

**SOAH DOCKET NO. 701-21-2464.IDEA**  
**TEA DOCKET NO. 195-SE-0521**

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

v.

**LAMAR CONSOLIDATED  
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, b/n/f Parent and Parent (Student, or collectively, Petitioner) brings this action against the Lamar Consolidated 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 the District provided Student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE).

The Hearing Officer concludes that the District provided Student with a FAPE reasonably calculated to allow Student to make progress in light of Student’s unique circumstances. The Hearing Officer also concludes that the District did not violate any procedural requirements.

**II. PROCEDURAL HISTORY**

**A. Legal Representation**

Student was represented throughout this litigation by Student's non-attorney representative, Karen Mayer Cunningham. The District was represented throughout this litigation by its legal counsel, Amy Tucker with Rogers, Morris & Grover, LLP.

### **III. DUE PROCESS HEARING**

The due process hearing was conducted on September 22 and 23, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's non-attorney representative, Karen Mayer Cunningham. In addition, \*\*\* and \*\*\*, Student's parents, attended the due process hearing. At Petitioner's request, the hearing was an open hearing and observers were present.

Respondent continued to be represented by its legal counsel, Amy Tucker. In addition, \*\*\*, the Executive Director of Special Education for the District, attended the hearing as the party representative. Both parties filed written closing briefs in a timely manner. The Decision in this case is due November 4, 2021.

### **IV. ISSUES**

#### **A.     Petitioner's Issues**

Petitioner raised the following IDEA issues for decision in this case:

1.     Whether the District provided Student a FAPE.
2.     Whether the District developed an appropriate Individualized Education Plan (IEP) for Student for the 2021-2022 school year.
3.     Whether the District proposed Student a placement in Student's least restrictive environment for the 2021-2022 school year.

4. Whether the District interfered with the parents' ability to meaningfully participate in the development of Student's IEP.

Petitioner raised for the first the first time in Petitioner's written closing brief allegations related to IEP implementation and expanding the statute of limitations in relation to that claim. Neither IEP implementation, nor exceptions to the statute of limitations, were timely raised as issues in advance of the due process hearing and are therefore not considered here.

**B. Petitioner's Requested Relief**

Petitioner confirmed the following items of requested relief:

1. Order the District to train staff working with Student on Student's IEP.
2. Any other relief the Hearing Officer deems appropriate.

In Petitioner's written closing brief, Petitioner identified additional items of requested relief. These items were not timely identified in advance of the due process hearing and are therefore not considered here.

**C. Respondent's Legal Position**

Respondent generally denied the factual allegations stated in Student's Complaint. The District denied Petitioner's issues and denied responsibility for providing any of Petitioner's requested relief.

## **V. FINDINGS OF FACT**

1. Student is \*\*\* years old and in the \*\*\* grade. Student lives with Student's parents and \*\*\*. Student was \*\*\*.<sup>1</sup>
2. Student began receiving speech therapy from the District in October 2009, when Student was \*\*\* years old. Student also attended the District's \*\*\* program for children with disabilities during the 2009-2010 and 2010-2011 school years. Student has attended school in the District since then.<sup>2</sup>
3. Student has typically received instruction in both special education and general education settings, depending on the subject area. A special education setting provides more hands-on activities, small group instruction, and one-on-one instruction at a slower pace and in a smaller setting.<sup>3</sup>
4. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in 2014.<sup>4</sup>
5. According to Student's most recent full individual evaluation (FIE), dated September \*\*\*, 2019, Student meets eligibility criteria for special education as a student with \*\*\*, speech impairment, and other health impairment due to ADHD.<sup>5</sup>
6. Based on testing in 2016, Student's full-scale IQ is \*\*\*. The 2019 FIE included the Test of Non-verbal Intelligence-Fourth Edition (TONI-4) and Student received an index score of \*\*\*, indicating cognitive abilities that are below normal limits when compared to same-age peers.<sup>6</sup>
7. Student's language abilities are below the average range. Student is a limited verbal communicator and has had access to \*\*\* since \*\*\* school. Student's \*\*\* is an application called \*\*\* on an iPad.<sup>7</sup>

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<sup>1</sup> Joint Exhibit (JE) 1; JE 7 at 11, 14.

<sup>2</sup> JE 7 at 18.

<sup>3</sup> JE 2; JE 6; JE 7; Transcript (Tr.) 265, 362, 372, 374.

<sup>4</sup> JE 7 at 19.

<sup>5</sup> JE 7 at 24.

<sup>6</sup> JE 7 at 3, 15.

<sup>7</sup> JE 7 at 9-10; Tr. 354, 384-85.

8. The 2019 FIE recommended modified instructional materials and access to the Texas essential knowledge and skills (TEKS) through the use of essence statements, as well as prerequisite skill instruction.<sup>8</sup>
9. The 2019 FIE notes that when Student attended \*\*\* and \*\*\* in the general education setting, Student “is able to successfully receive grade-level instruction with significant modifications to assignments and assistance from the Special Education staff” and Student “is performing significantly below Student’s grade-level peers in all academic areas.”<sup>9</sup>
10. During \*\*\* grade, in the 2019-2020 school year, Student received instruction in \*\*\* and math in the \*\*\* (\*\*\*), a special education setting. Student received instruction in the general education classroom with inclusion support for \*\*\*, \*\*\*, \*\*\*, and \*\*\*.<sup>10</sup>
11. During \*\*\* grade, the case manager recommended that Student receive more instruction in the special education setting. The speech therapist agreed that Student would benefit from more time in the special education setting in \*\*\* grade and it was discussed by Student’s admission, review, and dismissal committee (ARDC). Student’s parent did not agree with this proposal.<sup>11</sup>
12. The Student’s case manager also recommended that Student receive an alternative curriculum because the modified curriculum Student had been receiving was too difficult for Student. This proposal was implemented and through the alternative curriculum, Student received completely different assignments than Student’s general education peers.<sup>12</sup>
13. Student’s case manager modified Student’s general education \*\*\* work to an alternative curriculum at the \*\*\* and \*\*\* grade level. A different special education teacher was responsible for modifying Student’s \*\*\* work. During \*\*\* grade, Student was accessing the “\*\*\* curriculum through prerequisite skills (the \*\*\* to \*\*\* grade level).”<sup>13</sup>

**\*\*\* Grade (2020-2021 school year)**

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<sup>8</sup> JE 7 at 23.

<sup>9</sup> JE 7 at 19.

<sup>10</sup> JE 6 at 9.

<sup>11</sup> Tr. 264-65, 435-36, 447.

<sup>12</sup> Tr. 252, 262-63.

<sup>13</sup> JE 6 at 7; Tr. 249, 262.

14. Student was in \*\*\* grade during the 2020-2021 school year. Student's IEP for \*\*\* grade was developed at an annual ARDC meeting held at the end of \*\*\* grade, on April \*\*\*, 2020 and continued on May \*\*\*, 2020. Both of Student's parents attended, as well as their advocate. The meeting ended in agreement.<sup>14</sup>
15. In \*\*\* grade, Student continued to receive instruction in \*\*\* and math in the \*\*\*. Student also continued to receive instruction in the general education classroom with inclusion support for \*\*\*, \*\*\*, \*\*\*, and \*\*\*. Student's \*\*\* and \*\*\* instruction was aligned with TEKS essence statements. Student also received 30-minute speech therapy sessions 10 times per \*\*\* and direct \*\*\* instruction for 30 minutes two times per week.<sup>15</sup>
16. When Student received instruction in the \*\*\* classroom, the special education teacher communicated with Student using a \*\*\*.<sup>16</sup>
17. When Student was in a general education class, Student was accompanied by a special education teacher or paraprofessional 100% of the time. The special education staff used the \*\*\* with Student when Student was in general education classes.<sup>17</sup>
18. Student's IEP called for certain accommodations in all subjects, including: assistive technology, checks for understanding, minimize distractions, oral administration, preferential seating, \*\*\*, reminders to stay on task, shortened written assignments, small group administration, verbal prompts, and visual cues \*\*\*. In the four core content areas, Student had accommodations of: alternate assignments and tests, alternate curriculum, \*\*\*, and demonstrate concepts or relationships in images or text. In math and \*\*\*, Student had an accommodation of \*\*\*. In math, Student had an accommodation of math manipulatives. In English and math, Student had an accommodation of supplemental aids. In \*\*\* and \*\*\*, Student had an accommodation of \*\*\*.<sup>18</sup>
19. Student's alternate curriculum was on a \*\*\* or \*\*\* grade level. One hundred percent of the \*\*\* and \*\*\* curriculum had to be modified for Student. Student's alternative assignments were typically \*\*\* and Student required extensive support from the special education staff to complete these activities.<sup>19</sup>

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<sup>14</sup> JE 6 at 20-24.

<sup>15</sup> JE 6 at 12.

<sup>16</sup> Tr. 257, 424.

<sup>17</sup> Tr. 285, 298, 302, 347, 364, 420.

<sup>18</sup> JE 6 at 12-13.

<sup>19</sup> Tr. 213, 215, 253, 319, 321, 332.

20. Student received related services of special transportation, occupational therapy (OT) through in class-support and direct services, and assistive technology consultation.<sup>20</sup>
21. On November \*\*\*, 2020, an ARDC meeting was held to review an \*\*\* (\*\*\*) evaluation and Student began receiving \*\*\* services.<sup>21</sup>
22. On March \*\*\*, 2021, an IEP amendment was executed confirming that Student would take STAAR \*\*\* state assessments as a student with a significant cognitive disability who requires specialized, extensive supports to access grade-level curriculum through prerequisite skills.<sup>22</sup>
23. Student mastered most of Student's \*\*\* IEP goals for \*\*\* grade. Student's \*\*\* goal to \*\*\* was not mastered and continued for the next year. Student did not master Student's \*\*\* goals but was making progress on them.<sup>23</sup>
24. Student's grades in \*\*\* grade were consistently in the 90s.<sup>24</sup>
25. Student is extremely shy and hesitant to communicate, especially with new people. When in general education classes, Student only communicated with the teacher and paraprofessional. Student did not interact with other students. Student was hesitant to use Student's \*\*\* when in the general education setting.<sup>25</sup>
26. Student was more communicative when Student was in the \*\*\* classroom than in Student's general education classes. Student would communicate with peers in the \*\*\* classroom, including peers using \*\*\*. Student would laugh, make jokes, and appeared happier in the \*\*\* classroom.<sup>26</sup>
27. The speech therapist found that Student was more successful and made more progress in speech when she served Student one-on-one or in a small pull-out group, as opposed to working with Student within the general education classroom. The speech therapist also attributed Student's speech progress to teletherapy sessions where Student's family could

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<sup>20</sup> JE 6 at 13.

<sup>21</sup> JE 4 at 12, 17.

<sup>22</sup> JE 3 at 5-7.

<sup>23</sup> JE 8.

<sup>24</sup> JE 9.

<sup>25</sup> Tr. 84-86, 109-10, 194, 197-98, 210, 216, 236, 242, 256, 258, 320-21, 415.

<sup>26</sup> Tr. 254, 260, 270, 355-56, 362, 396-97.

see how the speech therapist used the \*\*\* with Student and would then use it more at home.<sup>27</sup>

28. Student’s teachers characterized Student’s experience in \*\*\* and \*\*\* as “a class within a class.” Student’s general education \*\*\* teacher observed that Student was frustrated and distracted in the general education class. Student’s teachers concluded that Student did not understand the grade-level material.<sup>28</sup>

**Proposal for \*\*\* Grade (2021-2022 school year)**

29. Student’s annual ARDC meeting was held on April \*\*\*, 2021 to develop Student’s IEP for Student’s \*\*\* grade year.<sup>29</sup>
30. In advance of the annual ARDC meeting, the \*\*\* speech therapist collaborated with the \*\*\* speech therapist to develop goals for Student. The \*\*\* speech therapist also had a meeting with Student’s parent to discuss proposed goals in advance of the ARDC meeting.<sup>30</sup>
31. The draft ARD document was sent home for the family to review one week in advance of the meeting. The case manager did not receive any feedback from the parents regarding the draft ARD document.<sup>31</sup>
32. Student continued to meet eligibility criteria for the conditions of \*\*\*, speech impairment (receptive language, expressive language, articulation, pragmatic language skills), and other health impairment due to ADHD.<sup>32</sup>
33. Student’s speech and language present levels of academic achievement and functional performance (PLAAFP or present levels) reflected that Student continued to communicate with a total language approach that included verbal, \*\*\*, and gestures. Student was able to consistently \*\*\* using the \*\*\*. Student’s average verbal sentence length was \*\*\*. Student was able to add vocabulary words to the \*\*\* \*\*self but often needed help to \*\*\*.<sup>33</sup>

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<sup>27</sup> Tr. 413, 421-24.

<sup>28</sup> Tr. 200, 206, 209-10, 217-18, 250, 267-68, 320, 322, 335, 390, 392-94.

<sup>29</sup> JE 2.

<sup>30</sup> Tr. 387-89.

<sup>31</sup> Tr. 271.

<sup>32</sup> JE 2 at 3.

<sup>33</sup> JE 2 at 7; Tr. 403.



34. Student's English \*\*\* PLAAFP reflected that Student performed overall at a \*\*\* level independently. Student was able to read \*\*\* grade level books aloud and answer comprehension questions with support.<sup>34</sup>
35. Student's math PLAAFP reflected that Student performed overall at a \*\*\* level. Student was able to \*\*\* but struggled with \*\*\*. When prompted, Student was able to \*\*\*. Student could \*\*\* and use a \*\*\*.<sup>35</sup>
36. Student's \*\*\* PLAAFP reflected that Student received alternate assignments that address the essence statements of the TEKS being addressed in the general education curriculum. Student was successful on \*\*\* assignments at the \*\*\* grade reading level when provided Student's accommodations.<sup>36</sup>
37. Student's \*\*\* PLAAFP reflected that Student received alternative assignments that addressed prerequisite skills and essence statements of the TEKS being addressed in the general education curriculum. Student was successful on modified assignments that were \*\*\* assignments provided with Student's accommodations.<sup>37</sup>
38. The District recommended that Student's schedule of services change for \*\*\* grade such that Student would begin to receive \*\*\* and \*\*\* instruction in the \*\*\* instead of the general education classroom. The proposed schedule of services recommended continued placement in the general education setting with inclusion support for \*\*\* and \*\*\*. The proposed schedule continued to reflect the same duration and frequency for speech therapy, direct \*\*\*, OT, special transportation, \*\*\* services, and assistive technology consult services as the 2020-2021 IEP.<sup>38</sup>
39. Student's accommodations remained the same as the 2020-2021 IEP with the exception of removing the \*\*\* and \*\*\* accommodation of \*\*\*.<sup>39</sup>
40. Student continued to be eligible for STAAR \*\*\* state assessments with accommodations.<sup>40</sup>

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<sup>34</sup> JE 2 at 7-8; Respondent's Exhibit (RE) 1 at 1; Tr. 175.

<sup>35</sup> JE 2 at 8; RE 1 at 10.

<sup>36</sup> JE 2 at 9.

<sup>37</sup> JE 2 at 9-10.

<sup>38</sup> JE 2 at 14-16.

<sup>39</sup> JE 2 at 14-15.

<sup>40</sup> JE 2 at 17-20.

41. In considering the least restrictive environment, the IEP stated that Student “requires additional time and support to master educational objectives. Continued remediation for academic subjects in the \*\*\* setting, as well as Speech Therapy, [\*\*\*], and OT is needed for Student to be successful.” The IEP stated that Student “cannot achieve the goals and objectives contained in the IEP even though supplementary aids and services are used in the general education setting.” The IEP further stated that any harmful effects of removal from the general education setting were thought to be outweighed by the benefits of the services provided.<sup>41</sup>
42. The IEP included annual goals in English (reading comprehension of \*\*\*), math (\*\*\*), \*\*\* (participating in \*\*\* activities, \*\*\*), \*\*\* (understanding \*\*\*), \*\*\* (\*\*\*), sensorimotor/OT (keyboarding), \*\*\* (ask peer a scripted question with \*\*\*), speech (\*\*\*), and \*\*\* (\*\*\*).<sup>42</sup>
43. The April \*\*\*, 2021 ARDC meeting was attended by Student’s mother and Student’s educational advocate. Student’s mother disagreed with the proposed IEP. The parent specifically disagreed with the recommendation that Student receive \*\*\* and \*\*\* instruction in the special education setting instead of the general education setting.<sup>43</sup>
44. A reconvene ARD Committee meeting was held on May \*\*\*, 2021. The meeting was attended by Student’s mother and Student’s educational advocate.<sup>44</sup>
45. The District continued to recommend that Student receive \*\*\* and \*\*\* instruction in the \*\*\* based on Student’s academic needs, the significant gap between Student’s abilities and the grade-level instruction, and a lack of benefit obtained from academic instruction in the general education setting.<sup>45</sup>
46. Student’s mother again disagreed with the proposed IEP.<sup>46</sup>

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<sup>41</sup> JE 2 at 21.

<sup>42</sup> JE 2 at 34-47.

<sup>43</sup> JE 2 at 23, 25, 26.

<sup>44</sup> JE 1 at 13.

<sup>45</sup> JE 1 at 14.

<sup>46</sup> JE 1 at 10, 14.

47. The District issued prior written notice of the decision to change Student's \*\*\* and \*\*\* instruction to the \*\*\* setting. Student's parent did not waive the 5 school-day notice requirement before implementing the new IEP.<sup>47</sup>
48. In \*\*\* grade, all of the general education \*\*\* and \*\*\* curriculum is being modified for Student to a \*\*\* level. Student is still experiencing a "class within a class" and requires extensive assistance to complete alternate assignments. Student's teachers have observed that Student does not understand the material covered in general education \*\*\* and \*\*\*.<sup>48</sup>
49. Student's parents obtained a private augmentative and alternative communication (AAC) evaluation report dated August \*\*\*, 2021. The report was completed by Dr. \*\*\*, a private speech/language pathologist. The evaluation consisted of informal assessment of Student's verbal speech and Student's use of Student's \*\*\*. Dr. \*\*\* did not review Student's educational records or speak with any of Student's educators as part of the evaluation. The report made recommendations for modifications to the layout of Student's \*\*\* application, suggestions for skills Student needs to work on using Student's \*\*\*, and a recommendation that all of Student's communication partners speak to Student both verbally and using a \*\*\*. Dr. \*\*\* recommended that teachers speak to Student using a \*\*\* themselves when providing instruction to the entire classroom and one-on-one instruction to Student.<sup>49</sup>
50. The \*\*\* curriculum recommended by Dr. \*\*\* is the curriculum used in the \*\*\* setting.<sup>50</sup>

## VI. DISCUSSION

Petitioner alleges that the District denied Student a FAPE by failing to devise an appropriate IEP for Student in the LRE for the 2021-2022 school year. Petitioner also alleges the District violated student and parental procedural rights because the District interfered with the parents' ability to meaningfully participate in the development of Student's IEP. Petitioner seeks an order mandating staff training.

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<sup>47</sup> JE 1 at 19.

<sup>48</sup> Tr. 86, 94-95, 99-100, 116, 121-122, 124-27.

<sup>49</sup> Petitioner's Exhibit (PE) 24; Tr. 21, 40, 63-65.

<sup>50</sup> PE 24; Tr. 361-62, 378, 428-29.

**A.      Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>51</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Tatro v. State of Tex.*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), and *vacated in part*, 741 F.2d 82 (5th Cir. 1984).

**B.      Duty to Provide FAPE**

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

Petitioner alleges that the District violated its duty to provide Student a FAPE by proposing an IEP for the 2021-2022 school year that is not in Student's LRE. The district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

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<sup>51</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009).

**C.      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's requirements. Those 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.*,<sup>52</sup> the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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

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

In meeting its obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual

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<sup>52</sup> *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

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, 300.323(a). The District’s obligation when developing 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). 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 proposed by the school district “was reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 999.

Student’s ARDC met in the spring of 2021 to develop Student’s IEP for the 2021-2022 school year, the IEP in question in this dispute. A review of Student’s PLAAFPs showed that Student was performing entirely different assignments than Student’s peers that were modified to the \*\*\* or \*\*\* grade level in Student’s general education \*\*\* and \*\*\* classes. Student required one-on-one assistance and extensive accommodations in order to complete this modified work. The District thus recommended that Student begin receiving \*\*\* and \*\*\* instruction in the \*\*\* to meet Student’s academic needs, address the widening gap between Student’s academic levels and Student’s peers, and Student’s lack of benefit from the general education academic instruction. Petitioner argues that the District recommendation was based on a misunderstanding about STAAR \*\*\* requirements. However, this argument \*\*\* ignores the substantial evidence to the contrary demonstrating that the recommendation was based on the Student’s individual needs and data. The hearing officer concludes that the District’s proposal is in line with Student’s needs reflected in

Student’s present levels, evaluation data, and performance and that the District offered a 2021-2022 IEP that was individualized on the basis of Student’s performance and assessment.

## **2.      Least Restrictive Environment**

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R. § 300.114(a)(2)(i)-(ii). State regulations require a school district’s continuum of instructional arrangements be based on students’ individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

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 determination of a student’s LRE requires an examination of the nature and severity of the student’s disability, the student’s needs and abilities, and the school district’s response to the student’s needs. *Id.* This determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting and modify the general education curriculum to meet the student's needs;
- the educational benefit a student is receiving while placed in the general education setting;
- the child's overall experience in general education, balancing the benefits of general and special education; and
- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

*Id.* at 1048-49.

In this case, it is undisputed that Student cannot be educated entirely in the general education setting with the use of supplementary aids and services. The ARDC, including Student's parents, have agreed for years that Student needs instruction in a special education setting for some academic subjects. The issue here is whether or not Student can be educated satisfactorily in the general education setting for \*\*\* and \*\*\* and whether or not the District's proposal mainstreams Student to the maximum extent appropriate.

**a.      Efforts to educate in general education setting**

Here, the District made efforts to educate Student in the general education setting for \*\*\* and \*\*\*. The District modified Student's work in order to present materials to Student at Student's level, using an alternate curriculum from that presented in the general education class. The District also provided continuous one-on-one support in the general education setting and implemented extensive accommodations. Petitioner argues that the District should have done more by requiring the general education teachers to communicate with Student using a \*\*\* while teaching the entire class and in one-on-one interactions. However, Petitioner offered no evidence that this would have made a difference in Student's ability to understand the general education instruction. Notably, Dr. \*\*\*'s testimony was of limited value here because Dr. \*\*\* did not review any school records or speak to any school staff. District witnesses familiar with Student also credibly testified that this



proposal would not have impacted Student’s cognitive ability to understand the material, which is congruent with Student’s present levels and cognitive data. Further, demanding that general education teachers provide instruction to the whole class using a \*\*\* for Student’s benefit is unduly burdensome on the District. *See Brillon v. Klein Indep. Sch. Dist.*, 100 F.App’x 309, 314 (5th Cir. 2004). Petitioner’s arguments also ignore that Student had a communication partner using Student’s \*\*\* with Student at all times when in the general education setting. This is significant and evidences the District’s extensive efforts to accommodate Student in the general education environment.

“The Act does not permit states to make mere token gestures to accommodate’ a disabled student, it instead provides a broad, but not limitless, requirement to modify and supplement the regular or general education setting for the student.” *H.W., by & through Jennie W. v. Comal Indep. Sch. Dist.*, 2021 WL 3887696, at \*14 (W.D. Tex. Aug. 31, 2021) (quoting *Daniel R.R.*, 874 F.2d at 1048). Here, the District’s efforts to accommodate Student in general education for \*\*\* and \*\*\* were legally sufficient.

**b.      Educational benefit in general education**

In support of the position that Student’s placement should not change, Petitioner relies heavily on Student’s progress on IEP goals. Student indeed mastered most of Student’s IEP goals during the 2020-2021 school year. However, the determination of placement is not based solely on progress on IEP goals. *See Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397-98 (5th Cir. 2012). Additionally, Student’s IEP goals represent a very small fraction of the material covered in the general education curriculum, and only at the TEKS essence statement level. *See Brillon*, 100 F.App’x at 314. Progress on IEP goals alone does not necessarily demonstrate appropriate progress. Notably, guidance from the Office of Special Education Programs states that “[t]here is no requirement that a student fail in a less restrictive environment before moving to a more restrictive environment.” Office of Special Ed. Prog., *Letter to Richards*, 211 IDELR 433 (1987). Student’s

IEP goals were narrowly targeted at Student’s specific needs and tailored to Student’s present levels. Student’s success or failure on these goals is not dispositive on whether Student’s placement is appropriate.

“[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.” *Daniel R.R.*, 874 F.2d at 1049. Student’s \*\*\* and \*\*\* grade \*\*\* and \*\*\* work has all been modified to a \*\*\* or \*\*\* grade level. Student’s assignments are entirely different from Student’s general education peers, although they are generally topically aligned through the TEKS essence statements. The evidence consistently showed that Student does not cognitively understand grade-level instruction. Student is also not required to learn any of the skills expected of Student’s non-disabled peers. The evidence demonstrates that Student is receiving little educational benefit from the general education setting in \*\*\* and \*\*\*.

**c.      Overall experience in general education, balancing the benefits of general and special education**

“[A]lthough a handicapped child may not be able to absorb all of the regular education curriculum, Student may benefit from nonacademic experiences in the regular education environment.” *Daniel R.R.*, 874 F.2d at 1048. Petitioner argues that Student benefits from the language modeling and language rich environment in the general education classroom. The evidence established that Student does not interact with Student’s general education peers in \*\*\* and \*\*\*. While it is difficult for the hearing officer to conclude that Student is obtaining no benefit from observing Student’s general education peers, even if Student does not interact with them, this uncertain benefit is minimal when balanced against the many benefits of the special education

setting established by the evidence. Many witnesses characterized Student's experience in the general education setting as a "class within a class." Student is more successful, makes more progress, communicates more, and is happier in the special education setting.

It is notable that the District's proposed placement still includes some instruction in the general education setting. Therefore, Student will still have access to general education peers and language modeling in those environments. Student will also have more access to the language modeling and interactions that have proven successful for Student in the special education setting, including interacting with other students using \*\*\*. The special education setting also provides Student more access to the \*\*\* curriculum recommended by Petitioner's expert witness. Student's overall experience in general education, balancing the benefits of general and special education, weigh in favor of the District's proposed placement.

**d.      Impact on general education setting and students**

The evidence did not show that Student is a disruption in the general education setting. However, even without evidence of disruption, the absence of a meaningful educational benefit may justify a change in placement. *See J.H. ex rel. A.H. v. Fort Bend Indep. Sch. Dist.*, 482 F.App'x 915, 919 (5th Cir. 2012) (per curiam).

Overall, Student's benefit from the general education setting for \*\*\* and \*\*\* is minimal at best. Student's abilities, along with Student's need for prompting and one-on-one support, and lack of engagement with general education peers support Student's need for more specialized instruction. The District's proposed placement consists of time in both general education and special education settings. Petitioner's closing brief argues that the District should have considered resource classes instead of the \*\*\*. However, Petitioner offered no evidence in support of this argument, and the evidence presented established the appropriateness of the District's proposed placement of core content instruction in the \*\*\*. When balancing the considerations required under

*Daniel R.R.*, the hearing officer determines that the District’s proposed placement is Student’s least restrictive environment.

**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, 658 (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.*

Here, Student’s IEP was developed through a collaborative process. Student’s speech therapist collaborated with \*\*\* staff to create appropriate \*\*\* grade goals for Student and held a meeting with Student’s parent to review those goals. Student’s case manager provided the parents with a draft of Student’s IEP, including the proposed placement, a week in advance of the annual ARDC meeting. Student’s parent and advocate attended and participated in all ARDC meetings. Petitioner argues that the parents were blindsided by the District’s placement proposal in the April 2021 ARDC meeting and that it was predetermined, but this argument ignores all of the collaboration and placement information that was provided in advance of the meeting. Petitioner’s arguments also narrowly focus on district staff never articulating that Student was “unsuccessful.” Petitioner’s overreliance on the use of the word “success” ignores the detailed documentation in the IEP demonstrating Student’s present levels in comparison with same-age peers. The District

collaborated with the parents and their advocate. District staff also collaborated with each other to serve Student. The evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders. Petitioner failed to show that the District excluded them in bad faith or refused to listen to them.

#### **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, 812-13 (5th Cir. 2012). Petitioner has not challenged whether or not Student would receive academic and non-academic benefits from the District's proposed placement, instead focusing on whether the proposed placement is the LRE. As discussed above, the District's proposal constitutes Student's LRE. Under these circumstances, the District's proposed placement of Student in the \*\*\* for core content areas and general education with inclusion support for \*\*\* and \*\*\* is reasonably designed to confer academic and nonacademic benefits.

The evidence showed that Student's program was reasonably calculated to provide meaningful educational benefit and was appropriately ambitious in light of Student's unique circumstances. *Andrew F.*, 137 S. Ct. at 992. Based on the four factors of *Michael F.*, the evidence establishes that the District has proposed a FAPE in the LRE in the 2021-2022 school year.

#### **D. Procedural Violations**

Petitioner alleges the District violated Student's procedural rights under the IDEA by generally alleging that the District impeded the parent's ability to participate in the decision-making process. 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 argued in Petitioner’s closing brief that the District’s proposed placement was predetermined. 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. Petitioner again ignores the collaboration that occurred in advance of the April 2021 ARDC meeting. Petitioner failed to present evidence of predetermination and did not meet Petitioner’s burden of proving the school district violated student or parental procedural rights under the IDEA. Furthermore, even if there were any procedural violations, Petitioner did not prove those violations, if any, impeded Student’s right to 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). Parent was a participant in ARDC meetings, the District was responsive to and considered parental input when offered, and Student has been offered a FAPE through the program that the District proposed.

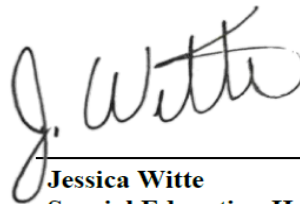
## VII. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127 (5th Cir. 1993).
2. Student was provided FAPE during the relevant time period and Student’s IEP was reasonably calculated to address Student’s needs in light of Student’s unique circumstances. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988.
3. Petitioner did not meet Petitioner’s burden of proving that Respondent failed to comply with student and parental procedural rights under the IDEA. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §§ 300.503(a); 300.504(a).

### VIII. ORDERS

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

**SIGNED November 1, 2021.**



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**Jessica Witte**  
Special Education Hearing Officer  
For the State of Texas

### IX. 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. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code § 89.1185(n).