

SOAH DOCKET NO. 701-22-2503.IDEA
TEA DOCKET NO. 226-SE-0422

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friends *** and *** (Parents or, collectively, Petitioner), brings this action against the Clear Creek Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations.

The issue presented in this case is whether the District failed to provide Student a free, appropriate public education (FAPE). The hearing officer concludes the District denied Student a FAPE by failing to provide an educational program that included appropriate *** supports and services that were reasonably calculated to confer educational benefit in light of Student’s circumstances.

II. LEGAL REPRESENTATION

Petitioner was represented throughout this litigation by Petitioner’s legal counsel, Mark Whitburn of Whitburn and Pevsner, PLLC. The District was represented throughout this litigation by its legal counsel, Amy Tucker of Rogers, Morris & Grover, LLP.

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on September 27-30, 2022. The hearing was recorded and transcribed by a certified court reporter. Petitioner requested an open hearing and observers were present.

Petitioner continued to be represented by Mark Whitburn. Student’s parents, *** and ***, attended the hearing, as did Petitioner’s advocate, Karen Mayer Cunningham. The District continued to be represented by Amy Tucker who was assisted by co-counsel Kyle Stone. ***, the District’s Executive Director of Special Services, attended the hearing as the party representative. The parties filed timely written closing arguments. The hearing officer’s decision is due on November 23, 2022.

IV. ISSUES PRESENTED

A. Petitioner’s Claims

The relevant time period includes the 2021-22 school year to present. Petitioner raised the following legal issue for decision: whether the District failed to provide Student a FAPE.

B. Requested Relief

Petitioner seeks the following items of relief:

1. An order directing the District to retain a consultant with expertise in ***** Impairment, approved by Petitioner or Petitioner's designated expert, to supervise development and implementation of an appropriate Individualized Education Program (IEP) for Student.
2. An order directing the District to develop and implement an appropriate IEP for Student with the assistance of a consultant with expertise in ***** Impairment with appropriate accommodations to address Student's ***** Impairment.
3. An order directing the District to provide appropriate training to all instructors and staff working with Student on the appropriate implementation of the IEP developed in accordance with #2 above.
4. An order directing the District to provide compensatory educational hours to Student in an amount to be determined by Petitioner's experts and evaluators.
5. Any and all further relief that the hearing officer deems appropriate, or which is recommended by Petitioner's experts and evaluators.

C. The District's Legal Position

The District generally and specifically denies the allegations and maintains that it has provided Student a FAPE consistent with its obligations under the IDEA at all relevant times. The District also raised the affirmative defense of the statute of limitations.

V. FINDINGS OF FACT

Background Information

1. Student is a ***-year-old *** grade student at *** in the District. Student lives with Parents and enjoys spending time with family, ***. Student's other interests include ***.¹

¹ Joint Exhibit (Jt. Ex.) 1 at 13; Jt. Ex. 10 at 10, 34, 42-43; Jt. Ex. 11 at 5, 7-8; Jt. Ex. 13 at 40.

2. Student experienced a *** and has several medical complications as a result of Student's *** history, including ***, a *** disorder, expressive language difficulties, and *****. Impairment (*****). Student receives special education and related services as a student with multiple disabilities, including *** Impairment, Speech Impairment, and *****. Impairment (*****).²
3. Student's ***** impairment, *****, is a brain-based ***** impairment that occurs due to ***. Individuals with ***** can ***." Students with ***** have unique needs compared to those of children with *** disorders, who are often offered materials that increase *** or reinforce *** learning. The assessment of and instructional materials for a student with ***** are different. Individuals with ***** have functional ***** that is expected to improve. A growing body of evidence indicates that this improvement can be facilitated through use of *** supports, accommodations, and increased interventions that help encourage the development of more functional *****.³
4. Dr. ***** is a child developmental specialist, prominent ***** researcher and publisher, and the author of four books in the area of ***. She also works with children with ***** impairments in a clinical setting in ***. Dr. ***** is the author of the ***, the most widely used functional ***** assessment for children with *** internationally. She is a former ***** teacher and the *** is specifically designed to identify appropriate educational opportunities for students with ***. The *** is a reliable and valid instrument used to determine the degree of impact of *** on a 0 to 10 continuum, with 0 representing little or no *** function and 10 representing near typical *** functioning. An individual is rated using a set of statements for a particular range (Ranges 1-2, 3-4, 5-6, 7-8, 9-10) that incorporate the distinct *** and behavioral characteristics of individuals at those levels in 10 areas: ***. The assessment produces a functional ***** score and identifies whether the individual is in Phase I, II, or III, with Phase I individuals having the least amount of functional ***** and Phase III individuals the highest.⁴
5. Two scores are obtained when conducting the ***, which form a range of an individual's upper and lower limit of functional ***. A *** is conducted using a score sheet to ensure the score is accurate and scores must meet a certain level of agreement to be valid. Proper scoring of the ***, including following the score sheet rules, is critical to developing an appropriate program because the scores represent the student's present levels of

² Jt. Ex. 1 at 1-2; Jt. Ex. 6 at 1-2; Jt. Ex. 10 at 2; Jt. Ex. 11 at 6; Jt. Ex. 18 at 1.

³ Jt. Ex. 1 at 11; Jt. Ex. 18 at 1; Petitioner's Exhibit (P. Ex.) 11 at 1; Transcript (Tr.) at 147-48, 549-50, 556-57, 567.

⁴ P. Ex. 1; P. Ex. 4 at 1-5; Tr. at 533-34, 542-43.

- functional *** to include in an IEP and offer a precise way to design supports and interventions that are not beneath the student’s level or overly challenging.⁵
6. Student’s disabilities impact Student’s speech and communication. Student can ***. Student is a “multimodal communicator,” and expresses ***self through various communication methods including ***. Student uses *** to access Student’s ***, which is ***. Student uses *** to activate Student’s *** and Student’s ***. Using *** and a “motor planning approach” that allows Student to learn the motor sequence of communicating a specific word, Student ***.⁶
 7. Student’s *** is ***, which uses a program called ***. In 2016, Student began with eight core, or cornerstone, words on Student’s *** and has steadily increased Student’s vocabulary, moving through the steps of the program to the highest level with access to thousands of words with grammatical endings, including all parts of speech and the necessary vocabulary for language development. Student’s *** also provides a framework for adding vocabulary as needed. Progression through the levels teaches the essential elements of scanning so Student has built motor patterns for getting to desired words. Device modifications and settings adjustments are made only when necessary to avoid interference with Student’s established motor pathways.⁷
 8. Student uses a *** in the classroom. Student requires assistance with most self-help skills and receives personal care services, including assistance with ***. Student has a one-on-one paraprofessional throughout the school day who provides communication support and assistance accessing the curriculum. Student worked with the same primary paraprofessional during the 2019-20, 2020-21, and 2021-22 school years.⁸
 9. Student has a *** plan. ***. Whenever possible, Student should be prepared for surprise or sudden sounds. Loud or unexpected noises may cause dysregulation and/or ***.⁹
 10. Student benefits from a multimodal approach to instruction, including auditory, tactile, and ***.¹⁰

⁵ Tr. at 540-42, 544, 547-58.

⁶ Jt. Ex. 1 at 7, 18-19; Jt. Ex. 4 at 13; Jt. Ex. 10 at 9-10; Jt. Ex. 11 at 7; Jt. Ex. 13 at 10-12, 16; P. Ex. 7 at 5; P. Ex. 9 at 5; Tr. at 129, 147, 404-05, 646-47, 833.

⁷ Jt. Ex. 13 at 10; P. Ex. 7 at 4; Tr. at 403, 405, 478, 491, 835.

⁸ Jt. Ex. 1 at 8, 29, 50-52; Jt. Ex. 6 at 30-31; Tr. at 440-41.

⁹ Jt. Ex. 1 at 2, 10; Jt. Ex. 10 at 34; Respondent’s Exhibit (R. Ex.) 1 at 1-2.

¹⁰ Tr. at 113-14.

March 2019 Full and Individual Evaluation

11. The District conducted a Full and Individual Evaluation (FIE) (re-evaluation) in March 2019. The Functional Communication Profile-Revised assesses communication skills, including expressive and receptive language. Examples of self-expression using multimodal communication included physical feelings, emotions, basic needs, social exchanges, interests, humor, preferences, objects, actions, pronouns, and people and places. Student used Student's ***. In the area of receptive language, Student understood words, phrases, simple sentences, simple conversations, and direct requests and responded to Student's name and attention commands. Student also demonstrated comprehension of concepts such as same/different, body parts, and basic emotions.¹¹
12. The March 2019 FIE included the *** systems, including operational and linguistic skills and social communication. Student's*** was available to Student throughout the school day, and Student used it "purposefully and intentionally" to communicate intent such as requesting, greeting, social language, and commenting. Student could use the ***. Student used Student's *** in combination with natural interactions like laughing and smiling to communicate and request desired items and actions. Student used Student's device to communicate ***.¹²
13. The March 2019 FIE included a functional *** evaluation and learning media assessment by a certified teacher for students with *** impairments who had provided Student direct, one-on-one *** services since *** grade. Student was a "pre-reader" and had recently shown emerging strength in tactile skills and demonstrating knowledge of concepts using tactile materials. Student was working on *** skills at the time.¹³
14. The March 2019 FIE included a "****" and purported to include a ***. However, the *** conducted by the *** teacher in September 2018 and March 2019 found Student's *** characteristics in the 10 areas fell in various ranges (Ranges 3-4, 5-6, 7-8, and 9-10). Scores cannot be this varied. Valid scores tend to cluster in a particular range and do not "bounce all around" between ranges, and this indicates the evaluator did not know how to conduct

¹¹ Jt. Ex. 13 at 1, 9-10, 12.

¹² Jt. Ex. 13 at 11-12.

¹³ Jt. Ex. 13 at 1, 26-36; Tr. at 208, 929-30.

a ***. The March 2019 FIE did not include a score sheet and did not provide an overall *** score.¹⁴

15. The *** teacher found Student’s strongest learning channel was auditory, with tactile as secondary, and *** as tertiary. Recommendations included direct instruction from a *** teacher, focusing on tactile skills and instruction in *** and ***, and a multisensory approach to instruction when possible to stimulate all sensory channels. Student was not discouraged from using Student’s ***, but the *** teacher found through working with Student Student was a stronger tactile, rather than ***, learner. Student’s IEP goals for *** services focused on developing tactile skills, including learning *** as a means of accessing the curriculum, rather than *** skills.¹⁵

2021-22 School Year

16. Student’s ARD Committee convened on April ***, 2021 for Student’s annual meeting and to develop Student’s program for the 2021-22 school year. The ARD Committee considered Student’s present levels of academic achievement and functional performance (PLAAFPs). Student demonstrated success using tactile aids to apply basic math concepts and had an understanding of material presented using *** instruction paired with tactile pictures in ***. The IEP included a math goal on ***. A second math goal targeted solving problems and finding ***. A third math goal targeted ***. An *** goal focused on ***. *** goals incorporated ***.¹⁶
17. In the area of ***, Student was working on *** and was “now showing some growth in this area,” including the ability to locate the same or different ***. Continued direct instruction from a *** teacher was recommended to continue to strengthen tactile skills and work on beginning *** skills. Student’s IEP included a *** goal focused on using *** materials to ***.¹⁷
18. In speech/language, Student used Student’s *** to engage in social conversation using *** in academic classes. Student had mastered ***. Student continued to use verbal approximations, adding more over the last year, and the speech therapist recommended Student continue to work on verbal approximations to support functional and routine

¹⁴ Jt. Ex. 13 at 26, 32-33; P. Ex. 11 at 1-2; Tr. at 179-89, 552-54.

¹⁵ Jt. Ex. 9 at 10-11; Jt. Ex. 13 at 35-36; Tr. at 196-201.

¹⁶ Jt. Ex. 6 at 1, 4-5, 19-25.

¹⁷ Jt. Ex. 6 at 6-7, 16.

- communication, with speech services continuing to focus on multimodal communication, including Student's *** and verbalizations; continued use of ***. Student's IEP included a Speech Therapy-Language goal focusing on using multimodal communication, including Student's ***. The IEP also included a Speech Therapy-Articulation goal targeting ***.¹⁸
19. Classroom and instructional accommodations included: ***. Accommodations related to materials included *** when appropriate.¹⁹
 20. For the 2021-22 school year, Student's IEP called for placement in the general education classroom for all academic courses with in-class support, including continued communication support from a one-on-one paraprofessional throughout the day. The April 2021 ARD Committee reached agreement on Student's program for the remainder of the 2020-21 school year and the 2021-22 school year.²⁰
 21. Student had ***. Student's ARD Committee met on August ***, 2021 to discuss changes in Student's placement and to develop a plan for homebound services. The ARD Committee agreed to modify Student's placement and Student's schedule of services was adjusted to provide for core class instruction in the resource setting when Student returned to school. Student's physician prescribed homebound services through September ***, 2021 to allow for *** and Student received homebound instruction for 4 hours per week, *** support for 1 hour per week, and speech therapy for 30 minutes per week.²¹
 22. Student returned to campus in early October 2021. Student still had ***, and attended school sporadically from October to December due to ***, with somewhat improved attendance beginning in January 2022. Student's absences were barriers to learning.²²
 23. Student is still developing language and communication skills and is an "emerging" or "developing" communicator. Given Student's *** circumstances in the fall of 2021, Student's mother asked the assistive technology (AT) Team Lead to help Student communicate when Student *** using Student's *** and the District prioritized self-

¹⁸ Jt. Ex. 6 at 7, 17-18.

¹⁹ Jt. Ex. 6 at 28-29.

²⁰ Jt. Ex. 6 at 38-39, 48-51.

²¹ Jt. Ex. 5 at 1-7, 10-12; R. Ex. 25.

²² Jt. Ex. 1 at 3, 5; Tr. at 335-36, 387, 458-59, 508-09, 734-35, 756.

advocacy and functional communication skills, such as the ability to communicate when Student is ***.²³

24. Because Student has access to considerable vocabulary on Student's***, the focus is on using the vocabulary already on the device and using "descriptive language" to teach a concept, rather than adding vocabulary to the device. Descriptive teaching teaches Student how to describe a term or concept. The AT Team Lead worked directly with Student's teachers on using descriptive language in the classroom.²⁴
25. Student primarily uses *** and it is up to the communication partner to listen and understand that it is a ***. To build a *** generally requires Student to output each word individually. Student can ***. Student's ***. The ***, but Student does not ***, in part because the District is prioritizing functional communication. Moreover, Student has shown a startle response to prior attempts to ***.²⁵
26. Student's teachers, paraprofessionals, related service personnel, and evaluators received professional development by the AT Team Lead on working with Student and were appropriately trained on Student's *** and strategies to support communication. At Parents' request, the former AT Team Lead helped train staff at the beginning of the 2021-22 school year, and the AT Team Lead provided additional training for the speech therapist and Student's primary paraprofessional on device and switch troubleshooting. She also provided ongoing technical assistance to Student's teachers on Student's device and the AT Team Lead and speech therapist worked directly with staff on being good communication partners. Working closely with the AT Team Lead, the speech therapist worked with teachers on vocabulary and instructional concepts, including descriptive teaching, and provided *** pathways for Student's device to help model in the classroom.²⁶
27. Student's mother contacted Dr. ***** in the fall of 2021. Dr. ***** conducted a virtual assessment of Student on October ***, 2021 and made initial recommendations for facilitating improvement in Student's functional *** so Student could begin accessing the curriculum using all sensory systems, not just *** approaches. Recommendations

²³ P. Ex. 7 at 2; R. Ex. 8 at 2; Tr. at 408-09, 810, 812, 833.

²⁴ P. Ex. 9 at 6; Tr. at 411-14, 431, 815.

²⁵ R. Ex. 9 at 14; Tr. at 408, 427-28, 435, 472-73, 475-76, 811-13.

²⁶ P. Ex. 9 at 1-11; R. Ex. 8 at 1-18; Tr. at 334, 383-84, 399-401, 495-96, 499-500, 729, 789-99, 802-03.

included a functional *** assessment that included the*** to aid in designing interventions and supports to address Student’s *** needs; a specific approach to a learning media assessment (***), which is for *** and improving functional *** by determining how each activity throughout the day should be adjusted for ***, ***, and technical approaches; and developing a *** Schedule. A *** Schedule is a tool which takes the content from the *** and incorporates it into activities occurring across the day and specifies the accommodations needed for Student in each class and section of Student’s learning day.²⁷

28. Dr. ***** evaluated Student in person over three hours on November ***, 2021 and completed the ***. In addition to authoring the test, Dr. *** has conducted thousands of *** during her career. Student’s *** scores were *** and Student was in Phase ***. Individuals in Phase *** are beginning to use *** appropriately and developing ***, which is associated with the development of detail. *** is near the midpoint of the *** and an individual of Student’s age would generally be in Phase *** if Student had received ongoing *** targeted supports early on.²⁸
29. The key to understanding *** is understanding the *** and behavioral characteristics. Dr. ***’s report detailed Student’s performance across the ten *** characteristics garnered from the *** and suggested interventions to support development of functional ***. Student responded to ***. Using ***. ***. Understanding the concept of *** is key to providing targeted interventions to an individual with *** and should be part of Student’s direct instruction from *** providers.²⁹
30. Student demonstrated ***. During periods of ***, it is critical that adults refrain from speaking, coaching, touching, or otherwise interfering with Student’s *** processing. Student demonstrated distinct ***.³⁰
31. Student demonstrated distinct complexity challenges. Difficulties in *** complexity can result in ***. Materials should be presented on a ***. When offered the ***, Student could only ***. *** and Dr. *** recommended *** staff develop ***-based instructional

²⁷ P. Ex. 3 at 1-2; Tr. at 509, 536-39, 588-89.

²⁸ Jt. Ex. 18 at 1; P. Ex. 4 at 1-5; Tr. at 539-41, 548, 554-55.

²⁹ Jt. Ex. 18 at 1-2, 4; Tr. at 557-60.

³⁰ Jt. Ex. 18 at 2; Tr. at 560-61.

- lessons which can incorporate ***. Using *** can also help support a more *** directed reach.³¹
32. Student was assigned a new *** teacher in October 2021 after Student’s long-time *** teacher stepped down as Student’s teacher of record due to recent difficulties working effectively with Parents, in part due to disagreeing with Parents over discontinuing the use of *** in favor of ***-focused instruction. At the time, *** was not a “strong learning channel” for Student. In October 2021, Student was learning some *** skills.³²
33. Student’s ARD Committee convened on October ***, 2021 to review Parents’ concerns with Student’s *** program and meeting Student’s ***-related needs, including concerns with use of *** in the classroom, teachers not getting the units of study to the *** teacher in advance, and *** aids not coming home. Student’s *** was not working properly and the AT Team Lead agreed to review the device and adjust it as needed. The meeting ended with Parents disagreeing with Student’s program.³³
34. On October ***, 2021, the new *** teacher gave Student’s teachers an initial plan for developing Student’s ***, which included identifying three items for instructional materials that would benefit Student and providing the *** teacher this information so Student could decide how to adapt the materials. Parents repeatedly inquired about ***, which were not sent home as promised.³⁴
35. The District convened a meeting at Parents’ request to discuss Student’s *** services on November ***, 2021, which was attended by Student’s mother, the new *** teacher, a special education supervisor, and an assistant principal. The new *** teacher was an experienced instructor of students with *** impairments but acknowledged he had limited experience with ***. He had never conducted a ***, did not know Student’s *** score, and was unfamiliar with the terms ‘***’.³⁵
36. Parents filed a due process hearing request in the fall of 2021. In January 2022, Petitioner requested dismissal of the complaint without prejudice after the parties entered into a *** calling for, among other things, staff training and virtual observations of Student by

³¹ Jt. Ex. 18 at 3-4; Tr. at 566-68.

³² Tr. at 97-99, 111, 178-79, 193-94, 210-11, 510, 781.

³³ Jt. Ex. 4 at 1, 39-40, 47.

³⁴ P. Ex. 10 at 3-4; Tr. at 103-05, 514-15.

³⁵ Tr. at 100, 106-08, 221-23, 510-14, 862-63.

- Dr. *** and a follow-up meeting to review her recommendations. On January ***, 2022, the District provided notice of its agreement to delay Student’s reevaluation at Parents’ request to allow for additional staff training and give Dr. *** an opportunity to observe Student and give recommendations before any re-evaluation.³⁶
37. The Instructional Specialist for Resource and Inclusion provided support to Student’s teachers and assistance implementing the academic elements of Student’s IEP, including preparing *** during the spring semester. *** were created using an online program, ***, which had ***. When the Instructional Specialist for Resource and Inclusion began preparing Student’s ***, she had not received training on ***, was not familiar with the ***, and was not sure what Student could ***. She relied on guidance from her supervisor and the *** Teacher to determine what was *** appropriate for Student. The *** teacher reviewed and approved materials before they were sent to teachers. The Instructional Specialist for Resource and Inclusion received training on *** in May 2022.³⁷
38. During the spring semester, the District provided ***-focused trainings for staff working with Student, including professional learning days for *** and orientation and mobility staff on January ***, 2022 and February ***, 2022.³⁸
39. Student may ***. In January 2022, Student’s teachers sought support and communication strategies to address recent behaviors surrounding ***. At the time, Student did not use Student’s *** to communicate Student’s need ***. The AT Team Lead provided a resource on supporting communication around *** and worked with the speech therapist to create a social narrative to teach Student communication expectations when Student is ***. The AT Team Lead also provided “vocabulary paths” for *** for teachers to model with Student.³⁹
40. Student’s ARD Committee convened on January ***, 2022 to consider Dr. ***’s report and adopted several recommended accommodations, including adapting classroom instruction to allow extra response time and strategic seating to minimize distractions. Accommodations related to classroom materials included ***. Required equipment/AT was updated to include ***-specific AT, including a ***. The January 2022 IEP continued

³⁶ Jt. Ex. 3 at 1-2; P. Ex. 15 at 1-3; Tr. at 515-16.

³⁷ Tr. at 40-41, 45-48, 50-58, 63, 124-26, 154-55, 272-78, 283-84.

³⁸ P. Ex. 8 at 1, 7; R. Ex. 6; R. Ex. 7; Tr. at 306-08.

³⁹ Jt. Ex. 10 at 45; Jt. Ex. 11 at 8; P. Ex. 20 at 152, 209-11; Tr. at 415-21.

to include a *** goal focusing on *** and included academic goals incorporating *** measures but did not include other goals specific to ***. The meeting ended in consensus. On February ***, 2022, the *** teacher contacted Student’s teachers to confirm receipt of a *** to implement the recently added accommodation of *** of instructional materials and met with teachers individually.⁴⁰

41. As provided by the ***, Dr. *** led an online session on February ***, 2022 and gave District employees feedback on approximately three hours of live stream observations of Student conducted on February ***, 2022. At the time, *** staff had some basic knowledge and understanding of ***, but this knowledge was “cursory.”⁴¹
42. Dr. ***’s observations indicated Student’s *** needs were not being appropriately considered and her overarching recommendation was that Student’s whole program needed an “overhaul.” Student was working on a *** during observations, which she found “wholly inappropriate.” Dr. *** recommended removing any *** instruction and designing instruction for Student to use Student’s *** more. *** is difficult to learn and individuals with *** can *** if provided*** accessible materials.⁴²
43. Dr. *** observed use of the *** for materials that had not been adapted and were not *** accessible to Student, which can lead to *** avoidance. The classroom was noisy and without adaptation for the complexity of the *** environment and Student struggled to attend. Dr. *** recommended creating an “office space” in each classroom with *** where Student can *** access learning materials in a *** quiet space. She recommended ***. Dr. *** also recommended a *** and that Student’s IEP include a goal for *** and direct instruction by the *** teacher to interpret what Student ***.⁴³
44. Dr. *** observed that Student did not appear engaged in instruction and the instruction provided was not benefitting Student. She discussed “starting over” with Student’s educational plan, including Student’s learning environment, goals and objectives, and accommodations. Dr. *** also recommended that the District seek out someone with higher knowledge of *** to mentor and guide the District in developing and implementing a program to meet Student’s ***-related needs because staff lacked the depth and

⁴⁰ Jt. Ex. 2 at 1, 13-14, 27-28, 39-40, 49; P. Ex. 10 at 45-47; Tr. at 115-20, 865-66.

⁴¹ P. Ex. 5 at 1; Tr. at 58-59, 128-29, 269-70, 568-70, 575-76, 635, 850-51.

⁴² P. Ex. 5 at 1; Tr. at 570-73, 576-77.

⁴³ P. Ex. 5 at 2; Tr. at 571-575, 584-87.

breadth of knowledge necessary to do so and to make up for lost time and missed concepts.⁴⁴

45. Student's ARD Committee convened on March ***, 2022 for Student's annual meeting and considered Student's PLAAFPs in all areas. The *** impairment PLAAFP prepared by the *** teacher did not include Student's *** to specify Student's *** needs regarding the 10 characteristics of ***. *** was removed as a component of Student's IEP in favor of two revised *** goals. An "Emergent Literacy" goal targeted ***. A second *** goal called "****" targeted building Student's **** skills to recognize consistently presented ***. Academic goals were modified to include instruction using ***.⁴⁵
46. Student's goals should be based on present levels derived from *** scoring and Student's *** goals were not appropriate to meet Student's needs. The combined literacy and *** goal did not focus on the *** teacher providing instruction on how to use Student's *** more efficiently and develop Student's functional ***. The *** goal included the ***, "which are not appropriate for a student with ***. The goal also included an objective on choosing between a *** with ***. However, *** are inaccessible to Student.⁴⁶
47. Accommodations were modified to include *** and the March 2022 IEP included accommodations to minimize *** distractions including strategic seating close to instruction. Agreeing that Student needed a mechanism for minimizing *** distractions, the ARD Committee considered Dr. ***'s "office space" recommendation and how to implement it consistent with an inclusive environment and provided ***—on an instructionally-needed basis in each classroom.⁴⁷
48. A March ***, 2022 Review of Existing Evaluation Data proposed a re-evaluation in all areas, including speech/language, cognitive, achievement, ***, orientation and mobility, occupational therapy (OT), physical therapy (PT), adapted physical education, and AT to be completed by September ***, 2022. Parents provided consent on April ***, 2022.⁴⁸

⁴⁴ P. Ex. 5 at 1-2; Tr. at 577-79, 593-594.

⁴⁵ Jt. Ex. 1 at 1, 10, 20-23, 26-27; Tr. at 144-46, 874.

⁴⁶ Jt. Ex. 1 at 26-27; Tr. at 611-15.

⁴⁷ Jt. Ex. 1 at 3, 31; Tr. at 137-42, 866.

⁴⁸ Jt. Ex. 11 at 1-3; Jt. Ex. 12 at 1, 33-34.

49. With the exception of the *** teacher—who provided accommodations limited to ***—Student’s core teachers, including the *** teachers, used the *** paired with *** instruction. Student’s paraprofessional would reinforce concepts using ***.⁴⁹
50. A student with *** may appear to be disinterested when presented novel information, which is generally related to ***. The modification of instruction over the year from primarily *** to focusing on *** instruction and use of *** resulted in less participation by and engagement from Student. Instances of Student *** in class increased with the introduction of *** and Student experienced increased *** fatigue. Student had difficulty ***. Student demonstrated increased “avoidance behavior,” such as ***.⁵⁰
51. Students have an hour off for lunch and can eat anywhere on campus. Student does not ***. With input from Student’s mother, Student *** classroom prior to March 2022 and was given an opportunity to stay in the room or go elsewhere when ***. In early March 2022, Student’s mother indicated she wanted Student to ***. Staff worked with Student to identify a location *** for Student to eat lunch and Student is provided a choice of where Student wants to eat, and staff attempt to honor Student’s request.⁵¹
52. The District held a professional learning day for Student’s teachers, paraprofessionals, and related service personnel on May ***, 2022. Staff received training on the instructional needs of students with ***, implementing Student’s new accommodations and IEP goals, *** Planning, and instructional planning. The entire team worked on helping Student’s teachers understand Dr. ***’s February 2022 recommendations and developed a draft ***.⁵²
53. Dr. *** met a second time with District personnel later in May to review Student’s program. Staff shared the draft *** and Dr. *** provided feedback. Regarding *** aids, Dr. *** advised the District to change the *** and this was done immediately. *** aids with ***, a strategy that helps increase fluency ***, were adjusted consistent with her feedback.⁵³

⁴⁹ Jt. Ex. 1 at 4; Tr. at 355-56, 447-48, 452-53, 457, 731-32.

⁵⁰ P. Ex. 8 at 18; Tr. at 343-45, 381-82, 449-51, 456, 458-60, 898-99.

⁵¹ Jt. Ex. 1 at 37, 47; Jt. Ex. 10 at 34-35; Tr. at 700-05, 708-14, 736-38.

⁵² P. Ex. 25; R. Ex. 4 at 1-2; Tr. at 165-66, 240-41, 913.

⁵³ Tr. at 64-66, 298-300, 591-92, 609-10, 753-54, 876-77.

54. Student passed each of Student’s classes during the 2021-22 school year. Many assignments were getting Student to participate and explore versus “actual true comprehension and correct application of the information.”⁵⁴
55. Parents’ relationships with staff have become strained, with teachers and paraprofessionals feeling criticized and defensive. Student’s paraprofessionals are hesitant to have direct communication with or work with Parents, with campus leadership running interference. Parents are “incredibly frustrated” by the lack of progress in implementing appropriate *** services for Student.⁵⁵

2022-23 School Year

56. Dr. ***, a Speech Language Pathologist and AT consultant, evaluated Student on August ***, 2022 and made several recommendations regarding Student’s *** and device vocabulary to support language development. Among other things, Dr. *** recommended Student’s scanning pattern include the message window to allow Student to communicate more than single word messages and phrases without relying on the listener to follow along. Dr. *** incorrectly identified “a major error in vocabulary mapping” because it appeared the cornerstone words—***—had been changed. However, the cornerstone words are intact on Student’s device and are never changed because they are foundational and implement Student’s established motor plan to get to the words Student needs to communicate.⁵⁶
57. The District trained Student’s new teachers on implementing Student’s IEP on August ***, 2022, and shared information from the May meeting with Dr. *** about *** and Student’s ***. The District also had a “toolkit meeting” on September ***, 2022 to review the equipment used in the classroom for instructional support and Student’s related services. The AT Team Lead trained all staff and paraprofessionals on Student’s ***.⁵⁷
58. The September 2022 FIE assessed Student in all areas, including cognitive, achievement, orientation and mobility, ***, OT, PT, AT, and speech. The FIE included a functional *** evaluation and learning media assessment by the *** teacher, who has completed a total of two ***. Relying on Dr. ***’s book, he completed the ***, including assessing Student’s

⁵⁴ Jt. Ex. 16 at 1; Tr. at 375-76.

⁵⁵ Tr. at 391-93, 680-83, 693, 779-80, 948-49.

⁵⁶ P. Ex. 7 at 1-2, 5-6, 8, 12-13; Tr. at 813-14.

⁵⁷ R. Ex. 9 at 1-15; R. Ex. 10 at 1-7; Tr. at 85-87, 799-801, 825-27, 866-67.

ten behavioral and *** characteristics of ***, but did not include a score sheet or provide an updated range. The FIE instead included Dr. ***'s *** score of **. A *** should be conducted at least 3 times a year. No valid *** has been conducted since November 2021. Elements of the functional *** evaluation were applicable to a student with *** impairment, not ***.⁵⁸

59. The *** aids prepared by the District were not appropriate and showed a “still developing understanding” of how to meet Student’s *** needs and a need for mentoring and ongoing support. The *** is convenient as a bank of images, but the images selected were stylized and not photographic or realistic and would not be able to be interpreted by a person with ***. Until May 2022, many *** aids had *** and were *** inaccessible to Student. Certain *** aids did not make sense or convey the concept correctly, were too abstract or complex for Student’s range score, used inappropriate or too much highlighting, or failed to appropriately identify the salient feature. When District staff began preparing Student’s *** aids, they were not clear on when to portray a word or concept using symbols versus *** or that *** should only focus on one word.⁵⁹
60. The goal for a *** instructor working with a student with *** in Phase II is to promote advancement to Phase III if possible. As the student moves to Phase III, interactions with others will require less description, mediation, and adaptation by communication partners and these interactions will become more independent and complex. According to Dr. ***, Student’s IEP and *** materials demonstrate an “attempt to embrace some of the principles” but “it has not landed” and Student is not receiving an educational benefit from Student’s current *** program. The District needs a mentor to work closely with *** and orientation and mobility staff to provide customized training, support and guidance on developing and implementing an appropriate program to meet Student’s *** needs. The District has not identified a mentor but acknowledges it would be helpful.⁶⁰

⁵⁸ Jt. Ex. 10 at 1, 30, 35-41; Tr. at 133-35, 168-71, 618-22, 879-81, 922.

⁵⁹ P. Ex. 10 at 87-90; P. Ex. 20 at 8, 26-27; P. Ex. 27 at 1-2, 6-7; P. Ex. 30 at 3-4; Tr. at 289, 293-97, 595-606, 871-82, 887.

⁶⁰ P. Ex. 5 at 2; P. Ex. 8 at 220; Tr. at 136-37, 578-79, 626-27, 888-89, 910-12.

*****. DISCUSSION**

A. 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.

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). The basic inquiry is whether the IEP implemented by the school district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁶¹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof in

⁶¹ 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).

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. *Id.*

C. FAPE

The Four Factors Test

The Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA 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).⁶²

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).

⁶² 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. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

a. Individualized on the Basis of Assessment and Performance

In meeting the 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 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, 300.323(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 District's obligation when developing Student's IEP is to consider Student's strengths, Parents' 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. § 300.324(a)(1). For a student who is *** impaired, the IEP must provide for instruction in *** and the use of *** unless the ARD Committee determines, based on evaluation of the student's reading and writing skills, that such instruction is not appropriate. 34 C.F.R. § 300.324(a)(2)(iii). The IEP must consider the student's communication needs. 34 C.F.R. § 300.324(a)(2)(iv). The IEP must also consider whether the student needs AT devices and services. 34 C.F.R. § 300.324(a)(2)(v).

i. * Services**

The evidence showed Student's program was not individualized on the basis of assessment and performance as to Student's *** services.

Student has complex needs and multiple disabilities, each of which impact Student's ability to learn and access the curriculum. The District has long recognized that Student's *** impairment is ***, which is different from *** forms of *** impairment in that improvement in Student's functional *** is possible, though not guaranteed, with appropriate interventions and instructional strategies specifically designed to facilitate this improvement over time. However, the evidence showed Student's *** services focused almost exclusively on tactile instruction, including continued instruction in *** skills, with limited to no focus on *** supports and services, for much of the relevant time period.

Dr. *** is an internationally recognized expert in *** and authored the ***. She has conducted thousands of ***. Importantly, while Dr. *** her primary role in this case has been to advise the District on developing and implementing an appropriate *** program. While the District faults Dr. *** for doing virtual, rather than in-person, observations of Student in February 2022 before recommending an "overhaul" of Student's ***-related programming, the parties agreed to a virtual format for Dr. ***'s observations when resolving the prior due process hearing request. Dr. *** also conducted an in-person evaluation of Student over several hours in November 2021, including the ***, and as such is familiar with Student and Student's instructional needs through not only her evaluation of Student but in her role advising the District on Student's program under the ***. She has more than an adequate basis to critique the District's program and her testimony thoroughly explained its deficiencies.

Dr. *** explained the importance of identifying the *** and behavioral characteristics of *** and completing a valid *** to determine Student's current level of functional *** and design interventions consistent with that level. Student's 2019 March FIE did not include a valid *** and, though the FIE identified *** as a tertiary learning channel, Student's subsequent IEPs included

direct services from a *** teacher focusing almost exclusively on tactile instruction, including several years of instruction in *** skills. Though assessment and performance indicated that tactile instruction is appropriate in academic classes and Student demonstrated success using tactile aids to apply basic math concepts and understood material presented using *** instruction paired with tactile pictures in ***, Student’s *** program failed to include any services to allow Student to begin to use Student’s functional *** more appropriately until well into the 2021-22 school year.

Even after the *** teacher received ***-specific training in the spring 2021 semester—a central theme of which was using the *** to determine Student’s present level of functional *** in order to develop appropriate *** goals—the September 2022 FIE did not include an updated ***. As Dr. *** explained, without knowing the upper and lower limits of the student’s functional ***, “we’re really just making a guess.” The *** teacher downplayed the importance of including a ***score in Student’s 2019 and 2022 FIEs because one could garner sufficient information concerning Student’s *** characteristics to plan an appropriate program. This approach, however, is directly contrary to Dr. ***’s testimony on the importance of precisely identifying the lower and upper range of Student’s functional *** to plan an appropriate program that has the possibility to increase Student’s functional *** over time.

Dr. *** was unequivocal in her testimony about the *** aids prepared by District staff, describing them as “completely inappropriate” and “wholly inappropriate.” While the District complains this feedback is not consistent with feedback she provided in May 2022, the fact remains that the materials were still not appropriate. Dr. *** identified flaws with numerous *** aids, including improper highlighting, improper identification of the salient feature, and *** complexity beyond Student’s level. Importantly, numerous *** aids prepared by the Instructional Specialist for *** and approved by the *** teacher before May 2022 were visually inaccessible

to Student in that the background was in ***. This was a major error. While the District immediately incorporated Dr. ***'s feedback and revised the *** aids after meeting with her in May 2022, Student spent the vast majority of the 2021-22 school year without appropriate and visually accessible *** aids. Indeed, it was not until the *** teacher heard Dr. *** testify that he developed an understanding of when to use ***, rather than a symbol, to convey concepts.

In March 2022, Student's academic goals were modified to include use of *** aids. The parties dispute whether Student's teachers knew how to correctly use and incorporate the *** aids into Student's instruction and properly use the *** for this purpose. While appropriate use of *** aids, including proper use of the ***, are key components of providing Student appropriate *** services, to the extent the *** aids used in the classroom were inaccessible to Student or otherwise inappropriate, Student could not benefit from the instruction provided even if the *** were used correctly. What teachers described as "avoidance behaviors" that reportedly increased after Student's program shifted to heavier reliance on *** aids is, as Dr. *** explained, consistent with the difficulties in *** complexity that can result in a student with *** looking away or appearing disinterested if, as here, the *** materials are unadapted.

As required by the January 2022 ***, the District made concerted efforts to train staff, and in particular *** and orientation and mobility staff, on *** and Student's ***-related needs. Staff were receptive to Dr. ***'s feedback. The District convened an ARD Committee meeting in January 2022 and added several instructional accommodations recommended in Dr. ***'s November 2021 evaluation. In February 2022, Dr. *** advised staff to discontinue *** instruction and credibly explained why further instruction in *** is inappropriate for someone of Student's age because it is difficult to learn and does nothing to develop functional ***. While the District revised Student's IEP in March 2022 consistent with this recommendation, Student spent much of the 2021-22 school year with *** instruction focused on developing this skill. Student

appeared to make only limited progress—in March 2019 Student was working on *** skills and was still learning *** skills almost three years later.

When viewed as a whole, Student’s *** services during the relevant time period were not appropriately individualized on the basis of Student’s present levels and performance.

ii. Communication and Assistive Technology

The evidence showed Student’s program was individualized on the basis of assessment and performance as to communication and AT and the District properly considered these needs in developing and implementing Student’s program.

The AT Team Lead provided extensive teacher training on Student’s communication needs and Student’s *** and supported Student’s teachers on communication strategies in the classroom. Her testimony demonstrated a high level of knowledge and understanding of Student’s device and AT related needs.

The District appropriately identified functional communication skills using Student’s *** as an area of critical need. For Student—who is dependent on others to meet most needs—this was particularly appropriate because Student developed *** after Student returned to school. Student also did not use Student’s primary method of communication, Student’s ***, to communicate Student’s need to ***, and the District appropriately focused on developing this type of communication.

In her August 2022 report, Dr. *** made several recommendations already being implemented by the District, including adding vocabulary only when necessary in favor of

descriptive teaching and language modeling by communication partners. She identified two major concerns with Student’s program as it relates to communication and Student’s *** – the message window and vocabulary mapping. The AT Team Lead and speech therapist credibly explained why Student does not currently scan to the message window because Student did not respond well to attempts to incorporate the message window feature and its use produced a startle response. Given Student’s risk of ***, this concern must be taken seriously. Moreover, Student has access to thousands of words on Student’s *** to expand Student’s communication and Student’s speech therapy goals focused on expanding communication beyond one- and two-word communications without using this currently contraindicated feature. In addition, Dr. *** concern with the vocabulary mapping was unfounded—the cornerstones on Student’s device are intact and the AT Team Lead and speech therapist showed a clear understanding of the need to maintain Student’s established motor pathways.

Finally, while Dr. *** reported observing that Student’s communication attempts using Student’s *** were ignored by adults, the evidence did not otherwise support this contention. Overall, the communication and AT aspects of Student’s program were appropriately individualized based on Student’s performance and needs.

b. Least Restrictive Environment

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

§ 300.114(a)(2). To determine whether a school district is educating a student with a disability in the least restrictive environment, 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).

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals and recess periods, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. 34 C.F.R. § 300.117.

Petitioner does not challenge Student's educational placement for instructional purposes and Student's placement in a *** classroom for academic classes appears appropriate given the nature and extent of Student's disabilities and need for modified curriculum and reinforcement of academic concepts. In considering Dr. ***'s "office space" recommendation, the ARD Committee also developed a way for Student to receive instruction with reduced *** which supported Student's inclusion in the classroom to the maximum extent possible. Petitioner instead argues the District failed to meaningfully include Student by failing to provide Student a way to choose Student's *** until at least March 2022. The evidence did not support Petitioner's contention.

Until March 2022, Student ***, including students with and without disabilities. This was an inclusive arrangement. In addition, Student had the option to stay in the room after Student *** or move around the campus, which is consistent with the freedom of movement enjoyed by Student’s peers during ***. This arrangement was modified at Student’s mother’s request in March 2022 and the District worked with Student to identify an area *** and made modifications to ensure it was **. District employees credibly testified that Student is offered a choice of ** and Student’s preference is honored when possible.

Student’s program was administered in the least restrictive environment and Student was included to the maximum extent appropriate as to Student’s instructional arrangement and in nonacademic settings, including **.

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. v. Spring Branch Indep. Sch. Dist.*, Civil Action No. 4:16-CV-0058, 2017 WL 3017282, at *27 (S.D. Tex. June 15, 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.*

In the fall of 2021, Parents acquired new information that called into question whether the District was appropriately considering Student’s ***-related needs and expressed

dissatisfaction with Student's *** services. The speech therapist testified it was "uncomfortable" working in Student's home while providing homebound services in the fall of 2021, with Student's mother questioning what she was doing which detracted from the session. The former *** teacher described a considerable change in the once collaborative relationship she enjoyed with Parents and characterized the atmosphere as "hostile" before she stepped down as Student's teacher. Parents were critical of teachers and paraprofessionals alike, to the extent that campus leadership instituted measures to prevent direct contact between Student's paraprofessional and Parents. While acknowledging that Parents are frustrated and much of the 2021-22 school year and the 2022-23 school year to date were spent in litigation, Parents' adversarial posture with and criticism of District personnel hindered the collaborative relationship contemplated by the IDEA.

Parents participated in all ARD Committee meetings and were given an opportunity to share concerns and the District convened both ARD Committee meetings and other meetings at their request. Parents, and in particular Student's mother, are very involved and the record showed the District attempted to respond to and incorporate Parents' concerns and suggestions, including focusing on functional communication surrounding pain on Student's ***, identifying a location for Student ***, and arranging for the former AT Team Lead to help train staff on Student's *** at the beginning of the 2021-22 school year. The District also collaborated with Parents by acceding to Parents' desire for the involvement of Dr. *** in Student's programming, assessment, and staff training.

Student's program evidenced a high level of coordination between key stakeholders surrounding Student's communication needs and ***. The AT Team Lead provided tailored training and professional development to all staff working with Student throughout the 2021-22 school year and at the beginning of the 2022-23 school year, and the AT Team Lead and speech

therapist provided ongoing technical assistance on Student's *** and worked directly with Student's teachers to support Student's communication needs in the classroom.

Student's *** program, however, was not properly coordinated between key stakeholders. The District assigned a new *** teacher in October 2021 who, at the time, did not have an adequate understanding of *** or instructional strategies for working with students with ***. When the District began preparing *** aids in the fall of 2021, they were not sent home as promised and the District's lack of response to repeated requests for these materials contributed to Parents' concerns about Student's *** program. Moreover, the Instructional Specialist for *** responsible for preparing Student's *** aids—and who acknowledged that “*** is not my strong area”—had no experience with or knowledge of *** or appropriate support from someone with this knowledge. Indeed, she did not receive ***-specific training until May 2022, several months after she began coordinating this effort.

While the District made significant efforts over the spring semester to train and educate key stakeholders on *** and developing and implementing Student's *** program, the District's “attempt to embrace some of the principles” is still a work in progress. For example, Dr. *** first recommended a *** Schedule during her initial evaluation in October 2021 and again made this recommendation in February 2022, but staff did not develop one until May 2022 and it was not implemented until the 2022-23 school year. This delay points to the District's need for continued assistance developing and implementing an appropriate *** program for Student.

While the evidence did not show that the District excluded Parents in bad faith or refused to listen to them, this factor does not squarely favor the District.

d. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012).

As an initial matter, the hearing officer acknowledges Student's attendance during the 2021-22 school year likely impacted Student's progress overall. That said, the evidence showed the District considered and furthered Student's non-academic needs, including exposure to friends and peers at lunch. When Parents expressed concerns with Student *** in the classroom in the spring of 2022, the District offered Student choices and let Student choose a location ***. These efforts furthered non-academic benefit by fostering Student's self-determination.

Student received good grades during the 2021-22 school year. However, Student's grades were based primarily on participation, rather than comprehension or correct application of the information, and thus are not indicative of any academic benefit received. Even taking into account the likely impact of Student's attendance on Student's progress, the weight of the credible evidence supports the conclusion that Student did not receive a meaningful benefit from Student's *** program and that Student's lack of progress was tied to Student's inappropriate program. The *** instruction Student received prior to March 2022 did not improve Student's literacy or further development of Student's functional *** and did not provide an academic benefit. Even after the District developed new *** goals in March 2022, Student's progress was hindered because these goals were not appropriate, lacked grounding in the *** conducted by Dr. *** in November 2021 and Student's present level of functional ***, and were implemented using inappropriate *** aids. Moreover, an analysis of whether Student's functional *** may have improved is impossible because Student's September 2022 FIE did not include an updated ***. Each of these deficiencies impaired Student's ability to make meaningful progress and support Dr. ***'s overall opinion that Student is not benefitting from Student's current program.

Conclusion as to the Four Factors

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the District must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress, not regression or trivial advancement. *V.P. ex rel. Juan P.*, 582 F.3d at 583. Student's current *** program falls short of this obligation.

The District argues that the IDEA does not require it to remediate Student's disability. Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability. However, given the wide range of disabilities covered under the IDEA, remediation may often be part of an IEP. *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F.3d 390, 397-98 (5th Cir. 2012). In this case, given the unique nature of Student's *** impairment, a distinction exists between remediating Student's disability and designing an appropriate program that includes interventions that may allow for improvement in Student's functional ***, which Student's *** teacher acknowledges is possible and should be the goal of providing these interventions. Having identified this educational need, which with appropriate ongoing assessment and interventions, may allow Student to enjoy greater access to the curriculum, Student is entitled to a *** program reasonably calculated to meet Student's ***-related needs whether the end result is remediation or not.

A preponderance of the evidence showed that Student's IEPs during the relevant time period were not reasonably calculated to address Student's needs in light of Student's unique circumstances in the area of ***. *Rowley*, 458 U.S. at 188-89, 203-04; *Andrew F.*, 137 S. Ct. at 999.

VII. CONCLUSIONS OF LAW

1. Petitioner met Petitioner’s burden of proving the District denied Student a FAPE during the relevant time period. *Schaffer*, 546 U.S. at 62.
2. Student was not provided a FAPE during the relevant time period and Student’s *** services were not reasonably calculated to confer educational benefit in light of Student’s circumstances. *Rowley*, 458 U.S. at 188-89, 203-04; *Endrew F.*, 137 S. Ct. at 999.

VIII. RELIEF AND ORDERS

The IDEA’s central mechanism for remedying perceived harms is for parents to seek changes to a student’s program. *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2nd Cir. 2002). Hearing officers have “broad discretion” in fashioning relief under the IDEA. Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *School Comm. of Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985).

While acknowledging the District’s ongoing efforts to modify Student’s *** services to address Student’s ***-related needs, the needed “overhaul” of Student’s *** program is still underway and, as discussed, Student’s *** program during the relevant time period was not reasonably calculated to confer educational benefit. Petitioner did not present evidence to support a compensatory education award, but met Petitioner’s burden of demonstrating, consistent with Dr. ***’s recommendation both when she began working with the District in February 2022 and at the hearing approximately six months later, that further mentoring and consultation is needed to ensure Student’s *** program meets Student’s ***-related needs. Given the broad discretion of the hearing officer in fashioning relief, the hearing officer makes the following orders:

1. In addition to any consultation provided for in the January 2022 ***, the District shall, at its expense, retain a consultant with expertise in *** who is approved by Petitioner, to supervise the development and implementation of Student's *** program and IEP for the remainder of the 2022-23 school year. The District shall retain an expert consultant by no later than January 6, 2023.
2. In implementing the above requirement, the District shall, at its expense, invite the expert consultant to meet with Student's *** teachers once during the ***-week grading period and once during the ***-week grading period of the 2022-23 school year to review Student's *** services and *** aids. At the discretion of the expert consultant, these meetings may occur by videoconference.
3. Unless not recommended by the expert consultant, the District, at its expense, shall arrange for the expert consultant to conduct the *** before Student's next annual meeting and invite the expert consultant to the annual meeting to discuss the results and offer input for Student's *** goals. In consultation with the expert consultant, the parties may agree to an alternative timeline to conduct the *** consistent with Student's current assessment needs.
4. The District, at its expense, shall arrange for the expert consultant to train *** staff working with Student on conducting the *** by no later than February 17, 2023 unless the parties agree on another deadline. At the discretion of the expert consultant, this training may occur by videoconference.
5. The District shall convene an ARD Committee meeting as needed to make any revisions to Student's IEP that are recommended by the expert consultant.

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

SIGNED November 22, 2022.

Kathryn Lewis
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO PARTIES

The Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).