

**SOAH DOCKET NO. 701-21-3042.IDEA**  
**TEA DOCKET NO. 230-SE-0721**

<b>STUDENT, B/N/F PARENT AND PARENT,</b> <b>Petitioner</b>	§ § § § § § § § § §	<b>BEFORE A SPECIAL EDUCATION</b>
v.		
<b>CONROE INDEPENDENT SCHOOL</b> <b>DISTRICT, TEXAS EDUCATION</b> <b>AGENCY, AND TEXAS STATE BOARD</b> <b>OF EDUCATION,</b> <b>Respondents</b>		<b>HEARING OFFICER FOR</b>  <b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

\*\*\* (Student), by next friends \*\*\* and \*\*\* (Parents, or collectively, Petitioner), brings this action against the Conroe 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 main issues in this case are whether the District failed to appropriately evaluate and identify Student’s eligibilities for special education and whether the District denied Student a free, appropriate public education (FAPE).

The Hearing Officer concludes the District failed to identify Student as a student with autism and failed to appropriately evaluate Student’s eligibility as a student with a Specific Learning Disability. The Hearing Officer further concludes Student’s educational program was not reasonably calculated to provide Student a FAPE.

## II. PARTIES AND LEGAL REPRESENTATION

In addition to claims against the District, Petitioner's due process hearing request raised claims against the Texas Education Agency and the Texas State Board of Education, which were dismissed on jurisdictional grounds in Order No. 4.

Petitioner was represented throughout this litigation by Petitioner's legal counsel, Henry Bostwick, of Henry Green Bostwick, PLLC. The District was represented throughout this litigation by its legal counsel, Amy Tucker, from the law firm of Rogers, Morris & Grover, LLP.

## III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform December 7-10, 2021. 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 Henry Bostwick. \*\*\* and \*\*\*, Student's parents, attended the hearing. The District continued to be represented by Amy Tucker and was assisted by co-counsel Jonathan G. Brush. \*\*\*, Assistant Director of Special Education for the District, attended the hearing as the party representative. The parties timely filed written closing arguments. The hearing officer's decision is due on February 22, 2022.

## IV. ISSUES PRESENTED

### A. Petitioner's Claims

Petitioner challenges Student's educational program for the 2019-20 and 2020-21 school years and raised both exceptions to the one-year statute of limitations. Petitioner raises the following legal issues for decision:

- Whether the District failed to manage Student’s behavior appropriately without necessitating interventions by District police officers lacking sufficient training on working with students with disabilities;
- Whether the District denied Student a FAPE during the 2020-21 school year through the inappropriate use of restraint;
- Whether the District failed to evaluate and identify Student as eligible for special education as a student with autism and the Specific Learning Disability (SLD) of dyslexia;
- Whether the District failed to provide Student a FAPE in the least restrictive environment during the 2019-20 and 2020-21 school years;
- Whether the District failed to provide Student individualized dyslexia services;
- Whether the District failed to develop an appropriate Individualized Education Program (IEP) based on an evaluation in all areas of suspected disability;
- Whether the District failed to revise Student’s Behavior Intervention Plan (BIP) to address escalating behavioral challenges;
- Whether the District failed to base Student’s IEP on Student’s Present Levels of Academic Achievement and Functional Performance (PLAAFPs);
- Whether the District failed to provide Student Extended School Year (ESY) services in the summers of 2020 and 2021;
- Whether Student’s parents were denied meaningful participation in the special education process;
- Whether Student’s IEP failed to enable Student to make academic and non-academic progress; and
- Whether the District violated Student’s rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Fourth and Fourteenth Amendments to the U.S. Constitution (dismissed in Order No. 3).

**B. Petitioner’s Requested Relief**

Petitioner seeks the following items of requested relief:

1. Compensatory educational services;
2. An order finding Student eligible under the IDEA as a student with autism and as a student with a SLD in reading fluency, basic reading, reading comprehension, and written expression;
3. Specially designed dyslexia services for the 2021-22 school year and the addition of reading and written expression goals to Student’s IEP;

4. Autism supplement and related services, including at a minimum, Applied Behavioral Analysis (ABA) therapy, an in-home and community needs assessment and training as appropriate, access to additional assistive technology, and integrated \*\*\* training;
5. Training for District police officers and/or school resource officers in best practices for engaging students with disabilities and recertification of all District staff, including school resource officers, in the proper use of restraint or a similar recertification;
6. Compensation, including monetary compensation, for disability discrimination and failure to accommodate under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act and for claims under Section 1983 (dismissed in Order No. 3); and
7. Any other relief deemed appropriate by the hearing officer.

**C. The District’s Legal Position**

The District denies the allegations and maintains it provided Student a FAPE consistent with the IDEA at all relevant times.

The District also raised the affirmative defense of the statute of limitations, which is addressed below, and sought dismissal of any claims asserted and relief requested under statutes other than the IDEA. These claims and items of relief were dismissed in Order No. 3.

**V. FINDINGS OF FACT**

**Background Information**

1. Student began attending school in the District in \*\*\*. Student is now \*\*\* years old and in \*\*\* grade at \*\*\*. Student lives with Student’s parents \*\*\*. Student \*\*\* and enjoys \*\*\*, movies, and eating out with Student’s family.<sup>1</sup>
2. In July 2014, Student was diagnosed with \*\*\* (\*\*\*) and \*\*\* (\*\*\*). Behaviors included \*\*\*. Student was routine and schedule driven with restricted, repetitive behaviors seen in

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<sup>1</sup> Joint Exhibit (Jt. Ex.) 1 at 1, 24; Jt. Ex. 19 at 2; Jt. Ex. 20 at 16.

persons with autism spectrum disorders. However, Student did not evidence social impairment, nonverbal communication problems, or impaired social reciprocity required for this diagnosis despite limited sharing of others' interests.<sup>2</sup>

3. Student's behavior issues in school began in \*\*\* and included difficulty \*\*\*. Other behaviors included \*\*\*.<sup>3</sup>

### **2016-17 School Year (\*\*\* Grade)**

4. At Parents' request, the District conducted a Full and Individual Evaluation (FIE) in November 2016 to determine whether Student had a speech impairment. The Developmental Profile-3 assesses age-appropriate development. Scores in the Physical, Cognitive, and Communication domains fell in the average range. Adaptive Behavior, Social-Emotional, and General Development scores were slightly below average, but above the disordered range. The Comprehensive Assessment of Spoken Language (CASL) measures oral language processing skills, including pragmatics. Student achieved a \*\*\* in pragmatic judgment and a core composite score of \*\*\*, which was above a disordered range. On the Goldman-Fristoe Test of Articulation (GFTA), Student achieved a standard score of \*\*\*, which was above the disordered range.<sup>4</sup>
5. The 2016 FIE considered Student's emotional/behavioral status. Parent reported Student's \*\*\* and \*\*\* diagnoses. Concerns included "emotional outbursts" and "controlling impulses," including \*\*\*. Student's behavior at the time did not significantly interfere with Student's ability to learn or impact classroom performance. Student was on grade level in reading and math.<sup>5</sup>
6. The 2016 FIE found Student was not eligible as a student with a speech impairment. The District issued Prior Written Notice following an Admission, Review, and Dismissal (ARD) Committee meeting on December \*\*\*, 2016.<sup>6</sup>
7. Parents requested a Section 504 evaluation in February 2017 due to concerns about behavior. Student received Response to Intervention (RTI) for behavior at the time. Based on Student's \*\*\* and \*\*\* diagnoses, Student was eligible for Section 504 services due to a behavior/emotional impairment substantially limiting communication and behavior.

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<sup>2</sup> Jt. Ex. 16 at 7-9.

<sup>3</sup> Petitioner's Exhibit (P. Ex.) 1 at 200; Transcript (Tr.) at 612-13, 642-43.

<sup>4</sup> Jt. Ex. 22 at 1-4, 9; Tr. at 365.

<sup>5</sup> Jt. Ex. 22 at 6-8.

<sup>6</sup> Jt. Ex. 17 at 1-2, 5; Jt. Ex. 22 at 9-10.

Instructional accommodations included a safe area, a \*\*\* at Student's request, a behavior chart, and earned incentives.<sup>7</sup>

8. During the 2016-17 school year, Student continued to exhibit behaviors, including \*\*\*. However, Student demonstrated good academic performance, receiving As in all subjects.<sup>8</sup>

### **2017-18 School Year (\*\*\* Grade)**

9. Student was evaluated for Attention Deficit Hyperactivity Disorder (ADHD) by Dr. \*\*\* in October 2017. Parents reported Student was struggling in school and had problems with attention and focus. Student was easily distracted and hyperactive and had difficulty concentrating and staying on task. Dr. \*\*\* diagnosed Student with ADHD, inattentive type, and prescribed medication.<sup>9</sup>
10. Parents requested a special education evaluation, and the Section 504 Committee referred Student for an FIE in November 2017. Student's behavioral accommodations were continued with an additional academic accommodation of small group testing.<sup>10</sup>
11. In November 2017, the campus RTI Team referred Student to the Section 504 Committee for a formal dyslexia assessment. Student's \*\*\* teacher reported difficulty reading grade level word problems independently. Even with growth in Student's reading level, Student's \*\*\* teacher reported below grade level expectations in reading fluency and difficulty with grade level \*\*\* patterns, writing sight words, and decoding unknown grade level text. Student also struggled with social issues and awareness of others' feelings. Student was respectful to the \*\*\* teacher, but had difficulty with peer relations. Classroom behaviors included \*\*\*, shutting down and refusing to take responsibility, and occasional physical aggression.<sup>11</sup>

### **2018 FIE**

12. The District completed a second FIE in February 2018. Areas of concern included Student's emotional/behavioral needs and articulation deficits in speech. Sources of data included a review of educational records; home language survey; medical, parent, and teacher information; student input; and classroom and systematic observations. The FIE included achievement, cognitive, articulation, attention-relation, adaptive behavior, and

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<sup>7</sup> Jt. Ex. 16 at 1-2, 5.

<sup>8</sup> P. Ex. 1 at 0189; Jt. Ex. 30 at 2.

<sup>9</sup> P. Ex. 4 at 2-13.

<sup>10</sup> Jt. Ex. 15 at 1-2; Jt. Ex. 21 at 2.

<sup>11</sup> Jt. Ex. 21 at 1, 4, 6-8.

executive functioning assessments. The FIE did not include an assessment specific to autism.<sup>12</sup>

13. In the area of speech and language, classroom language functioning was within the average range. On the GFTA, however, Student achieved a standard score of \*\*\*, falling in the \*\*\* percentile. Student presented with several sound substitutions impacting intelligibility and had articulation skills within the disordered range. Student met criteria as a student with a speech impairment in articulation.<sup>13</sup>
14. The 2018 FIE considered Student's emotional/behavioral status. Student had \*\*\* office referrals for noncompliance during the 2017-18 school year. Parents reported a fight or flight response when upset where Student becomes nonverbal and/or \*\*\*. Impulse control was improved with ADHD medication. Student's teacher described Student as sweet, respectful, and hardworking. Her primary concern was rigid and inflexible thinking and difficulty considering alternatives and other viewpoints, which may lead to overwhelming emotions. Student, however, was easily redirected with verbal prompts and Student's behaviors were effectively managed with classroom behavior supports.<sup>14</sup>
15. The Continuous Performance Test (CPT) assesses attention-relation problems. Student had two atypical T-scores, which is associated with a moderate likelihood of having a disorder characterized by attention deficits, such as ADHD. The degree of severity was inconsistent at home and school. While Student exhibited problems with hyperactivity and controlling impulses, Student could sustain attention, was successfully redirected with verbal prompts, and completed work on time. Systematic observations showed off-task behavior consistent with peers. Student did not show a need for more intensive interventions or specially designed instruction due to ADHD at the time.<sup>15</sup>
16. On the Behavior Assessment System for Children-Third Edition (BASC-3), Student's mother and Student's teacher endorsed clinically significant scores for hyperactivity. Student did not exhibit internal or emotional distress. Certain ratings were inconsistent across settings, including levels of atypicality and withdrawal. The BASC-3 Behavior Symptoms Index measures overall levels of problem behaviors. Student's mother's scores fell in the clinically significant range, with teacher scores falling in the at-risk range. On the Adaptive Behavior Composite, teacher scores fell in the at-risk range with Student's mother's scores falling in the average range. Both endorsed strengths in \*\*\*, leadership,

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<sup>12</sup> Jt. Ex. 19 at 1-2; Tr. at 390-91.

<sup>13</sup> Jt. Ex. 19 at 3-4, 22-23.

<sup>14</sup> Jt. Ex. 19 at 5-6, 23.

<sup>15</sup> Jt. Ex. 19 at 6-8, 23.

- functional communication, and study skills and weaknesses in adaptability and activities of daily living.<sup>16</sup>
17. On the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2) completed by Student's mother and teacher, index scores showed Student had difficulty across settings in behavioral and emotional regulatory functions including impulse control, self-monitoring, flexibility, and emotional regulation. Student did not have difficulty in cognitive regulatory functions, including the ability to sustain working memory and initiate, plan, organize, and monitor problem solving.<sup>17</sup>
  18. While present, Student's behaviors were inconsistent across settings and reasonably well-managed with classroom behavior supports, including positive reinforcement, meaningful jobs, private discussions about behavior, and behavior reflection. Student did not meet eligibility criteria as a student with an emotional disturbance at the time.<sup>18</sup>
  19. The Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) measures educational achievement compared to peers. Student achieved a standard score of \*\*\* in basic reading skills (\*\*\*) percentile), indicating a normative deficit and a significant area of weakness, particularly when compared to the strength of Student's writing sample and written expression score of \*\*\* (\*\*\*) percentile), which fell in the high average range of ability. Student achieved a standard score of \*\*\* in reading comprehension (\*\*\*) percentile) and a score of \*\*\* (\*\*\*) percentile) in reading fluency, both falling in the low average range of ability.<sup>19</sup>
  20. Academic skills and cognitive processes testing found Student exhibited primary characteristics of dyslexia with difficulties in the areas of reading words in isolation and \*\*\*. Student also exhibited difficulty in orthographic processing, an area of cognitive processing related to dyslexia. Overall, Student showed a pattern of low reading and \*\*\* skills that was unexpected in relation to Student's cognitive abilities and receipt of effective classroom instruction, indicating Student had dyslexia. Student met criteria as a student with dyslexia, but the evaluation did not find Student was eligible as a student with an SLD.<sup>20</sup>
  21. The Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-IV COG) measures general intellectual ability and strengths and weaknesses across cognitive processing areas. Student did not display any cognitive weaknesses, with scores falling in the average range in all

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<sup>16</sup> Jt. Ex. 19 at 8-11.

<sup>17</sup> Jt. Ex. 19 at 11-14.

<sup>18</sup> Jt. Ex. 19 at 23.

<sup>19</sup> Jt. Ex. 19 at 14-16; Tr. at 98-99, 186, 381-83.

<sup>20</sup> Jt. Ex. 19 at 17-19, 22.



areas except visual processing, which fell in the high average range. Informal measures showed Student’s adaptive behavior was consistent with Student’s intellectual functioning.<sup>21</sup>

22. In addition to academic and speech and language accommodations and interventions, the FIE recommended emotional and behavioral accommodations and interventions, including clear limits and expectations; increased classroom behavior supports and preventative strategies; reinforcing appropriate behavior with a behavior chart or point system; completing a reinforcement survey and alternating reinforcers; supporting on-task behavior by seating near on-task peers, redirection, and use of if-then visual; mentoring; and outside counseling focused on appropriately managing emotions.<sup>22</sup>
23. Student’s ARD Committee, including Parents, convened for an initial meeting on February \*\*\*, 2018, and found Student eligible as a student with a speech impairment in articulation. The ARD Committee reviewed Student’s PLAAFPs in speech and adopted three goals targeting the articulation deficits identified in the FIE. Student received speech therapy. Student’s instructional placement was otherwise in the general education setting.<sup>23</sup>
24. The February 2018 IEP called for STAAR testing accommodations and accommodations in all academic subjects, including a meaningful classroom job, small group testing, use of a timer for self-regulation, reading aloud allowable portions of tests and assignments, and no penalty for \*\*\* errors (ELA only). Classroom accommodations included a positive behavior chart and preferential seating away from visual and auditory stimulation.<sup>24</sup>
25. Committee deliberations reflect that Student would receive “general education dyslexia services.” Student’s behavior did not impede Student’s learning or that of others and the February 2018 IEP did not include a BIP. The ARD Committee agreed to implement the proposed services, and the District provided Prior Written Notice on February \*\*\*, 2018.<sup>25</sup>
26. On the same day the ARD Committee met to develop Student’s IEP, the District convened a Section 504 meeting to dismiss Student from Section 504 services because Student qualified for special education for speech and—according to District members of the Section 504 Committee—would receive special education services to address Student’s

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<sup>21</sup> Jt. Ex. 19 at 20-22.

<sup>22</sup> Jt. Ex. 19 at 23-24.

<sup>23</sup> Jt. Ex. 13; Jt. Ex. 13 at 1-2, 4, 11-12, 15.

<sup>24</sup> Jt. Ex. 13 at 5-6.

<sup>25</sup> Jt. Ex. 13 at 2, 5, 13-17.

dyslexia. Student, however, received only general education dyslexia services beginning in February 2018.<sup>26</sup>

**2018-19 School Year (\*\*\*) Grade)**

27. Student's ARD Committee, including Student's father, convened for Student's annual meeting in February 2019. Student continued to be eligible as a student with a speech impairment. The ARD Committee reviewed Student's PLAAFPs in speech. Student mastered two of three goals. The ARD Committee adopted two speech therapy goals targeting articulation deficits and continued Student's speech therapy. Student's instructional placement was otherwise in the general education setting.<sup>27</sup>
28. The classroom and STAAR testing accommodations set forth in Student's February 2018 IEP were continued. Student's behavior did not impede Student's learning or that of others and the February 2019 IEP did not include a BIP. The dyslexia teacher reviewed Student's progress. The District issued Prior Written Notice on February \*\*\*, 2019.<sup>28</sup>
29. On May 2019 STAAR testing, Student was approaching grade level in reading (\*\*\*) and math (\*\*%).<sup>29</sup>
30. Parents revoked consent for special education services in May 2019 after the District denied a request for transportation as a related service and advised Parents this service was available to Student only under Section 504. Student was dismissed from special education at that time.<sup>30</sup>
31. Student had a psychological evaluation by Dr. \*\*\* in March 2019. Student was diagnosed with ADHD, combined presentation, and autism spectrum disorder. Student's autism diagnosis was confirmed by Dr. \*\*\* in August 2019. Dr. \*\*\* completed the Childhood Autism Rating Scale-2 with parent input. Student met DSM-5 autism spectrum disorder criteria and Dr. \*\*\* diagnosed Student with high functioning autism spectrum disorder and ADHD. A child with more advanced language and intellectual skills, like Student, may not be diagnosed with an autism spectrum disorder until they are older when social deficits become more apparent.<sup>31</sup>

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<sup>26</sup> Jt. Ex. 14 at 1-2; Jt. Ex. 20 at 37.

<sup>27</sup> Jt. Ex. 12 at 1-2, 4, 11-14.

<sup>28</sup> Jt. Ex. 12 at 2, 5-6, 13, 15.

<sup>29</sup> Jt. Ex. 31 at 1; P. Ex. 1 at 0030-31.

<sup>30</sup> Jt. Ex. 11 at 1-3; Jt. Ex. 20 at 3; Tr. at 601-02, 652-54.

<sup>31</sup> Jt. Ex. 27 at 1, 13; P. Ex. 4 at 30-33; Tr. at 160-61, 520-21.

**2019-20 School Year (\*\* Grade)**

32. Parents requested a special education evaluation at the beginning of the 2019-20 school year. While the evaluation was pending, Student received Section 504 services. The Section 504 Committee put transportation services in place in August 2019. In October 2019, the Section 504 Committee reviewed the outside diagnoses of autism spectrum disorder and Student's dyslexia profile. Student continued to qualify for dyslexia services under Section 504. The committee updated Student's Section 504 eligibility to include dyslexia, ADHD, and autism spectrum disorder, disabilities which substantially limited Student's ability to read, communicate, write, and engage in appropriate behavior. Student's Section 504 plan included numerous behavior and classroom instruction and testing accommodations, as well as STAAR testing accommodations.<sup>32</sup>

**2019 FIE**

33. Completed on December \*\*, 2019, the FIE included these sources of data: Other Health Impairment (OHI) Disability Report; a Functional Behavior Assessment (FBA); teacher and principal interviews, classroom observations, and student interview; \*\* Processing Measure; parent information; Conners Continuous Performance Test; parent interviews; Childhood Autism Rating Scale; systematic observation; NEPSY-II Affect Recognition and Theory of Mind subtests; Children's Depression Inventory; Behavior Assessment System for Children; Clinical Evaluation of Language Fundamentals (CELF-5); GFTA; Comprehensive Assessment of Spoken Language (CASL-2), including the pragmatic language subtest; communication sample; Woodcock-Johnson IV Tests of Achievement and Cognitive Abilities; 2019 psychological evaluation by Dr. \*\*, 2019 autism evaluation by Dr. \*\*, and a review of educational records.<sup>33</sup>
34. Standardized assessments did not find a speech and/or language disorder. On the CELF-5, Student demonstrated average receptive and expressive language skills. On the CASL-2, Student demonstrated above average pragmatic language abilities with a standard score of \*\* (\*\* percentile). On the GFTA, Student's abilities fell in the average range. A communication sample was consistent with standardized assessments and did not yield concerns in general pragmatic skills, language content and structure, or articulation. Due to parent and teacher reports of pragmatic language concerns, including not understanding social cues and others' emotions and not engaging in appropriate interactions with peers and adults, the Speech Language Pathologist conducted additional classroom observations which did not yield concerns with pragmatic language abilities or other communication deficits. Student did not meet criteria as a student with a speech impairment.<sup>34</sup>

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<sup>32</sup> Jt. Ex. 9 at 1-4; Jt. Ex. 10 at 2-3; Respondent's Exhibit (R. Ex.) 3 at 18; Tr. at 603-04.

<sup>33</sup> Jt. Ex. 20 at 1-2.

<sup>34</sup> Jt. Ex. 20 at 4-8, 45-46; Tr. at 155.

35. The 2019 FIE included an occupational therapy (OT) evaluation, including exploration of \*\*\* processing difficulties due to teacher concerns with self-control/regulation, behavior, and focus. The \*\*\* Processing Measure (\*\*\*) assesses how a person processes \*\*\* information. Both school-based reports yielded total scores in the definite dysfunction range, with Student’s current and former teacher reporting \*\*\* processing difficulties in all but one area. Scores revealed more \*\*\* difficulty at school than at home, with Student’s mother reporting fewer, but still present, \*\*\* issues. These scores were more indicative of a person with autism than an emotional disturbance. An assistive technology (AT) evaluation recommended access to \*\*\* supports, such as foot or hand fidgets.<sup>35</sup>
36. The FIE assessed Student’s emotional/behavioral status and included a records review, parent, school personnel, and student interviews, rating scales, formal testing, direct observations, and behavioral data collection. Student’s mother reported increased emotional outbursts and socialization issues, \*\*\*, with “shutdowns” occurring more frequently and for longer duration. Student would sometimes \*\*\* when frustrated and had difficulty with changes in routine. On good days, Student showed empathy and shared. On “anxious” days, Student was non-emotional and did not care about others. She reported defiance with non-preferred activities, failing to take responsibility, and poor impulse control.<sup>36</sup>
37. Student’s teachers reported Student’s behavior interfered with Student’s work and relationships. Behaviors included \*\*\*. Student \*\*\*. Student became defiant and refused to do work even when given choices. Student could be compliant in the morning, but “fall apart” during afternoon classes. Noncompliance manifested itself in refusing to speak, sitting quietly, \*\*\*. Student got along with peers Student liked, but would \*\*\*. Student played with peers \*\*\*. The principal reported a significant difference in Student’s behavior that year compared to prior school years. Student’s need for behavioral support and interventions increased in \*\*\* grade.<sup>37</sup>
38. BASC-3 rating scales were completed by Student’s mother and three teachers. The Behavioral Symptoms Index (BSI) consists of the Aggression, Hyperactivity, Depression, Attention Problems, Withdrawal, and Atypicality scales and measures overall levels of problem behavior. Student’s composite BSI score was rated as clinically significant by all raters and reflected significant behavioral difficulties across settings.<sup>38</sup>

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<sup>35</sup> Jt. Ex. 20 at 9-15, 44-45; Tr. at 392-96.

<sup>36</sup> Jt. Ex. 20 at 16-17, 19.

<sup>37</sup> Jt. Ex. 20 at 20-21; Tr. at 846, 850.

<sup>38</sup> Jt. Ex. 20 at 24-25.

39. Certain BASC-3 ratings indicated a possible autism spectrum disorder and merited further exploration. The Atypicality scale was rated as clinically significant by Student's parent and two teachers and at-risk by one teacher. Student demonstrated behaviors considered odd or immature and generally seemed disconnected from Student's surroundings. Teacher ratings on the Withdrawal scale fell in the at-risk and clinically significant ranges. Student was generally \*\*\*. Parent ratings fell in the average range, reporting Student did not avoid social situations and could develop and maintain friendships.<sup>39</sup>
40. The BASC-3 Externalizing Problems composite consists of the Hyperactivity, Aggression, and Conduct Problem scales and measures acting out and disruptive behaviors. All ratings fell in the clinically significant range. Student engaged in many disruptive, impulsive, and uncontrolled behaviors. Student was restless and overactive, and displayed a high number of aggressive behaviors, including being argumentative, defiant, and/or\*\*\*. Student had difficulty \*\*\* and staying seated, and Student disrupted the schoolwork and activities of other children. Teachers gave clinically significant scores for conduct problems, indicating frequent rule-breaking behaviors. The BASC-3 Internalizing Problems composite consists of Anxiety, Depression, and Somatization scales and measures internal and emotional distress. Some scores were elevated, but overall Student did not display significant internalizing problems.<sup>40</sup>
41. The BASC-3 School Problems composite consists of the Attention Problems and Learning Problems scales. Overall, Student did not exhibit significant learning problems but had attention problems across settings. The BASC-3 Adaptive Skills composite consists of Adaptability, \*\*\*, Leadership, Study Skills, Activities of Daily Living, and Functional Communication scales, which measure adaptability, prosocial behaviors, and coping skills. Teacher ratings fell in the clinically significant range, while parent ratings fell in the at-risk range. Student had difficulty adapting to changing situations and took much longer to recover from difficult situations, especially at school. In \*\*\*, two teachers gave clinically significant scores and one teacher an at-risk score. Student demonstrated poor expressive and receptive communication skills and had difficulty seeking out and finding information independently, with more problems at school. All teachers reported Student had weak study skills, poor organization, and difficulty turning in assignments on time.<sup>41</sup>
42. On the BASC-3 ADHD Probability Index, all ratings fell in the clinically significant range. On the CPT assessment of attention-related problems, Student had a total of seven atypical scores, which is associated with a very high likelihood of having a disorder characterized by attention deficits, such as ADHD.<sup>42</sup>

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<sup>39</sup> Jt. Ex. 20 at 25-26; Tr. at 1005-06, 1009-11.

<sup>40</sup> Jt. Ex. 20 at 25-26.

<sup>41</sup> Jt. Ex. 20 at 25-27.

<sup>42</sup> Jt. Ex. 20 at 27, 29-31.

43. Children who present with elevated scores on the BASC-3 Autism Probability Index likely exhibit a variety of unusual behaviors and problems with developing and maintaining social relationships. All three teachers gave ratings in the clinically significant range, with the parent ratings in the at-risk range. Across settings, Student demonstrated impaired emotional/social reciprocation and rigidly adhered to routines/rituals.<sup>43</sup>
44. On the BASC-3 Emotional Behavioral Disturbance Probability Index, all ratings fell in the clinically significant range. Across settings, Student had verbally or physically aggressive temper outbursts and an irritable or angry mood between outbursts. Student \*\*\*, and had difficulty making decisions or concentrating. Teachers reported Student \*\*\*.<sup>44</sup>
45. The Conners, Third Edition (Conners-3) is an assessment instrument used to obtain parent or teacher observations about behavior across settings, including ADHD and its most common co-morbid problems. With the exception of Learning Problems and a high average score in Peer Relations from the parent, Student's scores fell in the elevated or very elevated ranges in all domains (Inattention, Hyperactivity/Impulsivity, Executive Functioning, Defiance/Aggression, Peer Relations). These responses indicated Student "probably" met the diagnostic criteria for ADHD, Combined Type and \*\*\*. Scores revealed Student's problem behaviors very frequently and seriously affected Student's schoolwork, grades, friendships and relationships, and home life. While Student's mother reported Student had friends and the ability to make friends, all three teachers reported Student had trouble keeping friends and poor \*\*\*.<sup>45</sup>
46. On the NEPSY-II Social Perception subtests, which measure how well a child understands others' feelings and thoughts, Student performed above expected level on the Affect Recognition subtest, which assesses reciprocal social interactions, suggesting Student can recognize and differentiate between affects when presented with social situations. The Theory of Mind subtest assesses ability to comprehend others' perceptions and experiences and apply that knowledge to questions. Student performed above expected level, suggesting Student can comprehend others' perspectives, experiences, and beliefs. However, the District did not provide scores or data underlying these findings, making these scores difficult to interpret.<sup>46</sup>
47. Using information obtained from observations, interactions with Student, parent and teacher information, and testing data, the Licensed Specialist in School Psychology (LSSP), educational diagnostician, and speech therapist completed the Child Autism

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<sup>43</sup> Jt. Ex. 20 at 27.

<sup>44</sup> Jt. Ex. 20 at 27.

<sup>45</sup> Jt. Ex. 20 at 27-29; Tr. at 1011-12.

<sup>46</sup> Jt. Ex. 20 at 31-32; Tr. at 155-56, 1002-03.

- Rating Scale, Second Edition (CARS2-HF), a behavior rating scale to determine whether a high functioning individual has sufficient symptoms to be considered for a diagnosis of autism spectrum disorder. Student achieved a total raw score of \*\*\*, which was below the standard clinic cutoff value of \*\*\* and corresponded to the interpretive category of Non-Autistic. However, the CARS2 assessment was completed before the occupational therapist completed the \*\*\*, which showed numerous areas of \*\*\* processing dysfunction, and the examiners rated them as appropriate or mild.<sup>47</sup>
48. The 2019 FIE did not include further assessments specific to autism. The LSSP relied on Student's \*\*\*/\*\*\* diagnoses, ability to interact socially with students and make eye contact, and lack of \*\*\* seeking indicators in not conducting the Autism Diagnostic Observation Schedule (ADOS) or other measures.<sup>48</sup>
49. The FIE included an FBA identifying two primary behaviors – non-compliance/task refusal behaviors and off-task behaviors. Non-compliance/task refusal behaviors included refusing to follow directions, \*\*\*. Behaviors indicative of autism included \*\*\*. Antecedents included: teacher directives/redirection, not being paired with preferred peer group, not getting attention when wanted, transitions, denial of activity/item, and being presented with a difficult task or activity. These behaviors may function to avoid tasks or gain control. Non-compliance/task refusal behaviors occurred on average \*\*\* times a day with a duration of \*\*\* minutes for each occurrence and most often occurred in the \*\*\*.<sup>49</sup>
50. Off-task behaviors included \*\*\*. Antecedents included when Student was given an assignment or task and when given a difficult task or activity. The function of these behaviors was to gain movement. Off-tasks behaviors occurred \*\*\* times in a \*\*\*-minute period on a daily basis. Behaviors resulted in class removals, loss of rewards, administration involvement, and parent contacts.<sup>50</sup>
51. The FIE assessed Student's intelligence and adaptive behavior. On the WJ-IV COG, Student's General Intellectual Ability (GIA) indicated global intellectual functioning within the high average range (standard score \*\*\* percentile), with all seven standard scores falling within or above the average range. These scores were consistent with previous testing. Informal adaptive behavior testing showed adaptive behavior skills consistent with Student's intellectual functioning.<sup>51</sup>

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<sup>47</sup> Jt. Ex. 20 at 32-33; Tr. at 399-400, 936, 1023-28.

<sup>48</sup> Tr. at 124, 396-97, 936-37.

<sup>49</sup> Jt. Ex. 20 at 33-34; Tr. at 407.

<sup>50</sup> Jt. Ex. 20 at 33-34.

<sup>51</sup> Jt. Ex. 20 at 34-36.

52. The WJ-IV ACH in Broad Reading is a combined measure of decoding (Letter-Word Identification), reading speed (Sentence Reading Fluency), and ability to comprehend connected text (Passage Comprehension). Student's standard scores demonstrated limited proficiency in reading fluency (\*\*\*) percentile) and average proficiency in decoding (\*\*\*) percentile) and reading comprehension (\*\*\*) percentile).<sup>52</sup>
53. The FIE considered Student's dyslexia services. Based on teacher reports of adequate performance, the 2019 FIE did not comprehensively evaluate Student for an SLD and instead maintained the previous dyslexia diagnosis, finding Student continued to meet criteria for general education dyslexia services based on the January 2018 Dyslexia Assessment report. While Student made some progress in reading comprehension based on the 2018 and 2019 FIEs, Student's basic reading skills and reading fluency remained in the below average range. With Student's above average intellectual abilities and interventions, consistent progress in reading would be expected. Student passed the May 2019 administration of the \*\*\* grade STAAR \*\*\* test, approaching standards with a \*\*\*%.<sup>53</sup>
54. The WJ-IV ACH in Broad Written Language evaluates production of written text, including \*\*\*, writing fluency, and quality of written expression. Student's overall standard score (\*\*\*) percentile) fell in the average range, but Student showed weakness in \*\*\* with a standard score of \*\*\* percentile), falling in the low range. This weakness correlated with the January 2018 dyslexia assessment where Student demonstrated primary dyslexia characteristics in the areas of \*\*\* and reading words in isolation. Student performed in the average range on the Writing Samples (\*\*\*) percentile) and Sentence Writing Fluency (\*\*\*) percentile) subtests. Student did not pass the beginning of year \*\*\* grade \*\*\* benchmark.<sup>54</sup>
55. The FIE concluded Student met criteria as a student with an emotional disturbance due to demonstrating inappropriate behavior or feelings under normal circumstances. The 2019 FIE concluded that Student did not meet eligibility criteria as a student with autism, but instead determined that an emotional disturbance was primarily affecting Student's educational performance. Without assessing cognitive distortion, the evaluators attributed Student's social interaction difficulties to cognitive distortions and impulse control deficits, rather than significant verbal and nonverbal communication difficulties. The finding that Student did not avoid social situations and could develop and maintain friendships was not supported by numerous sources of data indicating otherwise. Student was at times unable to adapt as well as peers to situations and did not engage in stereotypical and repetitive

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<sup>52</sup> Jt. Ex. 20 at 36-38.

<sup>53</sup> Jt. Ex. 20 at 37-38, 46; Jt. Ex. 31 at 1; Tr. at 147-48, 1033.

<sup>54</sup> Jt. Ex. 20 at 40-41.



behaviors. However, the finding that Student did not experience significant \*\*\* issues characteristic of autism was not supported by current testing.<sup>55</sup>

56. Dr. \*\*\* completed a Disability Report: OHI. Student had ADHD, Inattentive Type, resulting in poor focus and attention and struggled with hyperactivity and impulsivity. Student met criteria as a student with an OHI due to ADHD.<sup>56</sup>
57. The 2019 FIE recommended a BIP, counseling, and \*\*\* training. Academic recommendations included continuation of general education dyslexia services to address \*\*\* and reading weaknesses and \*\*\* accommodations. Emotional and behavioral recommendations included: behavior goals and a BIP to address non-compliance/task refusal and off-task behaviors; counseling; teaching response-delay techniques; short breaks and a cooling off period; setting clear rules and expectations; a quiet place to work; built in physical activity in daily routine and motor breaks; choices for activities and rewards; consequence-based systems; and \*\*\* supports.<sup>57</sup>

#### **December \*\*\*, 2019 ARD Committee Meeting**

58. Student's ARD Committee, including Parents, convened on December \*\*\*, 2019, and found Student met emotional disturbance and OHI eligibility criteria. The ARD Committee considered Student's PLAAFPs, including current academic, behavioral, and social performance. Student required AT (\*\*\*) and received \*\*\* training by the occupational therapist.<sup>58</sup>
59. The ARD Committee adopted two behavior goals. The first goal targeted using breaks (in a work-break-work-break sequence) and \*\*\* to replace off-task behavior. The second goal targeted complying with teacher directives. A \*\*\* goal targeted demonstrating problem-solving skills by participating in small group classroom activities and following classroom expectations. Three counseling goals targeted identifying/practicing strategies to recognize triggers (Goal 1), alleviate frustration (Goal 2), and roleplaying appropriate interpersonal skills (Goal 3).<sup>59</sup>
60. The IEP called for executive function skills/attention/concentration accommodations for all subjects, including: access to \*\*\*; a \*\*\*; clear expectations; designated \*\*\*; encouragement and feedback; frequent breaks; on-task reminders/structured reminders; \*\*\*; positive reinforcement or a \*\*\*; use of a checklist and timer; and work-break-work-

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<sup>55</sup> Jt. Ex. 20 at 47-48, 52-53; Tr. at 1001-02.

<sup>56</sup> Jt. Ex. 20 at 15, 54.

<sup>57</sup> Jt. Ex. 20 at 49-50.

<sup>58</sup> Jt. Ex. 7 at 1-4, 8, 18, 20.

<sup>59</sup> Jt. Ex. 7 at 5-7.

break sequence/chunking. Academic accommodations included oral administration of allowable portions of tests and assignments upon request and no penalty for \*\*\* errors. Student also received several STAAR testing accommodations. \*\*\* and a \*\*\* are autism-related interventions. \*\*\* and positive reinforcement are components of ABA therapy.<sup>60</sup>

61. Student's behavior impeded Student's learning or that of others. Student's December 2019 IEP included a BIP targeting off-task behaviors and non-compliance/task refusal and included positive behavioral interventions and supports. Classroom environment strategies included setting well-defined limits, rules, and task expectations; distraction removal; structured environment; consistent routine; a safe area to regain control when needed; and positive feedback when Student used the \*\*\* and other replacement behaviors. Classroom strategies included: setting easily obtainable daily goals; offering choices; frequent verbal reinforcement for appropriate behavior; directing over-activity into productive tasks; classroom motor breaks to help maintain focus and attention; a checklist to break Student's day into a work-break-work-break sequence; a check-in/check-out system; and a checklist to earn breaks. The BIP included a reward system, including positive reinforcers and earned activities and privileges, and direct instruction in pro-social behaviors, teaching alternate behaviors, and coaching in problem-solving situations.<sup>61</sup>
62. Student's Schedule of Services called for \*\*\* minutes per week of \*\*\* instruction in the special education setting, \*\*\* minutes per week of in class behavior supports in the general education setting, counseling services for \*\*\* minutes for 12 out of 36 instructional weeks, OT for \*\*\* minutes for 10 out of 36 instructional weeks, and daily transportation. Student continued to receive dyslexia services in the general education setting. The ARD Committee did not recommend ESY. The District provided Prior Written Notice on December \*\*\*, 2019.<sup>62</sup>
63. During school closures due to COVID-19 in the spring of 2020, Student participated in remote instruction to keep up with classroom assignments and behavior routines with support from Student's family and periodic checks from teachers. Student received counseling services virtually.<sup>63</sup>
64. For the 2019-20 school year, Student achieved the following grades: \*\*\*.<sup>64</sup>
65. On July \*\*\*, 2020, the District granted Parents' request for an Independent Educational Evaluation (IEE) and agreed to fund a psychological evaluation, a psychoeducational

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<sup>60</sup> Jt. Ex. 7 at 8, 10; Tr. at 322, 448.

<sup>61</sup> Jt. Ex. 7 at 3, 8, 24-26.

<sup>62</sup> Jt. Ex. 7 at 15, 17-18, 21.

<sup>63</sup> P. Ex. 1 at 3131, 4208, 4210, 4453-54, 4800-01.

<sup>64</sup> Jt. Ex. 30 at 1.

evaluation and FBA, as well as OT, AT, and Speech assessments. In Prior Written Notice dated July \*\*\*, 2020, the District declined to fund the AT IEE because the proposed provider did not meet District criteria and supplied a list of other providers.<sup>65</sup>

66. Student began an intensive ABA program at \*\*\*, an ABA clinic, in July 2020. Student received ABA therapy focused on language and communication development, communication skills, and \*\*\* to decrease maladaptive behavior, increase adaptive behavior, and teach functional replacement behavior for \*\*\* hours per week during the fall of 2020. In Student's initial assessment in June 2020, Student presented with mild communication deficits, moderate social deficits, moderate repetitive behaviors, mild restricted behaviors across settings. Behaviors included some aggression, \*\*\*, as well as disruptive behaviors. Student presented with \*\*\* requiring substantial support and marked deficits in verbal and non-verbal behavior. While Student has "great" communication, vocabulary, and language, Student does not use it appropriately and struggled in interactions with peers, adults, and authority figures.<sup>66</sup>

#### **2020-21 School Year (\*\*\*) Grade)**

67. Student's ARD Committee convened at Parents' request on August \*\*\*, 2020, to discuss Student's transition \*\*\*. Parents were accompanied by an advocate. Parents expressed concerns about Student's services and regression due to the break in school because of COVID-19. The District agreed to evaluate regression after the first \*\*\* weeks of instruction. The District ultimately did not recommend compensatory services because Student's services were not discontinued during school closures.<sup>67</sup>
68. Student had been attending ABA therapy full time for a month and was demonstrating improved behavior. Parents elected to have Student participate in virtual learning during the fall semester so Student could continue ABA therapy. The ARD Committee discussed coordination between the private ABA therapist and the District Board Certified Behavior Analyst (BCBA) to facilitate generalization of acquired behavioral skills. Student attended virtual instruction in academic classes and dyslexia instruction in the afternoon and evening and on weekends. OT and counseling services remained the same and Student's Schedule of Services was modified for the virtual setting to include \*\*\* minutes of indirect \*\*\* support. Parents disagreed with Student's program and waived the right to reconvene in 10 days because the pending evaluations would not be complete by then. The District provided Prior Written Notice on August \*\*\*, 2020.<sup>68</sup>

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<sup>65</sup> P. Ex. 1 at 1240-41, 1319, 1345, 1997, 3027.

<sup>66</sup> P. Ex. 5 at 13-14; Tr. at 238, 246-57, 321.

<sup>67</sup> Jt. Ex. 6 at 1-2, 8; P. Ex. 1 at 3131-33.

<sup>68</sup> Jt. Ex. 6 at 1-3, 8-10; R. Ex. 2 at 45-46; Tr. at 242-43, 862.

69. In August 2020, Student's dyslexia instructor advised Parents she would implement the \*\*\* dyslexia program and gave detailed information on the instruction to be provided remotely. The District also provided Parents online dyslexia resources in October 2020. Student was also given an opportunity to join \*\*\* class online during the fall of 2020.<sup>69</sup>
70. At Parents' request, the District agreed to a gradual return to in-person learning and deferring full-time attendance to January. Student returned to school on November \*\*\*, 2020, attending \*\*\* a week, and attended \*\*\* a week in December 2020.<sup>70</sup>
71. The District BCBA consulted with Student's ABA therapist about Student's transition back to school and obtained Student's assessment and treatment records and BIP. The District BCBA provided the behavior plan and other strategies to Student's special education teacher for use in the classroom.<sup>71</sup>

#### **December \*\*\*, 2020 ARD Committee Meeting**

72. Student's ARD Committee, including Parents, convened for Student's annual meeting on December \*\*\*, 2020. At Parents' request, the Committee deferred consideration of the completed Speech and Language IEE until all IEEs were completed and the family's advocate could participate. The ARD Committee reviewed Student's PLAAFPs, including Student's dyslexia services, emotional/social functioning, and areas of need, including recent behavioral data. Student had been at school \*\*\* times. During observations between November \*\*\* and December \*\*\*, there were \*\*\* tasks refusals, \*\*\* instances of non-complaint behavior, \*\*\*, and \*\*\* teacher-initiated breaks. AT needs included \*\*\*, \*\*\*, and access to speech-to-text/text-to-speech, which was added as an accommodation.<sup>72</sup>
73. Mastery of goals could not be determined due to insufficient data during COVID-19 school closures and Student's participation in virtual instruction during the fall of 2020. The ARD Committee adopted a behavior goal targeting completion of at least 70% of assigned tasks on Student's daily checklist. \*\*\* goals targeted complying with directives when given specified supports (Goal 1) and following classroom expectations and completing a specific task while working in a small group (Goal 2). Counseling goals targeted identifying/practicing strategies to recognize triggers to frustrations (Goal 1) and appropriate interpersonal skills (Goal 2). Student's BIP was revised to target verbal aggression (in lieu of off-task behaviors) and non-compliance/task refusal and continued previous interventions. Previous accommodations were continued.<sup>73</sup>

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<sup>69</sup> P. Ex. 1 at 3117; R. Ex. 2 at 36-37, 51, 55-57.

<sup>70</sup> Jt. Ex. 4 at 2; R. Ex. 2 at 27-35.

<sup>71</sup> P. Ex. 1 at 2953, 3119; P. Ex. 5 at 32-33; R. Ex. 2 at 21-25; Tr. at 300-03.

<sup>72</sup> Jt. Ex. 4; Jt. Ex. 4 at 1-3, 8, 18-19, 21.

<sup>73</sup> Jt. Ex. 4 at 5-8, 19, 24-26; Jt. Ex. 29.

74. The ARD Committee discussed ESY, which Parents requested. The District did not recommend ESY pending further data collection about Student’s regression after breaks in the school year.<sup>74</sup>
75. Student’s Schedule of Services included \*\*\* minutes per week of \*\*\* instruction in the special education setting and \*\*\* minutes per week of in-class behavior supports per subject in the general education setting for \*\*\*. Counseling services were increased to \*\*\* per week in response to Parents’ concerns. Indirect OT services for \*\*\* minutes in 10 out of 36 instructional weeks and daily transportation were continued. The ARD Committee reviewed the dyslexia supplement, which called for \*\*\* hours per week of general education dyslexia program instruction.<sup>75</sup>
76. Parents continued to disagree with Student’s program. The District provided Prior Written Notice on December \*\*\*, 2020.<sup>76</sup>
77. After returning to school in December and during the spring semester of the 2020-21 school year, Student showed an increase in the number and severity of behaviors, which included \*\*\*, disruption, task refusal/non-compliance, physical and verbal aggression, and \*\*\*. Between December \*\*\*, 2020, and March \*\*\*, 2021, Student had \*\*\* instances of non-compliance/task refusal, \*\*\* instances of verbal aggression, \*\*\* instances of physical aggression, and \*\*\* instances of \*\*\*. These included \*\*\* instances of \*\*\* behaviors (behaviors necessitating a \*\*\*); \*\*\* instances of \*\*\* behaviors (support staff called to assist and prompted use of coping strategies); and \*\*\* instances of \*\*\* behaviors (unwanted behavior responsive to redirection).<sup>77</sup>
78. During the spring semester, Student had \*\*\* disciplinary referrals, \*\*\*, and \*\*\* electronic parent contacts. Between April \*\*\* and May \*\*\*, 2021 alone, Student had \*\*\* instances of non-compliance/task refusal, \*\*\* instances of verbal aggression, \*\*\* instances of physical aggression, and \*\*\* instances of \*\*\*. These included \*\*\* instances of \*\*\* behaviors, \*\*\* instances of \*\*\* behaviors, and \*\*\* instances of \*\*\* behaviors.<sup>78</sup>
79. District police officers receive 20 hours of training on development and psychology, mental health crisis intervention, de-escalation techniques, mental health and behavioral health needs of student with disabilities or special needs, and positive behavioral interventions;

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<sup>74</sup> Jt. Ex. 4 at 15, 18-19, 22.

<sup>75</sup> Jt. Ex. 4 at 15, 20, 27-28.

<sup>76</sup> Jt. Ex. 4 at 21-23.

<sup>77</sup> Jt. Ex. 3 at 2; Jt. Ex. 18 at 5; Tr. at 410-12, 1034-35.

<sup>78</sup> Jt. Ex. 18 at 2, 5.

40 hours of crisis intervention training; and 40 hours of defensive tactics training designed to minimize the use of force.<sup>79</sup>

80. Student was restrained \*\*\* times during the 2020-21 school year. On January \*\*\*, 2021, Student\*\*\*. Student was unsupervised for approximately \*\*\* before being physically restrained by staff and a District police officer and returned to campus.<sup>80</sup>
81. Student was restrained by a District police officer, \*\*\* on \*\*\*, 2021. Staff attempted interventions for several minutes. Prior to the restraint, Student \*\*\*. Student’s behavior leading up to the restraint did not present an emergency situation. Student was taken to the principal’s office where Student \*\*\*. The District police captain acknowledged the officer’s involvement and response did not meet expectations. The officer underwent counseling and retraining on expectations.<sup>81</sup>
82. On May \*\*\*, 2021, Student was restrained for \*\*\*. Student was taken to the counselor’s office and \*\*\*. \*\*\* as a result of the restraint.<sup>82</sup>

#### **April \*\*\*, 2021 ARD Committee Meeting**

83. Student’s ARD Committee convened on April \*\*\*, 2021, to revise Student’s IEP and conduct a Review of Existing Evaluation Data (REED). Parents requested the ARD Committee not consider the completed IEEs until all IEEs were completed.<sup>83</sup>
84. The ARD Committee updated Student’s PLAAFPs, including emotional/social status, including strengths and areas of need. Student’s teacher discussed current behavioral interventions and strategies, performance in \*\*\* instruction, behaviors of concern, and consequences. The District provided data on current behaviors (\*\*\*, disruption, task refusal/non-compliance, physical aggression, verbal aggression, and \*\*\*), including frequency, and intensity (\*\*\*) and discussed antecedents. The District created a six-member response team to address \*\*\*.<sup>84</sup>
85. The ARD Committee reviewed Student’s goals, proposing new behavior goals targeting \*\*\* and calming strategies. The ARD Committee did not update Student’s BIP.<sup>85</sup>

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<sup>79</sup> P. Ex. 1 at 5551.

<sup>80</sup> Jt. Ex. 23 at 6; Jt. Ex. 34 at 6-8; Tr. at 580.

<sup>81</sup> Jt. Ex. 34 at 3-5; Jt. Ex. 40; Jt. Ex. 47; Jt. Ex. 48; Tr. at 467-69, 474-80, 871-72.

<sup>82</sup> Jt. Ex. 34 at 1-2; P. Ex. 9; Tr. at 570-80.

<sup>83</sup> Jt. Ex. 3 at 1, 15-18; R. Ex. 2 at 50.

<sup>84</sup> Jt. Ex. 3 at 1-3.

<sup>85</sup> Jt. Ex. 3 at 4-6, 10-11.

86. The District proposed a new placement in the \*\*\* (\*\*\*) program at \*\*\*. The \*\*\* program serves students demonstrating grade level academic performance with high intensity behavioral needs and was not available at Student’s current school. Parents were open to the proposal, but had concerns with a campus change close to the end of the school year and the impact on Student’s mental health. With parental input, the ARD Committee developed a plan to gradually transition Student to the new campus, beginning \*\*\* a week of Student’s choosing and increasing the frequency as appropriate. Student attended \*\*\* a week until the end of the 2020-21 school year.<sup>86</sup>
87. The April 2021 IEP modified Student’s Schedule of Services to reflect Student’s attendance on both campuses, with continued instruction in the general education setting for all subjects. For the remainder of the 2020-21 school year, Student received \*\*\* minutes of in-class support per subject per week on Student’s home campus and \*\*\* minutes per day per subject when attending the \*\*\* program. Beginning in August 2021, Student received \*\*\* minutes of in-class support in the general education classroom per subject. \*\*\* instruction was increased to \*\*\* minutes per week.<sup>87</sup>
88. Parents requested ESY. The District administrator deferred a staff recommendation on ESY pending further data collection to be presented at a reconvene ARD Committee meeting.<sup>88</sup>
89. The ARD Committee conducted a REED and recommended an FBA to determine factors and function of new behaviors not currently addressed in Student’s IEP. Parents disagreed with Student’s program. The District provided Prior Written Notice on April \*\*\*, 2021.<sup>89</sup>
90. The District did not reconvene the ARD Committee to discuss ESY. On May \*\*\*, 2021, Student’s special education teacher advised the principal that “It’s very possible that the progress [Student]’s made could be lost if Student doesn’t receive structured behavioral support.” On May \*\*\*, 2021, however, the principal refused Parents’ request to reconvene on this topic before the end of the 2020-21 school year and incorrectly advised them that the April 2021 ARD Committee did not recommend ESY.<sup>90</sup>

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<sup>86</sup> Jt. Ex. 3 at 5; Tr. at 605-09, 863-64, 884.

<sup>87</sup> Jt. Ex. 3 at 12-13.

<sup>88</sup> Jt. Ex. 3 at 5; Tr. at 535-37.

<sup>89</sup> Jt. Ex. 3 at 15-21.

<sup>90</sup> P. Ex. 1 at 2193-95, 2731-32, 2907-09, 3379-84; R. Ex. 2 at 1-2; Tr. at 529-37, 882-83.

91. Student met standards on the STAAR \*\*\* assessments and approached standards in \*\*\*. For the 2020-21 school year, Student achieved following grades: \*\*\*.<sup>91</sup>

**\*\*\* IEE**

92. Student had an independent psychological and psychoeducation evaluation and FBA by a licensed clinical psychologist and LSSP, Dr. \*\*\* (\*\*\* IEE). The report is dated April \*\*\*, 2021. The IEE relied on multiple sources of data, including information gathered from Student, Student's parents and teachers, observations, standardized testing, and previous testing and included assessments not performed by the District.<sup>92</sup>

93. One test cannot measure whether a student is on the autism spectrum and multiple sources of data allow for identification of commonalities and overlapping concerns when considering eligibility. The \*\*\* IEE included multiple sources of data to identify characteristics of autism. Autism-specific assessments included the ADOS and the Autism Spectrum Rating Scales (ASRS). The NEPSY-II and Conners, which measures executive function, also provide information about characteristics of autism. The ADOS is a standardized assessment consisting of a structured interaction with a student and gives information about performance in social interactions and pragmatic language skills and allows for comparison of the student tested to other students with suspected or confirmed autism spectrum disorder.<sup>93</sup>

94. Student's mother reported Student seeks out \*\*\*. Teachers reported Student interacts with other students but had significant difficulty with peers and needed help with social problem-solving. Observations showed Student did not \*\*\*. Parent reported nonverbal communication deficits including limited/fleeting eye contact, but appropriate use of facial expressions. Verbally, Student \*\*\*. Student is concrete and rule bound. Teachers reported Student often \*\*\*. Student's behavior deteriorates more in unstructured or less supervised settings. Student may \*\*\*. Once upset, Student requires between \*\*\* to calm down with teacher support. Student did not engage in repetitive movements at school or home.<sup>94</sup>

95. Dr. \*\*\* assessed Student's emotional and behavioral functioning, including internalizing and externalizing behaviors, academics, and \*\*\* using the Conners Comprehensive Behavior Rating Scales (Conners CBRS) which was completed by Student's father and five teachers. Responses indicated that, across settings, Student may demonstrate possible symptoms of \*\*\*, and defiant and aggressive behavior as well as hyperactive and impulsive behavior. In both environments, Student may demonstrate difficulty initiating and

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<sup>91</sup> Jt. Ex. 30 at 1; Jt. Ex. 31 at 1.

<sup>92</sup> Jt. Ex. 23; Jt. Ex. 23 at 1-2; Tr. at 84, 86-89, 805, 991-96, 1039-40.

<sup>93</sup> Tr. at 111-12, 116-19, 397, 733-34, 1012-14.

<sup>94</sup> Jt. Ex. 23 at 6; Tr. at 168.



maintaining positive social relationships with peers and may exhibit rigid, inflexible, or compulsive behavior.<sup>95</sup>

96. The Autism Spectrum Rating Scales (ASRS) consist of parent and teacher ratings in various behavioral and functional domains specific to diagnosing an autism spectrum disorder. Student's parent, ABA therapist, and two teachers gave total scores in the very elevated range, one teacher gave a total score in the elevated range, and one teacher gave a total score in the slightly elevated range. These results indicated parent and teachers alike were seeing numerous characteristics of autism spectrum disorder. Across settings, Student demonstrated clinically significant characteristics of autism spectrum disorder based on the DSM-5, with parent and teacher ratings suggesting significant difficulty initiating and maintaining social relationships with peers and adults and struggles with demonstrating socially and emotionally reciprocal behavior. Across settings, ratings suggested Student has difficulty regulating Student's emotions and frequently demonstrated rigid and inflexible behavior. At school and home, significant \*\*\* were noted and it was indicated Student used \*\*\* compared to other children Student's age.<sup>96</sup>
97. On the ADOS, Student struggled with back and forth interaction and reciprocity, had poor eye contact, and minimal use of facial expressions. Student's Social Affect Score (\*\*\*) and Restricted and Repetitive Behaviors score (\*\*\*) yielded a total score of \*\*\* and met the ADOS-2 autism cutoff. Student demonstrated a high level of autism spectrum-related symptoms.<sup>97</sup>
98. The NEPSY is a neuropsychological measure. Dr. \*\*\* administered the Social Perception subtest, which is comprised of two subtests. Student achieved an average score on the Affect Recognition subtest. On the Theory of Mind subtest, Student demonstrated significant deficits, suggesting difficulty understanding others' thoughts and feelings. The weaknesses seen on the Theory of Mind subtest correlated with Student's difficulty in engaging in reciprocal interactions on the ADOS.<sup>98</sup>
99. Dr. \*\*\* gave subtests of the Wechsler Intelligence Scale for Children-5th Edition (WISC-V) to identify intellectual strengths and weaknesses. Consistent with previous testing, Student demonstrated average intellectual abilities with average to very high abilities in all areas assessed, including crystallized intelligence, fluid reasoning, short-term memory, long-term storage and retrieval, visual processing, auditory processing, processing speed, and orthographical processing.<sup>99</sup>

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<sup>95</sup> Jt. Ex. 23 at 7; Tr. at 137-38.

<sup>96</sup> Jt. Ex. 23 at 7, 22-27; Tr. at 129-133, 496-500.

<sup>97</sup> Jt. Ex. 23 at 7-8; Tr. at 119-22, 124-26.

<sup>98</sup> Jt. Ex. 23 at 8; Tr. at 108-11, 126-27.

<sup>99</sup> Jt. Ex. 23 at 8.

100. The Kaufman Test of Educational Achievement-3rd Edition (KTEA-3) measures academic achievement through predominantly objective measurements, with written expression measured through structured scoring. Student demonstrated average math skills. Consistent with previous testing, basic reading skills (letter-word identification) fell in the below average range (\*\*\*) percentile). Reading comprehension fell in the average range (\*\*\*) percentile), a slight increase from previous testing. On the KTEA-2 Reading Fluency Composite, word recognition fluency fell in the low range (\*\*\*) percentile), decoding fluency fell in the below average range (\*\*\*) percentile), and silent reading fluency fell in the average range.<sup>100</sup>
101. The KTEA Dyslexia Index looks at characteristics associated with dyslexia. Student achieved an overall standard score of (\*\*\*) percentile). Student performed in the below average range in Nonsense Word Decoding (\*\*\*) percentile). Student's scores fell in the low range in Spelling (\*\*\*) percentile) and Word Recognition Fluency (\*\*\*) percentile). These scores confirmed a high risk of dyslexia.<sup>101</sup>
102. Because the 2019 FIE and 2021 IEE assessed academic achievement using different instruments (WJ-IV ACH and the KTEA), numerical scores cannot be used to determine progress over time. However, valid results on different instruments, including comparison of percentile rankings, can be used to measure skills over time because these tests measure academic achievement at the time of testing in the same areas. Student's percentile rankings in (\*\*\*) skills decreased over time (from (\*\*\*)% in 2018 to (\*\*\*)% in 2021), even with interventions, indicating Student is not mastering the (\*\*\*) rules that are the basis of the (\*\*\*) program. Better progress would be expected given Student's cognitive functioning. As (\*\*\*) is getting harder, Student is not keeping up.<sup>102</sup>
103. Students with dyslexia and students with autism spectrum disorder will often have difficulties with written expression. The KTEA-3 showed significant deficits in written expression (\*\*\*) percentile), with difficulties in forming sentences, capitalization, and correct punctuation. Student did not meet criteria for an SLD in written expression, but this is an area where interventions are needed.<sup>103</sup>
104. The ABAS-3 was completed by Student's father and four teachers. Across settings, Student demonstrated significant deficits in adaptive functioning with most adaptive behaviors rated in the extremely low, low, or below average ranges. Student's adaptive behavior skills were inconsistent with Student's intellectual abilities. A person with an autism spectrum

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<sup>100</sup> Jt. Ex. 23 at 31; Tr. at 99-102.

<sup>101</sup> Jt. Ex. 23 at 31; Tr. at 102-03, 196-97.

<sup>102</sup> Jt. Ex. 19 at 17; Jt. Ex. 23 at 31; Tr. at 106-07, 188-95, 996-99, 1044-46.

<sup>103</sup> Jt. Ex. 23 at 32; Tr. at 140-44, 197-98.

disorder may demonstrate differences between their intellectual ability and adaptive functioning.<sup>104</sup>

105. Pragmatic, or social, language is part of an autism assessment. On standardized measures, Student's pragmatic language scores fell in the average to above average range. However, one-on-one standardized testing may not adequately capture a student's ability to implement pragmatic skills in the classroom and interact with students and teachers. Students on the autism spectrum with average to above average IQ and language abilities may demonstrate average pragmatic language skills in one-on-one testing, but those skills do not generalize to social situations. Student's classroom performance, including data from teachers, showed definite struggles in social situations and interacting with other students.<sup>105</sup>
106. Based on all of the information gathered, Dr. \*\*\* concluded Student met criteria for special education and related services as a student with autism and met DSM-5 criteria for an autism spectrum disorder. Student demonstrated difficulty establishing and maintaining developmentally appropriate, positive social relationships; struggled to use and understand nonverbal and verbal communication effectively in social interactions; has difficulty with social and emotional reciprocity; struggled to adapt appropriately to changes in routine; and exhibited behavioral rigidity and \*\*\* at home and school. Student demonstrated characteristics of autism spectrum disorder, coupled with academic need (as evidenced by social, academic, and behavioral difficulties). Dr. \*\*\* recommended Student be served in special education as a student with a primary disability of autism.<sup>106</sup>
107. Student demonstrated not only impulsive and hyperactive behavior, but also attention deficits. Dr. \*\*\* recommended continuing eligibility for special education and related services as a student with a secondary disability of OHI due to ADHD.<sup>107</sup>
108. Student's behaviors at school are explained by Student's dual eligibilities of autism and OHI for ADHD, rather than inappropriate types of behavior and feelings under normal circumstances supporting emotional disturbance eligibility. These two diagnoses, together, account for some of what the District found was emotionally disturbed behavior. However, Student's behaviors occur secondary to \*\*\* and self-regulation deficits due to autism, coupled with impulsivity and hyperactivity due to ADHD. Student's "core diagnosis" is autism spectrum disorder coupled with ADHD. Student does not qualify for special education and related services as a student with an emotional disturbance.<sup>108</sup>

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<sup>104</sup> Jt. Ex. 23 at 9, 33-37; Tr. at 93, 133-36, 500-04.

<sup>105</sup> Tr. at 153-54, 157-58, 989-91.

<sup>106</sup> Jt. Ex. 23 at 12; Tr. at 138.

<sup>107</sup> Jt. Ex. 23 at 12.

<sup>108</sup> Jt. Ex. 23 at 12-13; Tr. at 138-140, 1015-16.

109. Due to academic deficits in basic reading, reading fluency, reading comprehension, and written expression, Student continued to demonstrate characteristics of dyslexia requiring intervention. Student continued to meet Texas Education Agency criteria as a student with dyslexia. Student demonstrated difficulty with fluent and accurate word reading, decoding, and \*\*\* words, and displayed deficits in writing grammatically correct sentences and editing written sentences and/or passages. Given Student’s dyslexia and resulting educational need, Dr. \*\*\* recommended Student be served in special education with a tertiary eligibility of SLD in basic reading and reading fluency, with accompanying deficits in reading comprehension and written expression. SLD testing utilized the dual discrepancy consistency model of a pattern of strengths and weakness approach. For an SLD, the student must have a deficit in cognitive processing “that is somewhat related to the deficit in academic performance.”<sup>109</sup>
110. The IEE recommended programming continue to include small group intervention with positive behavior supports in the general education and special education classrooms. Other recommendations included: check in/check out; “home base” classroom; calm tone with redirection, overemphasizing positive reinforcement for appropriate behavior; safety plan for \*\*\*; paraprofessional support in the general education classroom and numerous instructional accommodations. Dr. \*\*\* recommended continued counseling services for a minimum of \*\*\* minutes per week, continued \*\*\* training for a minimum of \*\*\* minutes weekly, in-home parent training, and consideration of ESY. Some recommendations were already reflected in Student’s IEP. Dr. \*\*\* opined that Student’s program had “many strengths,” including Student’s \*\*\* program.<sup>110</sup>
111. The District uses \*\*\*, a program created by the Region IV Educational Services Center, as its general education dyslexia program. Student received dyslexia instruction by a Reading Intervention teacher trained in \*\*\* during the 2020-21 and 2021-22 school years for \*\*\* minutes \*\*\* a week, which is consistent with program guidelines.<sup>111</sup>

### **2021-22 School Year (\*\*\*) Grade)**

112. Student’s ARD Committee convened on September \*\*\*, 2021, to consider the IEEs and the District’s June 2021 FBA. Parents were accompanied by an advocate. Dr. \*\*\* did not attend.<sup>112</sup>

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<sup>109</sup> Jt. Ex. 23 at 8, 13; Tr. at 158-59.

<sup>110</sup> Jt. Ex. 1 at 24; Jt. Ex. 23 at 13-15; Tr. at 1017-18.

<sup>111</sup> R. Ex. 2 at 51; Tr. at 862, 903, 925, 950.

<sup>112</sup> Jt. Ex. 1; Jt. Ex. 1 at 22, 29; Tr. at 663.

113. The ARD Committee updated Student’s PLAAFPs to include information about current behavioral supports and strategies, including a new point system where Student chooses rewards and fills out a point card related to targeted behaviors in Student’s BIP, providing a visual and self-reflective monitoring system of Student’s behavior.<sup>113</sup>
114. The ARD Committee considered the Speech and Language IEE. Student showed strengths in receptive and expressive language, voice, fluency, and articulation. Although pragmatic language scores and questionnaire data revealed average ability, Student had recognized difficulties in speaking contexts involving multiple listeners and/or communication partners. Recommendations included increased counseling services to address interpersonal communication and group \*\*\*. Student did not meet eligibility criteria as a student with a speech impairment.<sup>114</sup>
115. The ARD Committee considered the OT IEE, completed in February 2021. On \*\*\* skills testing, Student performed in the below average range with an age equivalent of \*\*\*. Student had difficulty \*\*\*. The OT IEE evaluated Student’s \*\*\* patterns using the \*\*\* Profile 2. Student had difficulty with \*\*\* processing for appropriate learning and behavior, including registering and modulating input from multiple \*\*\* channels, making it difficult for Student to respond appropriately when overloaded with too much \*\*\* information. Student required school-based OT to benefit from Student’s educational program, and the evaluator recommended OT services \*\*\* minutes a week to address deficits in \*\*\* skills and \*\*\* processing. Other recommendations included a \*\*\* and general \*\*\* classroom strategies to help Student process \*\*\* information.<sup>115</sup>
116. The ARD Committee considered the \*\*\* IEE and disagreed with its conclusion that Student met criteria as a student with autism. The District did not consider the scores on the ADOS because it was not normed with use of COVID-19 safety measures and testing was conducted with a plexiglass shield. However, it was appropriate to score the assessment because it was not conducted with a plexiglass shield between the evaluator and Student. The District also incorrectly interpreted the results of the ASRS on the \*\*\* IEE, indicating certain teachers did not identify characteristics of autism, when all raters did.<sup>116</sup>
117. The District disagreed with Dr. \*\*\*’s conclusion regarding SLD eligibility because Student did not demonstrate cognitive weaknesses linked to Student’s academic weaknesses in basic reading and written expression.<sup>117</sup>

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<sup>113</sup> Jt. Ex. 1 at 2-3.

<sup>114</sup> Jt. Ex. 25; Jt. Ex. 25 at 21-22.

<sup>115</sup> Jt. Ex. 24; Jt. Ex. 24 at 1-11.

<sup>116</sup> Jt. Ex. 1 at 23-24; Tr. at 122-23, 128, 150-52.

<sup>117</sup> Jt. Ex. 1 at 25.

118. Student's Schedule of Services called for instruction in the general education setting for all subjects, with \*\*\* minutes per week of in class behavior support from \*\*\* program staff per subject. \*\*\* instruction continued at \*\*\* minutes per week in the \*\*\* Classroom. Counseling was increased to \*\*\* minutes per week. The ARD Committee considered the OT IEE recommendation of \*\*\* minutes of weekly OT services and did not adjust Student's OT time or otherwise address the identified deficits in \*\*\* skills.<sup>118</sup>
119. Student's BIP was updated based on the June 2021 FBA to target behaviors of verbal aggression/physical aggression/\*\*\* behavior, noncompliance/task refusal, and \*\*\*.<sup>119</sup>
120. The ARD Committee agreed to parental suggestions for facilitating measurement of IEP goals by documenting Student's performance daily rather than weekly. Accommodations were continued, with the addition of an accommodation for reminders and/or pre-warning of changes in routine.<sup>120</sup>
121. Parents disagreed with Student's IEP. The District provided Prior Written Notice on September \*\*\*, 2021.<sup>121</sup>
122. During the first \*\*\* weeks of the 2021-22 school year, Student achieved good grades: \*\*\*.<sup>122</sup>
123. Student's \*\*\* program teacher since August 2021 is an experienced certified special education teacher. She meets Student at the bus and works with Student throughout the day, providing \*\*\* training and support in the general education classroom. Student has made "some progress" feeling comfortable using the \*\*\* classroom. Despite working well with Student's \*\*\* program teacher and some successes, Student's behavioral struggles have continued during the 2021-22 school year, with continued classroom disruption, \*\*\*. Student has good days without incidents and other days where significant behaviors are present.<sup>123</sup>

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<sup>118</sup> Jt. Ex. 1 at 18-19, 24.

<sup>119</sup> Jt. Ex. 1 at 27.

<sup>120</sup> Jt. Ex. 1 at 7-10, 12.

<sup>121</sup> Jt. Ex. 1 at 28, 30-31.

<sup>122</sup> Jt. Ex. 30 at 1.

<sup>123</sup> Jt. Ex. 33 at 1-3; P. Ex. 6; Tr. at 908-11, 917-18.

124. According to the behavioral data provided to Parents, Student missed approximately \*\*\* minutes, or \*\*\* hours, of instructional time due to behaviors during the fall semester of the 2021-22 school year (August \*\*\*, 2021 – November \*\*\*, 2021).<sup>124</sup>
125. Student was restrained on \*\*\*, 2021. Prior to the restraint, Student was \*\*\* and Student's behavior presented a safety-related emergency. Less restrictive interventions, including providing choices and verbal redirection, were attempted without success prior to the use of restraint.<sup>125</sup>
126. Student has not made behavioral progress, with an increase in inappropriate behaviors over time and current behaviors impacting both Student's ability to make progress in the academic environment and other students. Student requires intensive practice in the environment where behaviors occur, ongoing contact and collaboration with a behavioral analyst, and an educational program incorporating principles of ABA.<sup>126</sup>
127. Even though the behaviors may be overlapping, the neurologically-based needs of an individual with autism are significantly different than the emotionally-based needs a student with an emotional disturbance. Misclassification hinders the ability to provide effective interventions specific to autism. The interventions Student is receiving are not tailored to Student's autism-related needs.<sup>127</sup>
128. Student's rate of progress in reading is limited or stagnant and inadequate in light of Student's cognitive ability. Academically, despite average or above average intelligence, Student continues to exhibit below average abilities in reading and Student's performance is below expectations.<sup>128</sup>
129. The District provided Parents a Notice of Procedural Safeguards in September 2016, February 2018, February 2019, September 2019, December 2019, July 2020, August 2020, December 2020, April 2021, and September 2021.<sup>129</sup>

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<sup>124</sup> P. Ex. 7; Tr. at 550-55.

<sup>125</sup> Jt. Ex. 33 at 2, 4-5.

<sup>126</sup> Tr. at 145-47, 298, 321-24, 507-10, 1034-35, 1046-47.

<sup>127</sup> Tr. at 505-08.

<sup>128</sup> Tr. at 215, 1035.

<sup>129</sup> Jt. Ex. 1 at 30-31, 33; Jt. Ex. 3 at 20, 23; Jt. Ex. 4 at 22-23; Jt. Ex. 6 at 9; Jt. Ex. 7 at 17, 21, 30; Jt. Ex. 12 at 13, 15, 18; Jt. Ex. 13 at 13, 16; Jt. Ex. 17 at 5; Jt. Ex. 20 at 58; P. Ex. 1 at 1240-41.

## VI. DISCUSSION

### A. Burden of Proof

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

### B. Statute of Limitations

The parties disagree as to the timeframe in which causes of action can be recognized in this case. Petitioner filed Petitioner's due process hearing request on July 29, 2021, alleging the District denied Student a FAPE during at least the 2019-20 and 2020-21 school years. Respondent raised the affirmative defense of the statute of limitations and asserts that claims arising before July 29, 2020, are time-barred by the one-year statute of limitations. Petitioner asserts that one or more of the two exceptions to the one-year statute of limitations apply in this case and, therefore, claims that arose before July 29, 2020, are not time-barred and should be considered.

In Texas, a parent must request a due process hearing within one year of the date the parent knew or should have known about the alleged action that serves as the basis for the complaint. 19 Tex. Admin. Code § 89.1151(c). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

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



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

20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); 19 Tex. Admin. Code § 89.1151(d).

The IDEA statute of limitations period “is not subject to equitable tolling.” *Wood v. Katy Indep. Sch. Dist.*, 163 F. Supp. 3d 396, 409 (S.D. Tex. 2015). Parents bear the burden of establishing an exception to the one-year limitations period. *G.I. v. Lewisville Indep. Sch. Dist.*, 2013 WL 4523581, \*8 (E.D. Tex. 2013).

### **1. Misrepresentation Exception**

Neither the IDEA nor its implementing regulations clarify the scope of what constitutes a “misrepresentation” under the first exception to the statute of limitations. The United States Department of Education elected to leave it to hearing officers to decide on a case-by-case basis the factors that establish whether a parent knew or should have known about the action that is the basis of the hearing request. Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46706 (2006).

The alleged misrepresentation must be intentional or flagrant. Petitioner must establish not that the school district’s educational program was objectively inappropriate, but instead that the school district subjectively determined Student was not receiving a FAPE and intentionally and knowingly misrepresented that fact to Student’s parents. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 246 (3d Cir. 2012) (student could not show misrepresentations caused failure to request a hearing on time as teachers did not intentionally or knowingly mislead parents about extent of academic and behavioral issues or efficacy of solutions and programs attempted). *See also Evan H. ex rel. Kosta H. v. Unionville-Chadds Ford Sch. Dist.*, 2008 WL 4791634, at \*6 (E.D. Pa. 2008).

Furthermore, not every misrepresentation falls under the exception. Instead, the misrepresentation must be such that it prevented the parent from requesting a due process hearing regarding claims that would otherwise be time-barred. The misrepresentation also must indicate the school district has resolved the issues forming the basis of the complaint. *C.H. v. Northwest Indep. Sch. Dist.*, 815 F. Supp. 2d 977, 984-85 (E.D. Tex. 2011).

Petitioner argues the District misrepresented Student would receive special education services for dyslexia in February 2018, pointing to Section 504 paperwork indicating Student would receive special education for speech and dyslexia. While this is not accurate, Parents participated in an ARD Committee meeting the same day where Student's eligibility for services as student with a speech impairment only was established. Student's February 2018 IEP, as well as each subsequent IEP, reflected Student would receive general education dyslexia services. The record does not support Parents' contention of a misrepresentation about which program served Student, much less an intentional one that prevented them from filing.

Petitioner also argues the District misrepresented in the 2019 FIE that Student's behavior had only manifested itself in the previous four months. While the record establishes behavioral issues prior to the 2019-20 school year, there is no evidence to support an intentional act by the District to deny Student a FAPE. Indeed, the 2019 FIE found Student eligible as a student with an emotional disturbance.

Petitioner points to various other alleged misrepresentations by the District. None support a subjective determination by the District to deny Student Student's right to a FAPE or an intentional misrepresentation that prevented a timely filing. The Hearing Officer concludes the misrepresentation exception does not apply.

## **2. Withholding Exception**

Petitioner also argues the limitations period should not apply because the District withheld information about Student’s dyslexia program, preventing them from providing informed consent to Student’s special education and related services. Parental consent is required to conduct an evaluation and before services commence. 34 C.F.R. § 300.300(a), (b). Student has never received special education as a student with an SLD under the IDEA. Until Student qualifies for services as a student with an SLD, informed consent to those services under the IDEA is not required.

Petitioner also argues the District withheld information about its “nondescript” Texas dyslexia services during the 2019-20 and 2020-21 school years. Even if true, this exception applies when a school district withholds information required to be provided under the IDEA. The Hearing Officer declines to construe the withholding exception under the IDEA as applicable to curriculum or programming information for Section 504 services.

Parents were also provided Notice of Procedural Safeguards on numerous occasions between 2016 and 2021. This evidence supports the reasonable inference of actual or constructive knowledge of parent and student procedural rights, including the right to file a due process hearing request. In addition, the District provided Prior Written Notice at all times required under the IDEA. The Hearing Officer concludes the withholding exception does not apply.

The one-year statute of limitations applies in this case and Petitioner’s claims are limited to only those that arose within one year of filing Petitioner’s due process hearing request. The Complaint was filed on July 29, 2021. Unless Petitioner can prove an exception to the statute of limitations rule, claims arising prior to one year before the date of filing are time-barred. *Richard R.R.*, 567 F. Supp. 2d at 944; *Hooker v. Dallas Indep. Sch. Dist.*, 2010 WL 4025776, \*11 (N.D. Tex. 2010); *T.C. v. Lewisville Indep. Sch. Dist.*, 2016 WL 705930, \*9 (E.D. Tex. 2016). Petitioner did not prove an exception applies. This decision will therefore consider only violations of the IDEA that accrued after July 29, 2020.

**C. Duty to Provide FAPE**

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. Once a student is determined to be eligible for special education, an IEP must be developed. The District's mandate to design and deliver an IEP falls under its broader statutory obligation to furnish a FAPE that emphasizes special education and related services designed to meet Student's unique needs and prepare Student for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209 (5th Cir. 2019). The District is responsible for providing, at public expense, the specially designed instruction and support services necessary to meet Student's unique needs and confer an educational benefit. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

**D. Individualized Education Program Requirements**

In developing an IEP, the ARD Committee must consider strengths, parental concerns for enhancing the student's education, results of the most recent evaluation data, academic, developmental, and functional needs. The IEP must include a statement of PLAAFPs, including how the student's disability affects involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1)(i). The ARD Committee must review, at least annually, a student's IEP, and make any needed revisions to address lack of expected progress based on re-evaluations, parental information, or the student's anticipated needs, including behavioral needs. 34 C.F.R. § 300.324(b).

An IEP does not need to be the best possible one or designed to maximize a student's potential. However, a school district must provide a student with meaningful educational benefit—and one that is likely to produce progress, not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576, 583 (5th Cir. 2009). The inquiry here is whether the IEP developed and implemented

by the District was reasonably calculated to enable Student to make progress appropriate in light of Student’s unique circumstances.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

**E. Evaluation and Identification under the IDEA**

Petitioner alleges the District failed to evaluate and identify Student as eligible for special education as a student with autism and the SLD of dyslexia in violation of its Child Find duty. School districts have an affirmative obligation under Child Find to identify, locate, and evaluate each student with a disability who needs special education services as a result of that disability. 34 C.F.R. § 300.111(a)(1). The Child Find regulations, however, provide that “[n]othing in this Act requires that children be classified by their disability so long as each child who has a disability... and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.” 34 C.F.R. § 300.111(d).

A school district that has determined a student is eligible for special education and provided the student an IEP has satisfied its Child Find obligations even if the parties disagree over the correct eligibility condition. *See Lauren C. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 370-71 (5th Cir. 2018) (quoting District Court’s conclusion that “a specific classification or label is not required as part of the Child Find obligations or as part of the IDEA itself; rather, the relevant inquiry is whether [the student] received a FAPE.”)

Here, Student has been eligible for services since February 2018. The District satisfied its Child Find obligation at that time. Petitioner’s claim is thus appropriately construed as a challenge the District’s failure to properly evaluate and identify Student’s eligibility under the IDEA, rather than a Child Find claim, and the Hearing Officer analyzes this claim as such. Because Student’s eligibility under the IDEA has been established, the relevant inquiry is whether the District provided Student a FAPE. *Id.*

## **F. Eligibility Determinations under the IDEA**

An eligibility determination is made on the basis of an evaluation that meets IDEA criteria. 34 C.F.R. §§ 300.8(a), 300.304-.311; 19 Tex. Admin. Code § 89.1040(b). Assessments and other evaluations must assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

An evaluation must also be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). The school district should also consider a student's academic, behavioral, and social progress in determining whether the student needs special education for purposes of IDEA eligibility. *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007); *D.L. v. Clear Creek Indep. Sch. Dist.*, 117 LRP 22536 (5th Cir. 2017) (unpublished) (*per curiam*).

Eligibility for services under the IDEA is a two-pronged inquiry: (1) whether the student has a qualifying disability, and (2) whether, by reason of that disability, the student needs IDEA services. 20 U.S.C. §§ 1401(3); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 208 (5th Cir. 2019). In making an eligibility determination, the ARD committee must “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior.” 34 C.F.R. § 300.306(c)(1)(i).

### **1. Autism**

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental

change or change in daily routines, and unusual responses to \*\*\* experiences. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. § 300.8(c)(1)(i)-(ii); 19 Tex. Admin. Code § 89.1040(c)(1).

A preponderance of the evidence showed that the District's 2019 FIE was not sufficiently comprehensive in the area of autism and its conclusion Student did not meet eligibility criteria was not supported by its own data. Despite two recent private evaluations conducted in 2019 diagnosing Student with an autism spectrum disorder, the 2019 FIE included a single measure specific to autism, the CARS-2 HF. This evaluation, however, was completed before the \*\*\* completed by the occupational therapist showed Student had significant \*\*\* processing difficulties at school. Moreover, the \*\*\* results contradict the finding that Student did not experience significant \*\*\* issues characteristic of autism underlying its conclusion that Student did not meet autism eligibility criteria.

In finding Student did not meet autism eligibility criteria, the 2019 FIE indicated Student was capable of developing and maintaining friendships. This conclusion was not supported by considerable data gathered during the evaluation and Student's substantial history of struggles in social interactions with peers and adults at school. While parental reports and ratings indicated fewer social difficulties, teacher ratings on the BASC-3 and Conners-3 indicated substantial deficits in \*\*\* and peer relations. In addition, while Student's pragmatic language skills on District testing, including the 2019 FIE, appeared adequate, Dr. \*\*\* credibly explained how Student's cognitive capability explains these scores. This explanation is supported by Student's demonstrated inability to generalize pragmatic language skills and more consistent with Student's ongoing and pronounced social struggles. Notably, three teachers rated Student in the clinically significant range on the BASC-3 Autism Probability Index showing Student demonstrated impaired emotional/social reciprocation and rigidly adhered to routines/rituals.

In addition, the LSSP relied on \*\*\*/\*\*\* diagnoses that predated \*\*\* as well as an ability to interact socially with students and a lack of \*\*\* seeking indicators when she decided not to

conduct additional testing, such as the ADOS, in this area. While no particular assessment is required—and the District was not required to conduct the ADOS—a single measure of a far more recent diagnosis was not sufficient to assess Student’s needs.

Further, in determining Student’s eligibility in 2019, the LSSP attributed Student’s significant social deficits to “cognitive distortions,” but did not assess cognitive distortion and this conclusion was reached without data to support it. In contrast, in addition to the comprehensive assessment of Student’s characteristics of autism, Dr. \*\*\* thoroughly and credibly explained her conclusion as to why autism, rather than an emotional disturbance, combined with ADHD, are Student’s “core” diagnoses.

The \*\*\* IEE is the most recent and comprehensive assessment of Student’s characteristics of autism and the impact of Student’s autism on Student’s performance and functioning at school. The IEE included multiple of sources of data, including autism-specific assessments not previously performed by the District and additional measures. Dr. \*\*\* personally conducted the testing, whereas the District’s expert never met Student; did not evaluate Student; reviewed a limited set of records; did not review Dr. \*\*\*’s testing protocols; and appeared unfamiliar with certain aspects of Student’s program, including Student’s eligibility history.

In determining Student did not meet criteria as a student with autism in September 2021, the District inappropriately discounted the ADOS-2 administered by Dr. \*\*\* due to a concern over scoring validity related to the use of a plexiglass shield during testing. However, Dr. \*\*\* credibly confirmed during her testimony describing her evaluation room that she did not conduct the evaluation with a plexiglass shield between herself and Student. Further, the District misinterpreted the IEE as to the ASRS findings.

Finally, Student’s autism adversely affects Student’s educational performance.



The weight of the credible evidence established that Student meets and has met the criteria as a student with autism under the IDEA since 2019, rather than as a student with an emotional disturbance. Petitioner challenges the District’s failure to appropriately classify Student but also more broadly challenges whether Student’s IEP was reasonably calculated to confer educational benefit as a result. The accrual of this claim depends on a fact-intensive inquiry of when the alleged deficiency became sufficiently apparent that Parents knew or should have known of the problem, including from a child’s lack of progress under the IEP. *R.S. v. Highland Park Indep. Sch. Dist.*, 951 F.3d 319, 329 (5th Cir. 2020). Here, with disruption of in-person learning due to COVID-19 and Student’s participation in ABA therapy during the fall of 2020, this deficiency became sufficiently apparent after Student returned to school in December 2020 and experienced significant behavioral challenges, at which point Parents became aware the program was not serving Student’s autism-related behavioral needs. Since Parents filed within one year of December 2020, this claim is within the limitations period. Further, because the District should have found Student eligible under that classification in December 2019 and still has not done so, Student’s injury is ongoing and falls within the limitations period.

As discussed, the IDEA does not require that an eligible Student be classified by a particular disability and instead focuses on the appropriateness of the educational program. However, contrary to the District’s expert’s opinion that distinguishing between autism and emotional disturbance is like “splitting hairs,” Petitioner’s expert, Dr. \*\*\*, offered a more reasoned basis for the importance of appropriate classification—that misclassification in this case impacted Student’s programming because it deprived Student of behavioral interventions specific to autism that Student needs to make progress. Here, the weight of the credible evidence supports the conclusion that proper classification indeed matters and that Student needs interventions specific to autism to make behavioral progress.

Finally, in addition to informing appropriate behavioral interventions, eligibility as a student with autism entitles Student to consideration of certain autism-related educational needs. In Texas, the ARD Committee must consider (and when needed, address in the student’s IEP) specific

interventions and supports, including teaching strategies based on peer-reviewed, research-based practices such as discrete trial training, visual supports, ABA, structured learning, augmentative communication, or \*\*\* training. 19 Tex. Admin. Code § 89.1055(e)(1)-(11).

## **2. Specific Learning Disability**

Petitioner alleges the District failed to evaluate and identify Student as eligible for special education as a student with the SLD of dyslexia. Dyslexia is not one of the thirteen categories of disabilities identified under the IDEA. Rather, the IDEA defines an SLD as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to . . . read, write, [or] spell . . . , including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental dysphasia.” 34 C.F.R. § 300.8(c)(10).

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

(iii) meets one of the following criteria:

(I) does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in clause (ii)(I)-(VIII) of this subparagraph when using a process based on the student's response to scientific, research-based intervention; or

(II) exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, state-approved grade-level standards, or intellectual development that is determined to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 34 C.F.R. §300.304 and §300.305.

19 Tex. Admin. Code § 89.1040(c)(9).

A student may qualify with a SLD in one or more of eight areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving. 34 C.F.R. § 300.309(a)(1); 19 Tex. Admin. Code § 89.1040(c)(9)(B)(ii).

It is undisputed Student has dyslexia and Student demonstrates deficits in achievement as a result. The District, however, disagrees with Dr. \*\*\*'s conclusion Student is eligible as Student with an SLD under the IDEA because, as the District's expert explained, Student did not show a pattern of weaknesses from a cognitive perspective on the IEE's cognitive testing. Dr. \*\*\* confirmed a student must have a deficit in cognitive processing related to the deficits in academic performance. Here, Student demonstrates deficits in academic achievement in reading and written expression. However, Student's cognitive testing across multiple evaluations consistently showed average or above average functioning, including Student's performance on the WISC-V in 2021. With agreement among the experts that a deficit in cognition is required to establish a pattern of strengths and weaknesses for purposes of eligibility and absent further explanation from Dr. \*\*\* of her finding a pattern exists, a preponderance of the evidence did not establish Student meets criteria as a student with an SLD.

Petitioner alleges the District failed to develop an IEP based on an evaluation in all suspected areas of disability. Here, the District's 2019 FIE failed to include an evaluation of Student's eligibility as a student with an SLD and instead relied on Student's 2018 dyslexia assessment in continuing Student's Section 504 services. This was not sufficient given Student's history of dyslexia, and standard scores on achievement testing demonstrating continued limited proficiency in basic reading skill and reading fluency. A school district's failure to comprehensively assess a student in all areas related to a suspected disability can result in a procedural violation of the IDEA. *See Amanda P. v. Copperas Cove Indep. Sch. Dist.*, 2020 WL 1866876, \*4-5 (W.D. Tex. 2020); *Dawn G.*, 2014 WL 1356084, at \*6; *see also* 34 C.F.R. §§ 300.304(c).

Unlike the 2019 evaluation as it related to autism, the District's failure to appropriately consider or evaluate Student for an SLD in its 2019 FIE prevented this deficiency from being sufficiently apparent at that time. Instead, this claim accrued in April 2021 when the \*\*\* IEE supporting eligibility was provided. This claim is thus within the one-year limitations period.

## **G. FAPE**

### **The Four-Factor Test**

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

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

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (citing *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017)). These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

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

In meeting the obligation to provide a student with a disability a FAPE, his or her 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. 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 and implemented by the school district was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Andrew F.*, 137 S. Ct. at 999.

**a.       \*\*\***

Student has longstanding \*\*\* deficits, including peer conflict and difficulty engaging appropriately with other students and adults. The 2019 FIE identified substantial difficulties with social interactions and recommended \*\*\* training. Student's December 2019 IEP included a \*\*\* goal and called for \*\*\* minutes per week of \*\*\* training. Student's December 2020 IEP included two \*\*\* goals, but reduced Student's \*\*\* instruction to \*\*\* minutes per week. In April 2021, \*\*\* training was increased to \*\*\* minutes per week.

While the October 2020 Speech and Language IEE did not find that Student had a speech impairment, it recommended increased \*\*\* interventions. Student's placement change to the \*\*\* program resulted in increased \*\*\* support throughout the day and real time interventions to address areas of concerns and reinforce appropriate interactions. Overall, the evidence showed the District has been responsive to Student's needs in this area.

**b. \*\*\* Needs**

The 2019 FIE identified \*\*\* processing deficits. Student has demonstrated \*\*\* differences which interfere with Student's ability to benefit from instruction and self-regulate, and Student requires implementation of \*\*\* strategies throughout the school day. Student's December 2019 IEP and subsequent IEPs included interventions to address Student's \*\*\* needs at school, including access to \*\*\* supports and OT as a related service. \*\*\*\*\* were incorporated into two behavior goals in Student's December 2019, a \*\*\* goal in Student's December 2020 IEP, and a behavior goal targeting compliance and task completion in September 2021.

In addition to confirming Student's need for \*\*\* support at school, the October 2020 OT evaluation identified \*\*\* deficits and skills well below age-level expectations. No additional OT services were recommended by the District to address this newly identified deficit, which went unaddressed in Student's September 2021 IEP.

**c. Counseling**

The 2019 IEP recommended counseling. Student's December 2019 IEP included three counseling goals and called for counseling (\*\*\* minutes for 12 out of 36 instructional weeks). Student's December 2020 IEP included two counseling goals and increased Student's counseling services to \*\*\* minutes per week and these services were increased to \*\*\* minutes per week in September 2021. Overall, the evidence showed the District has been responsive to Student's needs in this area.

**d. Behavior**

Appropriate behavioral interventions are important components of FAPE. A need for special education and related services is not limited to academics, but includes behavioral progress and learning appropriate \*\*\*. *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR 185 (2002). For a student whose behavior impedes his or her learning or that of others, the IEP must consider positive

behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i).

Student has longstanding behavioral issues at school, with certain behaviors dating back to \*\*\*. However, the evidence showed Student’s behavior was relatively well-managed through accommodations and classroom supports until \*\*\* grade (2019-20 school year), when Student’s behavioral needs increased.

The 2019 FIE included an FBA and recommended a BIP. Student’s December 2019 IEP and subsequent IEPs included numerous positive behavioral supports and interventions and included one or more behavior goals. While Student’s IEP included certain strategies specific to students with autism and numerous other interventions, Student failed to respond to these interventions as evidenced by continued and significant behavioral struggles at school necessitating a more restrictive placement and use of restraint.

The IDEA does not specifically address the use of restraint. Students with disabilities may be restrained consistent with state law without violating a student’s IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 798 (5th Cir. 2020). State regulations prescribe when and how restraint of students with disabilities may occur in schools and mandate training for personnel likely to use restraint, to include prevention and de-escalation techniques and alternatives to restraint. 19 Tex. Admin. Code § 89.1053(d). Restraint of students with disabilities in Texas is limited to behavioral emergencies: situations where a student's behavior poses a threat of imminent, serious physical harm to self or others; or imminent, serious property destruction. 19 Tex. Admin. Code § 89.1053(b). When a student with a disability is restrained, his or her ARD Committee should consider the impact of the student’s behavior on learning and whether revisions to his or her BIP are necessary. 19 Tex. Admin. Code § 89.1053(e)(4).

Petitioner alleges the District denied Student a FAPE through the inappropriate use of restraint. Student was restrained on \*\*\* occasions during the 2020-21 school year and \*\*\* during

the 2021-22 school year. The evidence showed the \*\*\* 2021 and \*\*\* 2021 restraints, as well as the restraint occurring in \*\*\* 2021, were in response to a behavioral emergency and that less restrictive interventions were attempted before the restraints occurred.

The evidence showed, however, the use of restraint by a District police officer in \*\*\* 2021 was not in response to a behavioral emergency and did not warrant the use of restraint. The \*\*\* 2021 restraint thus violated state regulations. Petitioner specifically alleges the District failed to manage Student’s behavior, thereby resulting in interventions by District police officers lacking sufficient training in working with students with disabilities. While noting the \*\*\* 2021 use of restraint was inappropriate, District law enforcement personnel receive training on de-escalation and working with students with disabilities. Petitioner presented no evidence to show that the restraint was due to insufficient training.

While the \*\*\*, 2021 restraint complied with state law, this was a significant and dangerous instance of \*\*\*, a behavior not addressed in Student’s December 2020 IEP. Student’s ARD Committee did not convene to discuss Student’s program until April \*\*\*, 2021—more than 11 weeks later—during which time Student was restrained again in the absence of a behavioral emergency and continued to struggle behaviorally, with an increase in the severity and frequency of established behaviors and emerging behaviors including \*\*\*. Student’s behavioral performance at school during the spring semester of the 2020-21 school year and the use of restraint as an intervention warranted a more urgent response by the District. An IEP goal was added to address \*\*\* in April 2021, but Student’s BIP was not updated to address \*\*\*, physical aggression, or \*\*\* behavior until September 2021.

**e. Extended School Year Services**

Parents contend that Student should have received ESY services during the 2020 and 2021 summers. The Hearing Officer considers only Petitioner’s claim for the summer of 2021 because Student’s ARD Committee considered and did not recommend ESY services at the December



2019 meeting. Petitioner’s ESY claim for the summer of 2020 accrued at that time and is outside the limitations period.

State and federal regulations require the ARD Committee to determine a student’s need for ESY services. 34 C.F.R. § 300.106; 19 Tex. Admin. Code § 89.1065. ESY is necessary when benefits accrued to the child during the regular school year will be significantly jeopardized if the child is not provided an educational program during the summer months. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). Under state regulations, ESY services must be provided when a student has “exhibited, or reasonably may be expected to exhibit, severe or substantial regression” in one or more critical areas addressed in Student’s IEP “that cannot be recouped within a reasonable period of time.” 19 Tex. Admin. Code § 89.1065(2). “Severe or substantial regression means that the student will be unable to maintain one or more acquired critical skills in the absence of ESY services.” *Id.* The reasonable period of time for recoupment must be determined on the basis of needs identified in each student’s IEP, but in any case, must not exceed eight weeks. 19 Tex. Admin. Code § 89.1065(3).

The evidence showed the District failed to appropriately consider Student’s need for ESY services. Parents requested ESY services at ARD Committee meetings in December 2020 and April 2021. The District deferred consideration of ESY pending further data collection in both instances and agreed to reconvene following the April 2021 but failed to do so. While Parents waived a reconvene ARD to further consider Student’s program until the IEEs were complete, deliberations clearly document a promise to reconvene to discuss ESY services. In response to Parents’ request to meet on this topic, the District instead incorrectly advised the parent ESY services were not recommended despite data showing Student may lose skills and regress without continued behavioral supports. Student’s IEP was not individualized on the basis of assessment and performance as to ESY services.

Despite being tailored to meet Student’s identified needs in several areas, the District’s slow response to increased behavioral needs during 2020-21 school year, use of restraint violating

state regulations, failure to consider and provide ESY services, and failure to modify Student's IEP to address \*\*\* skill deficits favor Petitioner on this factor. The Hearing Officer concludes Student's program was not individualized on the basis of assessment and performance.

## **2. Least Restrictive Environment**

The IDEA requires that a student with a disability must be educated with peers without disabilities 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).

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).

The evidence showed that Student's program was administered in the least restrictive environment. Student is cognitively adept, with average to above average intelligence. Despite requiring extensive behavioral supports, Student's IEPs have always provided for academic instruction in the general education classroom, and Student has access to the grade level instruction and academic rigor warranted by Student's intellect. Student also participates in electives with Student's classmates.

Student's placement in the \*\*\* program—where Student has access to direct behavioral support in all classes and throughout the day—is consistent with Student's significant behavioral

needs. In addition, the \*\*\* program placement is consistent with Dr. \*\*\*'s recommendation of continued small group interventions programming in the general education and special education classrooms.

Overall, the evidence showed that the supplemental aids and services Student receives support Student's continued placement in the general education setting for academic and other instruction to the maximum extent appropriate and that Student is educated with typically developing peers to the maximum extent appropriate.

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

The IDEA contemplates a collaborative process between a school district and the parents of a student with a disability. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, \*27 (S.D. Tex. 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). As key stakeholders, parents, school administrators, and teachers familiar with the student's needs should all be involved in the "highly coordinated and collaborat[ive] effort" of developing a student's IEP. *Michael F.*, 118 F.3d at 253. The IDEA, however, does not require a school district, in collaborating with a parent, to accede to all of the parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657 (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 the parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence showed numerous instances of collaboration with Parents. Parents were present at each ARD Committee meeting, given the opportunity to raise concerns and ask questions, and actively participated in developing Student's program despite certain disagreements over its content. The District convened ARD Committee meetings at Parents' request. The record

also reflected extensive communication between the District and Parents and efforts by District personnel to address questions and concerns outside the ARD Committee process.

The District incorporated parental concerns at key transition points. The District agreed to Parents' proposal to gradually transition Student to in-person learning after Student finished Student's ABA therapy program. The District BCBA consulted with Student's ABA therapist regarding behavioral strategies when Student returned to school and provided Student's teachers this information. In addition, despite its position Student would benefit from starting the \*\*\* program immediately, the District listened to parental concerns and agreed to Parents' proposal to begin services \*\*\* a week for the remainder of the 2020-21 school year.

The evidence also showed certain failures to work collaboratively with key stakeholders. Notably, the District did not consult with Dr. \*\*\* or hear from her at the September \*\*\*, 2021 ARD Committee meeting where the IEE was discussed. It is reasonable to infer that doing so would have cleared up concerns regarding the ADOS administration and afforded due weight to her opinion regarding Student's eligibility and services.

In addition, the District's failure to reconvene the April 2021 ARD Committee to consider ESY services is a procedural violation of the IDEA that significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE and violated the IDEA. 34 C.F.R. § 300.513(a)(2)(ii).

Despite evidence of collaborative efforts, the District's handling of Parents' request for ESY was not handled in good faith and impacted Student's receipt of needed services. This significant error not only resulted in a procedural violation, but fell well short of the collaborative effort contemplated by the IDEA. The Hearing Officer concludes this factor favors Petitioner.

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

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

For Student, appropriately addressing Student's behaviors is key to Student's academic and non-academic progress. Consistent with the credible testimony of both Dr. \*\*\* and Dr. \*\*\*, the evidence showed Student did not make behavioral progress and experienced behavioral regression. Despite intensive ABA therapy services in the fall of 2020, Student returned to school and Student's behaviors intensified and became more frequent. Student's behavior impacted other students and Student has not progressed socially despite receipt of considerable \*\*\* training.

Student's need for a more restrictive placement in the \*\*\* program on another campus, while appropriate, evidences the extent of this behavioral struggles between December 2020 and April 2021, when this change was proposed. While this placement is appropriate for Student and offers the intensive behavioral support Student requires, its necessity is consistent with Student's continued and significant behavioral struggles at school.

The evidence further showed that, despite behavioral support by Student's \*\*\* program teacher who is a certified special education teacher, Student continues to struggle behaviorally and has missed considerable educational time during the 2021-22 school year due to behaviors.

Assessing Student's academic progress is more nuanced, in part because Student's IEP contains no academic goals by which to measure Student's success or lack thereof. Despite behavioral struggles, Student achieved passing grades during the 2019-20 and 2020-21 school years, and Student's grades reflect Student's ability to make progress in grade level curriculum. Student's STAAR testing results also show Student is making progress in the grade level curriculum, with approaching grade-level scores in reading and math in 2019. In 2021, Student was still approaching standards in \*\*\*, but met standards in \*\*\*.

Student’s dyslexia impacts Student’s academic achievement. However, District witnesses’ largely conclusory testimony that Student is making progress and acquiring reading skills in Student’s general education dyslexia program was not reflected in Student’s scores on recent achievement testing. Dr. \*\*\* credibly explained that results on different achievement tests (here, the WJ-IV ACH and the KTEA) cannot inform conclusions as to progress over time, but can inform skill acquisition over time. Student’s achievement scores over time demonstrate continued deficits in basic reading skills and reading fluency that are lower than would be expected given Student’s cognitive abilities despite several years of general education dyslexia interventions. Despite passing marks, the weight of the credible evidence showed Student made limited academic progress in an identified area of need.

Given Student’s behavioral regression and limited response to several years of general education dyslexia interventions, this factor favors Petitioner.

## **5. Conclusion on the Four Factors**

In this case, the appropriateness of Student’s educational environment is the only factor clearly favoring the District. Despite Student’s program’s “many strengths”—as noted by Dr. \*\*\* and supported by the evidence (including services and supports to address \*\*\*, \*\*\* needs, and counseling, and an IEP replete with interventions)—Student did not make behavioral progress. Student was restrained in violation of state regulations, and the District was slow to respond with programmatic changes when Student’s behavioral needs intensified. The District’s failure to consider Student’s ESY needs was uncollaborative as to Parents and deprived Student of services.

When Student’s program is considered as a whole, Student was not provided a FAPE by the District. *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F.3d 390, 391 (5th Cir. 2012). A preponderance of the evidence showed that Student was denied a FAPE and Student’s IEP was not reasonably calculated to address Student’s needs in light of Student’s unique circumstances. *Rowley*, 458 U.S. at 188, 203-04; *Andrew F.*, 137 S. Ct. at 999.

## **H. Procedural Violation**

Liability for a procedural violation only arises if the procedural deficiency impeded Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). *See also Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003).

### **1. PLAAFPs**

Petitioner alleges the District failed to base Student's IEP on Student's PLAAFPs. The regulations require the District to include in Student's IEP a statement of Student's PLAAFPs, including how Student's disability affects Student's involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1).

Petitioner's allegation requires a determination as to whether the PLAAFPs included in Student's IEP provided sufficient information related to Student's strengths and weaknesses. A preponderance of the evidence shows that they did. Each IEP included a discussion dedicated to Student's PLAAFPs, including Student's current behavioral and emotional functioning, strengths and needs, as well as information about current interventions. For example, the April 2021 IEP included a lengthy discussion of recent behavioral data and recent interventions.

Student's December 2019 and December 2020 IEPs each included a thorough picture of Student's PLAAFPs, including strengths, needs, and current level of functioning. Student's PLAAFPs were updated in September 2021 with information regarding new behavioral interventions. The Hearing Officer concludes the District satisfied the procedural requirements related to PLAAFPs.

## VII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proving that the withholding and/or misrepresentation exception to the statute of limitations applies in this case. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); 19 Tex. Admin. Code § 89.1151(d).
2. The District failed to identify student as a student with autism under the IDEA. *See Lauren C.*, 904 F.3d at 370-71.
3. Student is eligible for special education and related services as a student with autism. 34 C.F.R. § 300.8(c)(1)(i)-(ii); 19 Tex. Admin. Code § 89.1040(c)(1).
4. Student is not eligible for special education and related services as a student with an emotional disturbance. 34 C.F.R. § 300.8(c)(4)(i); 19 Tex. Admin. Code § 89.1040(c)(4).
5. The District procedurally violated the IDEA by failing to evaluate Student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).
6. The District violated the IDEA by failing to appropriately consider ESY services for the 2021 summer. This violation significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE. 34 C.F.R. §§ 300.106, 300.513(a)(2); 19 Tex. Admin. Code § 89.1065.
7. The District violated state regulations by restraining Student in the absence of a behavioral emergency. 19 Tex. Admin. Code § 89.1053(a)-(c).
8. Student was denied a FAPE during the relevant time period, and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188, 203-04; *Andrew F.*, 137 S. Ct. at 999.
9. Petitioner did not meet Petitioner's burden of proving the District failed to base Student's IEP on Student's Present Levels of Academic Achievement and Functional Performance. 34 C.F.R. § 300.320(a)(1).

## 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).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided prospectively to compensate the student for a deficient educational program provided in the past. *G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). A compensatory education award should place Student in the position Student would have been but for the school district's violations of the IDEA. *P.P. v. Northwest Indep. Sch. Dist.*, 839 Fed. App'x. 848, 856 (5th Cir. 2020). A qualitative, rather than quantitative, standard is appropriate in fashioning compensatory and equitable relief. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516, 523-24 (D.C. Cir. 2005).

Petitioner seeks various forms of compensatory relief. While Petitioner successfully demonstrated that Student needs a program tailored to meet Student's autism-specific needs, including ABA-based interventions in the school environment, the lack of specificity of the evidence on the question of what would put Student in the position Student would have been but for the District's violation of the IDEA hinders a reasoned qualitative analysis in this area.

That said, Petitioner is entitled to certain programmatic revisions as set forth below and is entitled to a compensatory award in the form of reimbursement for privately obtained services for the District's failure to appropriately serve Student's autism-related needs during the 2020-21 school year and compensatory ESY services. Petitioner is further entitled to an independent evaluation at District expense to make recommendations regarding autism-specific behavioral interventions in the school environment. Petitioner is also entitled to an independent evaluation at District expense for the purpose of determining whether Student is a student with an SLD under the IDEA.

The evidence showed that the key to providing Student a FAPE in the future is managing Student's behavioral issues. Given the broad discretion of the Hearing Officer in fashioning relief, the Hearing Officer makes the following orders:

1. The District shall convene an ARD Committee meeting no later than March 22, 2022, for the purpose of accepting Student's eligibility as a student with autism and removing Student's eligibility as a student with an emotional disturbance.
2. At the ARD Committee meeting required by Item 1, above, Student's IEP shall be modified to include an Autism Supplement and the ARD Committee shall consider the strategies required by 19 Tex. Admin. Code § 89.1055(e)(1)-(11).
3. At the ARD Committee meeting required by Item 1, above, the ARD Committee shall consider the \*\*\* skills deficits as identified in the OT IEE and modify Student's IEP to address these deficits.
4. The District must deliver to Petitioner no later than 5:00 p.m. on March 4, 2022, a set of reasonable criteria for the selection of an independent BCBA or other qualified evaluator to conduct an FBA, evaluate Student's autism-specific behavioral needs, and make recommendations for providing school-based ABA services and/or other autism-specific behavioral interventions in the educational environment.
5. Petitioner shall select a provider who fits the reasonable criteria set by the District no later than 5:00 p.m. on March 18, 2022. If Petitioner does not provide the name of evaluator to the District by that time and day, the District shall select an evaluator who meets its criteria by April 1, 2022.
6. Within 15 days of receipt of the written report from the independent evaluator, the District shall convene an ARD Committee meeting to review the evaluation and implement its programmatic, training, and services recommendations and make any necessary modifications to Student's IEP and BIP. The District shall invite the independent evaluator to the ARD Committee meeting, and the meeting shall occur at a time when the evaluator can participate.
7. The District must deliver to Petitioner no later than 5:00 p.m. on March 4, 2022, a set of reasonable criteria for the selection of an independent qualified evaluator to evaluate Student for an SLD.
8. Petitioner shall select a provider who fits the reasonable criteria set by the District no later than 5:00 p.m. on March 18, 2022. If Petitioner does not provide the name of evaluator to

the District by that time and day, the District shall select an evaluator who meets its criteria by April 1, 2022.

9. Within 15 days of receipt of the written report from the evaluator, the District shall convene an ARD Committee meeting to review and implement the results of the SLD evaluation. The District shall invite the independent evaluator to the ARD Committee meeting, and the meeting shall occur at a time when the evaluator can participate.
10. The District shall provide Student ESY services in summer of 2022.
11. Either during the summer of 2022 or another timeframe mutually agreed upon by the parties, the District shall provide Student compensatory ESY services equal to the number of hours of ESY services Student would have been entitled to in the summer of 2021.
12. Petitioner is entitled to reimbursement in the amount of \$\*\*\* for the cost of private ABA therapy at \*\*\*, \*\*\*.

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requested relief is **GRANTED IN PART AND DENIED IN PART**.

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

**SIGNED February 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).