

SOAH DOCKET NO. 701-21-2136.IDEA
TEA DOCKET NO. 162-SE-0421

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend Parent (collectively, Petitioner), brings this action against the Pearland Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issue in this case is whether the District denied Student a free appropriate public education (FAPE) during the relevant time period. The hearing officer concludes that the District provided Student with a FAPE at all relevant times.

II. LEGAL REPRESENTATION

Petitioner was represented throughout this litigation by non-attorney advocate Karen Mayer Cunningham. Respondent was represented in this litigation by Paula Maddox Roalson, Christina Garcia Henshaw, and Sydney Keller with Walsh, Gallegos, Treviño, Kyle & Robinson, P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on August 25-26, 2021. The hearing was recorded and transcribed by a certified court reporter.

Petitioner continued to be represented by advocate Karen Mayer Cunningham. In addition, *** and ***, Student's parents (Parents), attended the due process hearing.

Respondent was represented by its legal counsel, Paula Maddox Roalson, Christina Garcia Henshaw, and Sydney Keller. In addition, Dr. ***, Assistant Superintendent of Special Programs, and Ms. ***, Special Education Director, participated as party representatives for the District. Both parties filed written closing briefs in a timely manner. The Decision in this case is due on November 5, 2021.

IV. ISSUES

A. Petitioner's Issues

Petitioner raises the following IDEA issues from April 26, 2020, through the 2020-21 school year for decision in this case:¹

1. Whether the District denied Student a FAPE by failing to provide Parent with a meaningful opportunity to participate in the educational decision-making process;
2. Whether the District denied Student a FAPE by failing to develop and implement an appropriate Individualized Education Plan (IEP) that included appropriate goals, accommodations, and necessary supplementary services and supports;
3. Whether the District failed to provide Student a FAPE in the least restrictive environment (LRE) that met Student's individual needs;
4. Whether the District failed to adhere to required timelines;
5. Whether the District failed to permit Parent to inspect and review education records relating to Student within the timeframe allowed under the IDEA; and
6. Whether the District failed to comply with Parent's procedural rights.

¹ Initial Prehearing Conference Transcript (PHC Tr.) at 12.

B. Respondent’s Legal Position and Additional Issues

Respondent generally denies the factual allegations stated in Petitioner’s Complaint and contends that it provided Student with a FAPE in the LRE during the relevant time period. Respondent denies that Petitioner is entitled to any of the relief requested and asserts the statute of limitations as an affirmative defense.

V. REQUESTED RELIEF

Petitioner requests the following items of relief:

- A. Training for staff who work with Student; and
- B. Compensatory education through one-on-one tutoring provided by a private tutor or an agreed-upon special education teacher.

VI. FINDINGS OF FACT

2018-19 School Year: * Grade**

1. Student is a ***-year-old child who attended *** in the District during the 2018-19, 2019-20, and 2020-21 school years. Student is eligible for special education services as a student with a specific learning disability in basic reading, reading fluency, and written expression and has been identified with dyslexia.²
2. In the spring of 2019 when Student was enrolled in *** grade, Student’s mother expressed concern regarding Student’s reading, writing, and *** and requested a special education evaluation. The District conducted a full and individual initial evaluation (FIE) of Student in May 2019 and the report was completed on May ***, 2019. The Admission, Review, and Dismissal (ARD) committee met on May ***, 2019, to review the FIE. The committee determined that although Student exhibited characteristics of dyslexia as well as an underlying cognitive weakness associated with the disability, Student did not have an educational need for special education services. Student was able to complete grade level

² Joint Exhibit (JE) 4 at 1; JE 6 at 13-14; JE 8; JE 9.

- work and did not require a modified curriculum. The ARD committee agreed that Student should receive services instead through the campus' dyslexia program under Section 504.³
3. The District provided Parents with Notice of Procedural Safeguards under the IDEA on April ***, 2019, when parent requested an FIE, and again at the May *** ARD committee meeting.⁴
 4. Upon conclusion of the May ***, 2019 ARD committee meeting, Student's Section 504 committee met, identified Student as a student with dyslexia, and determined Student to be eligible for dyslexia services under Texas law. Pursuant to Student's Section 504 Services Plan, Student would begin receiving accommodations and standard protocol dyslexia instruction from a dyslexia specialist in a small group pull-out setting in the dyslexia classroom at the beginning of Student's *** grade year.
 5. The Section 504 committee agreed that Student's *** grade teacher and the dyslexia specialist would monitor Student's progress over the course of Student's *** grade year to determine if Student required special education services.⁵

2019-20 School Year: * Grade**

6. Student began receiving dyslexia services through the *** program at the beginning of *** grade. The *** program is an evidence-based, multisensory standard protocol dyslexia program developed by the Region 4 Education Service Center. It is designed to address the following components of reading: phonological awareness, sound-symbol association, the six syllable types, written spelling patterns, morphology, syntax, reading fluency, and comprehension. Student's dyslexia teacher was trained in the *** program, and the program was implemented with fidelity.⁶
7. The District suspended in-person instruction on March 16, 2020, due to the COVID-19 pandemic and transitioned students to remote instruction for the remainder of the school year.⁷
8. On April ***, 2020, Parent emailed Student's teacher and the campus principal and expressed concern that the services and accommodations provided pursuant to the

³ JE 18; JE 19; JE 3 at 2; JE 19 at 11; JE 3 at 6.

⁴ JE 3 at 5, 13.

⁵ JE 1; JE 1 at 6.

⁶ JE 4 at 3; JE 21 at 3; Transcript (Tr.) at 37-40.

⁷ JE 4 at 13.

Section 504 Services Plan were insufficient to meet Student's needs. She requested an ARD committee meeting to consider special education services for Student.⁸

9. An ARD committee meeting convened on May ***, 2020, to review Student's progress and determine whether Student required special education supports and services. Prior to the meeting, District members of the ARD committee met to develop a proposal for the committee to consider regarding services and supports for Student. The District also provided Parents with a draft of Student's present levels of academic achievement and functional performance (PLAAFP) and a proposed IEP prior to the meeting.⁹
10. At the May ***, 2020 ARD committee meeting, the committee discussed Student's PLAAFP. At the beginning of the 2019-20 school year, Student was reading on a Level *** according to the Benchmark Assessment System (BAS). By the end of the third grading period, Student was reading on a Level ***. Student was reading *** words correctly per minute (wcpm) with ***% accuracy. Most *** grade students are reading an average of *** wcpm and on a level *** at that point in the school year. Student demonstrated difficulty in writing, ***, and applying the correct phonics rules to words. Student was also earning *** in math, a *** in reading, and *** in *** and was meeting grade level expectations in ***, and math. Although Student made progress over the course of the school year, the ARD committee agreed that Student demonstrated a need for specially-designed instruction and should be determined eligible for special education services as a student with a specific learning disability in basic reading.¹⁰
11. The ARD committee developed an individualized educational program (IEP) that included *** minutes of dyslexia services *** times a week. The District initially proposed *** minutes *** days per week of inclusion support during reading, but Parents requested *** minutes *** days per week. The District agreed to Parents' request. Student's IEP also included a goal to address Student's needs in the area of reading fluency. The annual goal focused on Student's ability to read *** words per minute with ***% accuracy on a BAS Level *** and included three benchmarks to support Student's progress towards the annual goal over the course of the school year.¹¹
12. The IEP included the following accommodations for English, math, ***: checking for understanding, oral administration of tests, preferential seating, reminders to stay on task, repeated review, and small group administration of tests. Student also received extra time

⁸ JE 16 at 256-57.

⁹ JE 2 at 4; JE 4 at 3, 13-14; JE 4; Petitioner's Exhibit (PE) 3; Tr. at 49-50.

¹⁰ JE 4 at 3; Tr. at 39; JE 4 at 13-14.

¹¹ JE 4 at 5, 13; Tr. at 50-51, 61-62; JE 7.

and *** assistance in English. Student's *** assistance accommodations included a ***. The May ***, 2020 ARD committee meeting ended in consensus.¹²

13. The ARD committee also conducted a review of existing evaluation data (REED) to (1) determine whether Student continued to have a disability or had a particular category of disability, and (2) identify Student's present levels of performance and educational needs. The committee agreed to re-evaluate Student for the presence of a learning disability in all academic areas. The committee further agreed that the evaluation would be completed by December ***, 2020, and that ARD committee would review the evaluation report on or before January ***, 2021.¹³

2020-21 School Year: * Grade**

14. Student returned to campus on September ***, 2020, in the fall of Student's ***-grade year. Prior to Student's return to campus, Student's special education case manager shared information from Student's IEP with other teachers and staff who worked with Student. Student continued to receive standard protocol dyslexia instruction through the *** Program *** days per week, *** minutes per session, for the 2020-21 school year.¹⁴
15. Student's dyslexia teacher provided Parents with a report on Student's progress in the dyslexia program at the end of each grading period. At the end of the first ***-week grading period, Student demonstrated strengths in the phonological awareness tasks of *** and practiced in daily lessons. Student struggled with the phonological awareness task of ***.¹⁵
16. By the end of the second grading period, Student continued to perform well in the areas previously identified as strengths and demonstrated progress in ***—previously identified as a weakness. By December ***, 2020, Student demonstrated several additional areas of progress in phonological awareness: ***. Student was ***. Student struggled, however, with specific sounds in Student's reading deck, including ***. Student also struggled with reading a list of words covering previously taught skills and ***.¹⁶
17. Student received *** minutes of inclusion support in reading every day from a special education teacher in the general education setting. Student also received accommodations identified in Student's IEP. Student's classroom teacher collaborated with Student's

¹² JE 4 at 5, 14; Tr. at 69-70.

¹³ JE 4 at 15-18; Tr. at 67.

¹⁴ JE 17 at 66-67, 71; Tr. at 72-74.

¹⁵ JE 13.

¹⁶ JE 13 at 1-3.

- dyslexia teacher and Student's inclusion teacher on a regular basis to coordinate instruction.¹⁷
18. Teachers took data on Student's first and second readings ("read" or "reads") of texts to assess Student's progress in reading fluency. The teachers consulted with the District's Curriculum and Instruction Department before doing so to determine the best method for measuring Student's progress in this area. The benefit of collecting data from a second read is to identify and monitor how a student performs when provided targeted instruction after the first read. Data from both reads is beneficial in monitoring Student's progress. At the end of the first *** week grading period, Student was reading on a BAS Level *** with ***% accuracy and *** words per minute on a first read. By the end of the next ***-week grading period, Student was reading on a BAS Level *** with ***% accuracy and *** words per minute on a second read.¹⁸
 19. In December 2020, the re-evaluation requested by the ARD committee in May 2020 was completed. The evaluation reported that Student liked to socialize with Student's peers and please Student's teachers and that Student was typical of other students Student's age who require some redirection to initiate tasks. Student, however, was getting better at doing so independently.¹⁹
 20. Student's emotional/behavioral performance was evaluated with the Behavior Assessment Scale for Children ("BASC"), Third Edition. Student did not present with any clinically significant emotional behavioral concerns. Concerns were related to academic difficulties.²⁰
 21. Student's speech and language were evaluated informally, but no formal testing was conducted in this area because there was no referral data indicating the need for further testing.²¹
 22. Student was also evaluated in the area of occupational therapy due to concerns regarding the ***. The District evaluator assessed Student using the Beery-Buktenika Developmental Test of Visual Motor Integration – Sixth Edition. Student scored *** for visual motor coordination and within the average range for visual perception and motor coordination. No sensory processing issues or concerns with gross motor or self-help skills were identified.²²

¹⁷ Respondent's Exhibit (RE) 9; RE 20; RE 21; Tr. at 64-65, 74, 153-54, 168-69, 387-91.

¹⁸ Tr. 103-04, 251-52.

¹⁹ JE 21 at 20.

²⁰ JE 21 at 12-20.

²¹ JE 21 at 4.

²² JE 21 at 11.

23. Student's cognitive abilities were formally assessed using the Woodcock-Johnson Test of Cognitive Abilities, the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), and the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2). Consistent with the May 2019 evaluation, Student's full scale intelligence quotient was *** and within the average range. Student's crystalized intelligence, fluid reasoning, short-term memory (memory span), visual processing, and processing speed all fell within the average range. Long-term retrieval fell within the low-average range while auditory processing and short-term memory (working memory) were identified as cognitive weaknesses. Student's adaptive behavior was assessed informally and was consistent with Student's current level of intellectual functioning.²³
24. Student's academic achievement was evaluated using the Kaufman Test of Education Achievement – Third Edition (KTEA-3). Student scored in the *** range on both the Decoding and Reading Composite portions of this assessment, indicating that Student's ability to decode, read, and understand what Student reads is below that of Student's peers. Student's score on the Written Composite also fell within the*** range. Meanwhile, Student scored in the Average range on the Math Composite.²⁴
25. The District evaluators administered the Gray Oral Reading Test – Fifth Edition (Gort-5) as a supplemental achievement measure to assess reading fluency and comprehension. The results of this assessment indicated that Student was performing in the ***range of reading abilities and below Student's same-age peers.²⁵
26. The District also conducted a *** therapy assessment. Assessment results showed that Student attempted to *** therapy. The District's *** therapist concluded that Student needed *** therapy to benefit from Student's education and recommended including it in Student's program to assist with ***.²⁶
27. Using the Dual Discrepancy/Consistency Model (DD/C) of Specific Learning Disability, the District evaluators determined that Student's scores from the December 2020 re-evaluation demonstrated a pattern of strengths and weaknesses consistent with a specific learning disability in basic reading and written expression. Evaluation results also indicated that Student met the criteria as a student with the condition of dyslexia.²⁷

²³ JE 21 at 20-26.

²⁴ JE 21 at 31-32.

²⁵ JE 21 at 32-33.

²⁶ JE 21 at 35, 39.

²⁷ JE 21 at 36-37.

28. An ARD committee meeting was convened on January ***, 2021, to review the results of the re-evaluation. Parents and their advocate participated by telephone. The District provided Parents with a copy of the evaluation report and offered to review it with them and their advocate prior to the ARD committee meeting. The District similarly sent home proposed PLAAFP statements and IEP goals before the meeting and provided Parents with a copy of the Notice of Procedural Safeguards along with each ARD committee meeting invitation.²⁸
29. Student's ARD committee reviewed the evaluation report at the January ***, 2021 meeting. Based on the report, the District proposed that Student be identified as a student with a specific learning disability in basic reading (dyslexia) and written expression. In response to a request by Parents' advocate, the District agreed to review the evaluation data to determine whether it supported identifying Student with a specific learning disability in reading fluency.²⁹
30. Based on the evaluation results, the District recommended that Student receive two sessions of *** therapy, *** minutes each, per ***-week grading period. The District agreed to increase the number of sessions provided to every other week during the grading period at Parents' request. The District also recommended that Student receive occupational therapy services on a consult basis. However, it agreed to provide in-class support through direct occupational services in the classroom *** times per *** weeks at Parents' request.³⁰
31. The January ***, 2020 ARD committee meeting was tabled in the interest of time. The advocate, on behalf of Parents, disagreed with the PLAAFP statements and the proposed IEP. The ARD committee reconvened on January ***, 2021. The District reviewed an addendum to the FIE and confirmed that the data supported the committee's decision to identify reading fluency as an additional area of eligibility for Student. An updated draft of the PLAAFP statement was also reviewed and indicated that Student was reading about a half a year behind grade level expectations and that Student had progressed to a reading Level ***. The advocate, again speaking for Parents, disagreed with the PLAAFP statement and the District's proposed IEP goals.³¹
32. The District proposed the following services for Student's IEP: (1) continue the *** minutes per day, *** days per week, of inclusion support in reading; (2) continue the *** minutes per day, *** days each week, of standard protocol dyslexia instruction in the ***

²⁸ JE 17 at 234-38; Tr. at 92-93; RE 1-4; JE 17 at 95-143, 187-232, 246-73, 277-303; Tr. at 84-85.

²⁹ JE 6 at 13; Tr. at 92, 424.

³⁰ JE 6 at 13; Tr. at 96-97, 400-01.

³¹ JE 6 at 13, Tr. at 91, 397-98; JE 6 at 14-18; Tr. at 92, 398-99.

- program; (3) add *** minutes per week on a pull-out basis to provide instruction on IEP goals in a special education setting; and (4) add inclusion support for written expression, *** minutes per session, *** days per week.³²
33. Parents' advocate requested additional pull-out time in the special education setting, but District members of the ARD committee expressed concern that doing so would deprive Student of instructional time in the general education setting that was beneficial to Student. Student made progress in the classroom, and Student was socially aware. Student noticed that Student was being pulled out of the classroom for specialized instruction. The District provided Prior Written Notice to Parents and agreed to implement the new IEP the next day at Parents' request.³³
34. The January ***, 2021 IEP included three English goals to be implemented and monitored by the District from January ***, 2021, through January ***, 2022. The first of these goals focused on written expression, the second addressed reading fluency, and the third targeted decoding skills or explicit phonics instruction. Student's English goal for writing required Student to ***. By the end of the third grading period, Student was able to ***. By the end of the school year, Student was able to double the length of Student's composition to ***. The demands of this increase in production resulted in a slight decrease in *** accuracy and an increase in capitalization and punctuation errors.³⁴
35. The second English goal required Student to ***. Student was able to read *** words per minute on a second read of a Level *** book by the end of the third grading period. By the end of the year, Student was able to read *** words per minute on Student's first read of a Level *** book and *** words per minute on Student's second read. A jump in a BAS reading level per grading period is considered good progress.³⁵
36. Student's English goal for decoding required Student to *** with ***% accuracy. As of March ***, 2021, Student was able to do this with ***% accuracy. By the end of the year, Student had increased Student's accuracy to ***%.³⁶
37. Student's IEP included the following accommodations: checking for understanding, oral administration of tests, preferential seating, reminders to stay on task, repeated review, and small group administration of tests. Student also received extra time and *** assistance in

³² JE 6 at 5.

³³ JE 6 at 5, 15; Tr. at 97-98; JE 6 at 15-18, 27-28.

³⁴ JE 11 at 1; Tr. at 185, 249-250, 409-10.

³⁵ JE 17 at 93; JE 10; Tr. at 88, 90, 247-48.

³⁶ JE 11 at 2.

- English. Student's *** assistance accommodations included a *** and an alternative *** test.³⁷
38. During the third grading period, Student continued to advance in the dyslexia curriculum. Student demonstrated strengths in all phonological awareness tasks measured, including ***. Student continued to show strength in ***. Student struggled, however, with ***.³⁸
39. By May ***, 2021, Student showed the following strengths: ***. Student struggled to ***. Student also had difficulty ***.³⁹
40. Student took the State of Texas Assessments of Academic Readiness (STAAR) in Spring 2021. Although Student received oral administration of the test questions on the reading portion of the assessment, Student was expected to read the passages on Student's own. It is a lengthy assessment. Student scored a ***.⁴⁰
41. Student earned mostly Bs in reading during Student's ***-grade year. During the fall semester, Student earned *** during the first two grading periods. Student finished the 2020-21 school year with the following grades: ***. Student received a ***. Student was promoted to *** grade but was later withdrawn from the District by Student's Parents.⁴¹
42. Parents requested and received a copy of Student's educational records from the District in March 2021. On March ***, 2021, Parents notified the District that they were unable to open some of the records that had been provided electronically and asked for help in accessing them. The District replied to Parents' request the same day, offering four alternatives for Parents to retrieve and access the requested records.⁴²

VII. DISCUSSION

Petitioner contends that the District violated the IDEA by failing to develop and implement an appropriate special education program in the LRE. Specifically, Petitioner alleges that Student had significant struggles with reading and that the District failed to develop and implement an

³⁷ JE 6 at 5.

³⁸ JE 13 at 3.

³⁹ JE 13 at 4.

⁴⁰ JE 23; PE 13 at 5; Tr. at 254-55.

⁴¹ JE 9; Tr. at 117.

⁴² RE 36; Tr. at 509-10.

appropriate program to meet Student's unique needs. Petitioner further alleges that the District deprived Parents of a meaningful opportunity to participate in the educational decision-making process, failed to comply with Parents' procedural rights, and failed to adhere to required timelines.

VIII. BURDEN OF PROOF

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.

A. 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 than two years 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 complaint. 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).

Petitioner filed the Complaint in this case on April 26, 2021, and the District contends that any claims arising prior to August 26, 2020, are time-barred. Petitioner 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 one-year time period leading up to the filing of the Complaint. 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 April 26, 2020.⁴³

B. Duty to Provide FAPE

⁴³ Petitioner argues in Petitioner's Closing Brief that the District violated its Child Find obligations under the IDEA in May 2019 when the ARD committee identified Student with dyslexia but determined that Student did not require a modified curriculum. *Pet. Closing Brf.* at 2-8. Petitioner, however, failed to identify Child Find as an issue for hearing either in Petitioner's Complaint or during the initial prehearing conference. Nor did Petitioner plead either one of the two exceptions to the statute of limitations. The hearing officer will not consider issues raised for the first time in a party's closing brief. *Cf. Melartin v. CR&R, Inc.*, 2009 WL 972484 n.1 (Tex. Ct. App. 2009) (mem. op.) (courts do not consider arguments raised for the first time in a reply brief). Moreover, in the absence of a properly pled exception supported by competent evidence, any actions taken by the ARD committee in May 2019 fall outside the one-year limitations period and are time-barred.

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. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 208 (5th Cir. 2019). 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).

C. FAPE

1. The Four-Factor 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) (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017)). 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).

a. 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 that includes a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP developed and implemented by the school district was reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances. *Endrew F.*, 137 S. Ct. at 999.

The evidence showed that the IEP developed in May 2020 and later revised in January 2021 was based on Student's PLAAFP as determined by current data (both instructional and evaluative) and individualized to meet Student's unique needs. Under the May 2020 IEP, the District provided Student with *** minutes of dyslexia services *** times a week and reading inclusion support *** days a week, *** minutes a day. The ARD committee developed an IEP goal to address Student's deficits in basic reading, reading fluency, and accuracy.

During the ARD committee meeting on May ***, 2020, the committee agreed that another full evaluation of Student would be completed in December 2020. Based on the results of this

evaluation, the District continued to provide Student with the levels of reading inclusion support and standard protocol dyslexia instruction included in Student's previous IEP. In addition to these services, the District added *** minutes of pull-out special education instruction per week and *** minutes of inclusion support for written expression as well as related services in the areas of occupational and *** therapy. Student's IEP was updated to include two additional goals targeted to address Student's *** deficits and a newly identified learning disability in written expression. Finally, both the May 2020 and January 2021 IEPs included accommodations specific to Student's needs to further enable Student to access and progress in the general education curriculum.

In sum, the IEP developed by the District in May 2020 and revised in January 2021 was reasonably calculated to allow Student to make progress appropriate in light of Student's unique needs. *Andrew F.*, 137 S. Ct. at 999.

Petitioner argues, however, that Student's program was inappropriate because the English goal related to reading fluency included in the January 2021 IEP was too ambitious and the program did not include goals for deficits related to dyslexia, basic reading skills, and written expression. Petitioner's claims are not supported by the record.

The January 2021 IEP English goal measured Student's ability to read *** words per minute fluently on Student's instructional level with ***% accuracy. This goal was scaffolded by three benchmarks with which to measure Student's progress over the course of an instructional year (which would end on January ***, 2022). While this was an admittedly challenging goal for Student, it identified the areas in which Student struggled and provided a metric by which the District could measure progress. Moreover, this goal was based on instructional and evaluative data available to the ARD committee in January 2021. As such, this goal satisfied regulatory requirements. 34 C.F.R. § 300.320(a)(2)(i).

Student's program included goals to address Student's needs related to dyslexia and basic reading skills. Dyslexia is a type of specific learning disability that manifests itself in the imperfect

ability—among other things—to read, write, and spell. 34 C.F.R. § 300.8(c)(10). Characteristics of dyslexia include poor decoding ability, poor spelling skills, and difficulty with accurate and/or fluent word reading. *The Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders (The Dyslexia Handbook)* (2018 Update) at 32. These are the same types of deficits observed in students with a specific learning disability in basic reading skills. Thus, to the extent the January 2021 IEP included a goal focused on developing Student’s *** ability, the goal addressed Student’s needs with respect to both dyslexia and basic reading skills.

Student’s IEP also included an English goal for written expression focused on increasing the ***. In addition to increasing the number of sentences, this goal targeted Student’s ability to use ***, and it was measured through a review of writing samples. There is no evidence to support Petitioner’s claim that this goal “was immeasurable and never measured.”

Finally, Petitioner seems to contend that Student should have received services based on the number of eligibility categories identified rather than Student’s unique needs. Petitioner’s arguments portray a fundamental misunderstanding of special education law as well as the evidence introduced at hearing. It is well-settled that a student’s category of eligibility is not determinative of the services Student receives. The IDEA does not concern itself with labels, but with whether a student is receiving a FAPE. *Rowley*, 458 U.S. at 181. The evidence here establishes that the services, supports, and accommodations provided by the District were individualized to meet Student’s needs.⁴⁴

b. LRE

The IDEA requires that a student with a disability shall be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling, and other

⁴⁴ Similar reasoning applies to Petitioner’s claim that the IEP should have included goals to address Student’s deficits in auditory processing and working memory. The evidence shows that the IEP addressed Student’s needs in these areas—at a minimum—through Student’s accommodations, dyslexia services, and supplementary aids and related services.

removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the LRE requirement. 34 C.F.R. § 300.114(a)(2)(i)-(ii).

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

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

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

The 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 standard protocol dyslexia instruction and special education support for reading in a special education setting. 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.

Petitioner, however, argues that Student's program should have been more restrictive and included additional time in a pull-out special education setting. The hearing officer disagrees. As discussed more fully below, the evidence shows that Student was making progress in Student's current placement and receiving an educational benefit from instruction provided in the general education setting. Neither the law nor the evidence presented in this case supports the more restrictive setting Petitioner advocates.

c. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). As key stakeholders, parents, school administrators, and teachers familiar with the student's needs should all be involved in the "highly coordinated and collaborat[ive] effort" of developing a student's IEP. *Michael F.*, 118 F.3d at 253. The IDEA, however, does not require a school district, in collaborating with a parent, to accede to all of the parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). Absent a 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 weight of credible evidence establishes in this case that staff members worked together in a coordinated manner to collect data, review Student progress, and collaborate on instruction. It also demonstrates that Student's teachers collaborated with Parents over the phone, by email, and through virtual meetings. Parents and their advocate were active participants in the ARD committee meetings. The District shared data with Parents and provided them with progress reports. It also forwarded draft IEPs to Parents prior to ARD committee meetings and provided them with Notice of Procedural Safeguards and Prior Written Notice at appropriate times. Parents' suggestions were considered and frequently adopted by the committee.

Petitioner contends, however, that decisions related to Student's program were predetermined by the District. Predetermination occurs when a school district makes educational decisions so early in the planning process that it deprives the parents of a meaningful opportunity to fully participate as equal members of the ARD committee. *E.R.*, 909 F.3d at 769. The record is devoid of any credible evidence to support this claim. Nonetheless, Petitioner cites witness testimony and asserts that "teacher collaboration" drove the development of Student's IEP. As a threshold matter, Petitioner's argument misconstrues witness testimony. But to the extent this is an attempt to base Petitioner's predetermination claim on collaborative efforts by staff to prepare for an ARD committee meeting, Petitioner's argument is legally indefensible. *Pet. Closing Brf.* at

14, ¶55. Case law establishes that school district staff may engage in activities aimed at preparing a proposal or a response to a parent proposal that will be discussed at a later meeting with the parent. *See, e.g., T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2d Cir. 2009).

In short, a preponderance of the evidence demonstrates that services were provided in a coordinated, collaborative manner by key stakeholders during the relevant timeframe. Petitioner failed to show that the District excluded Parents in bad faith or refused to listen to them.

d. Academic and Non-Academic Benefits

Whether a student received academic and non-academic benefit from a special education program is one of the most critical factors in any analysis regarding the provision of FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012). The evidence in this case establishes that Student liked to socialize with Student's peers and please Student's teachers and that Student was typical of other students Student's age who require some redirection in order to initiate tasks. Student did not present any significant emotional behavioral concerns. Rather, the primary concern with Student's performance was related to academic difficulties.

With respect to academic benefit, the record establishes that Student made regular and steady progress during the relevant timeframe. Student made passing grades in all academic subjects and was making progress towards Student's IEP goals. Student's reading level increased *** per grading period, and the evidence shows that this is appropriate progress. Student also increased the *** Student was able to produce in a written composition. Student's ability to accurately *** more than doubled, and Student was progressing through the dyslexia curriculum. Student missed passing ***. In light of Student's deficits in basic reading skills and reading fluency and the number of passages included in the assessment, Student's performance on this assessment cannot be viewed in a negative light. Nor should a student's performance on a single test overshadow steady progress demonstrated over time. In short, a preponderance of the evidence established that Student received academic benefit from Student's program.

2. IEP Implementation

In determining whether a school district failed to adequately implement a student's IEP, thereby denying the student a FAPE, a hearing officer must consider whether there was a significant or substantial failure to implement the IEP under the third *Michael F.* factor and whether there were demonstrable academic and nonacademic benefits from the IEP under the fourth factor. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). That is, Petitioner must show more than a *de minimis* failure to implement all elements of an IEP. They must demonstrate that the school district failed to implement substantial or significant portions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Petitioner appears to argue that the District failed to properly implement Student's IEP because it did not (1) provide in-class support from an adequately-trained special education teacher; (2) keep appropriate data on Student's IEP goals; and (3) provide data on the related services provided to Student in occupational and *** therapy. The record does not support Petitioner's position. The evidence shows that Student's inclusion teacher was certified in special education and that Student's teachers worked together to collect data on Student's progress towards Student's IEP goals. As for collecting data on the related services Student received, Petitioner points to no authority to support Petitioner's position that the District was required to do so. The regulations require the IEP to include measurable annual goals and provide progress reports on those goals. 34 C.F.R. § 300.320(a)(2), (3). While there may be instances in which collecting data on a related service is helpful or even necessary, such is not the case here.

Related services are defined as "supportive services . . . required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34(a). The occupational and *** therapy services provided by the District supported Student's needs in the areas of written expression and ***. As noted above, Student made progress in both areas throughout the spring semester of the 2020-21 school year. The evidence thus leads to the conclusion that the District

satisfied its obligation to provide Student with the supportive services necessary to assist Student in benefitting from special education.

In sum, the weight of credible evidence establishes that Student's program was implemented in a coordinated, collaborative manner by key stakeholders and that Student received an academic benefit from the program. Petitioner did not meet Petitioner's burden of proving that the District failed to implement a substantial or significant portion of Student's IEP.

3. Procedural Requirements

Finally, Petitioner alleges the District violated Student's procedural rights under the IDEA. 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); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

Petitioner alleges that the District failed to meet its procedural obligations under the IDEA and denied Parents access to Student's educational records. The IDEA requires school districts to permit parents to inspect and review their child's education records without unnecessary delay and before an ARD committee meeting, a due process hearing, a resolution session, and in no case more than 45 days after the request was made. 34 C.F.R. § 300.613. The evidence shows that the District provided Parents with all of Student's educational records. When Parents experienced technical problems accessing some of the electronic records, the District offered Parents support and alternate ways to access the records. The District thus complied with its obligations under § 300.613, and Petitioner's claim on this issue is without merit.

The evidence also shows that the District provided both prior written notice (PWN) 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.


IX. CONCLUSIONS OF LAW

1. Student was provided a FAPE in the least restrictive environment during the relevant time period, and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188, 203-04; *Andrew F.*, 137 S. Ct. at 999.
2. Petitioner did not meet Petitioner's burden of proving that Respondent failed to provide Parents with a meaningful opportunity to participate in the educational decision-making process. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.321(a), 300.322.
3. Petitioner did not meet Petitioner's burden of proving that Respondent failed to permit Parents to inspect and review Student's education records within the timeframe allowed under the IDEA. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.613.
4. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comply with Parents' procedural rights under the IDEA related to the provision of PWN or Notice of Procedural Safeguards. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a), 300.504(a).

X. ORDER

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

SIGNED November 5, 2021.



Stacy May
Special Education Hearing Officer
For the State of Texas