARD committee meeting no later than ***, 2021, for the purpose of accepting Student's eligibility for a specific learning disability in basic reading skills and written expression due to dyslexia and developing an appropriate IEP in accordance with the findings and recommendations included in the DCA Evaluation;
2. The District must deliver to Petitioner no later than 5:00 p.m. on ***, 2021, a set of reasonable criteria for the selection of an independent licensed dyslexia therapist (LDT) or other qualified reading specialist capable of providing an assessment and written report of the nature and scope of services necessary to place Student in the position Student would have been in if the District had provided Student with an appropriate structured literacy program to meet Student's needs as of August 24, 2019;
3. Petitioner shall select a provider who fits the reasonable criteria set by the District no later than 5:00 p.m. on ***, 2021. If Petitioner does not provide the name of an LDT to the District by that time and day, the District shall select an LDT who meets its criteria by ***, 2021.
4. Within 30 days of receipt of the written report from the independent LDT, the District will convene an ARD committee meeting to review and implement the results of the report consistent with the services being provided pursuant to Student's IEP.

All other relief not specifically stated herein is **DENIED**.

SIGNED April 16, 2021.



Stacy May
Special Education Hearing Officer
For the State of Texas

XI. 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).