CONFIDENTIAL
Pursuant to FERPA – 20 U.S.C. § 1232g;
34 C.F.R. Part 99

SOAH DOCKET NO. 701-23-03906.IDEA
TEA DOCKET NO. 056-SE-1022

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend *** (Parent and, collectively, Petitioner), brings this action against the Friendswood Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issue in this case is whether the District denied Student a free appropriate public education (FAPE) in the least restrictive environment.

The hearing officer concludes that the District provided Student a FAPE in the least restrictive environment during the relevant timeframe.

II. LEGAL REPRESENTATION

Petitioner was represented throughout this litigation by legal counsel, Mark Whitburn with Whitburn & Pevsner, PLLC. Respondent was represented throughout this litigation by its legal counsel, Amy Tucker with Rogers, Morris & Grover, LLP.

III. DUE PROCESS HEARING

The due process hearing was conducted on April 4-5, 2023. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Mark Whitburn, and Parent attended the hearing.

Respondent continued to be represented by Amy Tucker. In addition, ***, the Director of Special Education for the District, attended as the party representative. Both parties timely filed written closing briefs. The decision in this case is due May 30, 2023.

The parties submitted joint and separately filed exhibits. The following witnesses were called to testify: Student's *** and *** grade special education teachers, the *** Assistant Principal, Parent, the District's Executive Director of Special Education, the Special Education Coordinator who is also a board certified behavior analyst (BCBA), and one of the District's licensed specialists in school psychology (LSSP). Because the Special Education Coordinator worked with Student in her capacity as a BCBA, she is referred to herein as the BCBA. The BCBA provided expert testimony in the areas of instructional programming, behavior management, and autism. The LSSP provided expert testimony in psychology. Petitioner also called Dr. ***, Psy. D., to provide expert testimony in the areas of autism and psychology.

IV. ISSUES AND REQUESTED RELIEF

A. Petitioner's Issue

Petitioner raised the following issue for decision in this case:

- Whether the District denied Student a FAPE in the least restrictive environment.

B. Petitioner's Requested Relief

Petitioner requested the following items of relief:

1. An order compelling the District to provide compensatory education in an amount to be determined by Petitioner's experts and evaluators;

2. An order compelling the District to place Student in a small classroom environment with appropriate supports, both behavioral and otherwise, for the full school day; and

3. Any and all relief that the hearing officer deems appropriate or which is recommended by Petitioner's experts and evaluators.

V. FINDINGS OF FACT

1. Student is a *** year-old *** grader who lives with Student's mother and ***. Student has been enrolled in the District since ***. Student is smart, caring, and creative and enjoys ***.[1]

2. Student has difficulty interacting appropriately with peers; adapting to changes in plans, routines, and expectations; attending to tasks; complying with requests; and regulating Student's emotions. When Student is upset, Student can be verbally inappropriate (***) and physically aggressive (***).[2]

3. Student is eligible for special education and related services as a student with autism, specific learning disabilities, and other health impairment (OHI) due to attention deficit hyperactivity disorder (ADHD). Student has been identified with specific learning

[1] Joint Exhibit (Jt. Exh.) 7 at 10, 16-17; Jt. Exh. 8 at 10, 15; Transcript (Tr.) at 264.

[2] Jt. Exh. 2 at 2; Jt. Exh. 7 at 10-11, 13, 15; Jt. Exh. 8 at 10, 18, 25, 29; Tr. at 133, 267.

disabilities in the areas of basic reading skill, mathematics calculation, and written expression.[3]

4. Prior to *** grade, Student received behavior support through the District's *** (***) program. In April 2021, at the end of Student's *** grade year, the Admission, Review, and Dismissal (ARD) committee met for its annual review of Student's individualized education program (IEP). The ARD committee recommended Student receive instruction in a smaller group setting through the *** (***) [4] to address Student's need for more intensive behavioral support.[5]

5. The *** provides a highly-structured environment in a self-contained setting with flexible, individualized support and small group instruction. It also includes daily *** instruction; a research-based classroom management system and positive behavioral supports; consistent data collection and record keeping; visual representation of routines, procedures, and schedules; regular contact with parents; and an individualized crisis management plan. Instruction in the *** is provided by a behavior-trained teacher with direct and indirect support from a BCBA.[6]

6. The purpose of the *** is to support students in developing and demonstrating expected behaviors and attending classes in the general education setting. Each student moves out of the *** at their own pace.[7]

7. The small group setting in the *** can include from ***to several students and allows students to receive individualized instruction outside the general education classroom which can be overstimulating for them. The exact number of students in a small group varies because the number of students in the group at any point in time depends on each student's schedule and progress within the program. When there is *** in a small-group, there are other opportunities for generalization of skills throughout the day.

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[3] Jt. Exh. 2 at 1-2; Jt. Exh. 7 at 23; Jt. Exh. 8 at 36.

[4] Parent and her advocate disagreed that the *** was an appropriate placement for Student. Jt. Exh. 4 at 3-4. Parent requested placement in a nonpublic day school, and a due process hearing request was filed. A decision in that case was issued by another hearing officer in December 2021. *Friendswood Indep. Sch. Dist.*, 122 LRP 866 (TX SEA 2021).

[5] Jt. Exh. 6 at 22, 27; Tr. at 153-54.

[6] Jt. Exh. 3 at 3, 6, 23, 25.

[7] Tr. at 159, 203, 398.

Generalization can occur with other staff members and during lunch, *** (***.[8]

2021-22 School Year: * Grade**

8. Student did not begin attending school for a full day in *** grade until January 2022.[9]

9. Student received all core academic instruction in the *** as well as 30 minutes of *** instruction per day. The *** lessons focused on teaching Student how to use strategies and skills to deal with Student's emotions.[10]

10. Whole group lessons in the *** for academic core classes such as *** during *** grade included from *** students. Student was often the only student in the group during these lessons because other students were either absent, attending general education classes, or because there was frequently *** receive instruction separately.[11]

11. Student received psychological services to help support and manage Student's emotions. Student was successful in using the strategies and support available to Student when emotionally upset to make appropriate choices. Student made progress identifying and expressing Student's feelings and had success in working through Student's emotions when upset.[12]

12. Student received occupational therapy services on a direct basis to support Student's needs in writing. Writing is a nonpreferred activity for Student, but Student was able to complete writing tasks with the use of ***.[13]

13. Student's IEP included academic goals in ***. *** goals were later added. Student's IEP also included behavior goals for improving self-

[8] Tr. at 156-57, 159-60, 399-400.

[9] Tr. at 170, 376, 379.

[10] Jt. Exh. 2 at 19; Jt. Exh. 3 at 14; Jt. Exh. 6 at 22; Tr. at 379-80.

[11] Tr. at 379-80.

[12] Jt. Exh. 2 at 3.

[13] Jt. Exh. 2 at 3; Jt. Exh. 6 at 22.

regulation; time on-task during non-preferred, small group, or independent activities; and using respectful words and tone of voice.[14]

14. Student received the following accommodations and supplemental aids in both *** and *** grade: teacher check for understanding, visual aids, calculator, math charts, mnemonic devices, copies of class notes, spelling assistance, breaking down assignments into smaller chunks, no penalty for spelling errors, oral administration of assessments, and reduced length of assignments. Student received dyslexia services and had access to audiobooks and ***. Student also received accommodations for state- and district- wide assessments.[15]

15. With respect to behavior management, Student had access to a ***, behavior support through the ***, a behavior intervention plan (BIP), frequent breaks, and private discussions about behavior.[16]

16. Student's *** grade teacher worked to build a positive relationship with Student so that Student would feel safe. She was able to create a successful connection with Student and develop Student's capacity to attend *** in the general education setting by transitioning Student into classes over a period of weeks. Student made friends and gained confidence.[17]

17. Student met passing standards on the *** grade State of Texas Assessments of Academic Readiness (STAAR) in ***, but not in ***. Although Student did not pass the *** STAAR, Student made the expected level of academic improvement from the prior year.[18]

18. Student earned the following grades by the end of Student's *** grade year: ***.[19]

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[14] Jt. Exh. 6 at 9-13.

[15] Jt. Exh. 2 at 11, 13-15; Jt. Exh. 6 at 14-15, 18.

[16] Jt. Exh. 2 at 11.

[17] Jt. Exh. 2 at 3; Petitioner's Exhibit (Pet. Exh.) 5 at 6; Pet. Exh. 9 at 6:00; Tr. at 376-78, 400-01.

[18] Jt. Exh. 1 at 1; Jt. Exh. 14 at 1-3; Tr. at 378-79.

[19] Jt. Exh. 12 at 2.

19. Student mastered Student's academic IEP goals as well as Student's goals for on-task behavior and using respectful words and tone. Student showed improvement in self-regulation, but still had difficulty taking directions from unfamiliar adults.[20]

20. Student's *** grade teacher helped prepare Student for the transition to *** grade by discussing Student's concerns, answering Student's questions, providing social stories, and *** with Student twice.[21]

21. Student's ARD committee met for an annual review of Student's program on May ***, 2022, and determined that Student continued to need specialized instruction in a self-contained setting and access to small groups with specialized instruction, methodology, or content. The committee developed IEP goals for ***, a behavior goal for self-regulation, another one for listening to teachers and staff, and a *** goal aimed at Student's ability to formulate a verbal response without using ***.[22]

22. The schedule of services included (1) *** instruction for 90 minutes every day in the ***; (2) *** instruction for 90 minutes every other day in the ***; and (3) *** in the general education setting for 45 minutes each daily. For core classes, the IEP indicated that Student would "work Student's way into" the general education setting with support from the ***.[23]

23. As with Student's previous IEP, Student's May 2022 IEP included a BIP that identified target behaviors; specified positive strategies, supports, and interventions to prevent or decrease targeted behaviors; and identified reinforcers to increase replacement behaviors. Among other things, Student's BIP incorporated the use of visual supports and schedules as positive interventions to help prevent or decrease targeted behaviors.[24]

24. Finally, the ARD committee recommended that Student attend *** to help with Student's transition to the ***. *** offered students a chance to become familiar with new routines and meet school staff.[25]

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[20] Jt. Exh. 11.

[21] Tr. at 383-84.

[22] Jt. Exh. 2 at 1, 6-9, 16-17.

[23] Jt. Exh. 2 at 19-20.

[24] Jt. Exh. 2 at 30-40.

[25] Jt. Exh. 2 at 20; Tr. at 22, 439.

25. The May ***, 2022 ARD committee meeting ended in agreement.[26]

26. Student attended *** in July 2022. During the ***, the *** teacher organized an exercise intended to facilitate interaction among the students and allow them and the teacher to get to know one another. The activity initially required students to provide a ***. *** by Student. A *** could include one or more maladaptive behaviors, including ***. The *** teacher modified the exercise to eliminate the *** component when she realized that *** was one of Student's non-preferred activities.[27]

27. Student does not like ***, but the *** teacher was unaware of this when she first met Student at ***. The teacher ***. The *** teacher did not see Student's IEP prior to ***.[28]

28. Concerned with the interactions between Student and the *** teacher during ***, Parent sent the *** teacher, the BCBA, and the Assistant Principal an email entitled "Instruction Manual" on August ***, 2022. The email described preferred items, non-preferred activities (such as ***), and situations (including ***) that might result in maladaptive behaviors. The email also indicated that Student did not *** and that encouragement should be subtle. District staff reviewed the email, and the *** teacher shared pertinent information with another teacher who worked with Student.[29]

2022-23 School Year: * Grade**

29. The *** grade *** teacher met with Student's *** grade teacher prior to the beginning of the 2022-23 school year to discuss Student's likes, dislikes, and needs. She also met with the BCBA to discuss the circumstances in which Student worked best.[30]

30. The first day of school for the 2022-23 school year was August ***, 2022.[31]

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[26] Jt. Exh. 2 at 27.

[27] Pet. Exh. 5 at 7; Tr. at 29, 183-84, 268-69.

[28] Jt. Exh. 8 at 24; Pet. Exh. 5 at 8; Tr. at 30, 32-33, 128-29.

[29] Pet. Exh. 5 at 8; Tr. at 30-33.

[30] Pet. Exh. 5 at 9; Tr. at 42-43, 184, 384-85.

[31] Respondent's Exhibit (Resp. Exh.) 1 at 29; Tr. at 136-37.

31. Student was *** students placed in the *** at the ***. *** attended class in the *** daily for the 30-minute *** lessons. The *** student's attendance was inconsistent. *** for at least half the day. Student was not the only student in the classroom.[32]

32. There was often conflict between Student and ***. The *** had to be removed from the classroom on multiple occasions for safety reasons. The *** was moved to another classroom in mid to late September.[33]

33. Student initially enrolled in ***. *** included approximately *** and was overstimulating for Student. Student's *** was switched to *** which included only ***.[34]

34. In accordance with Student's IEP and BIP, Student had access to a ***. The *** was a space in the *** with sensory items where Student could go during both scheduled and unscheduled breaks. Student also had access to a ***that included a ***, and other items to help with regulating Student's emotions.[35]

35. On September ***, 2022, the *** teacher discussed the classroom schedule with the students, and explained that scheduled breaks would be limited to seven minutes because students were struggling to return to instruction after taking longer breaks. This change did not apply to unscheduled breaks that Student needed for self-regulation and de-escalation. Both Student and Parent were upset with the change in number of minutes proposed for scheduled breaks.[36]

36. On September ***, 2022, Student was taking a break in the ***. When Student's break time was up, the BCBA (who was in the *** at the time) approached Student *** to show Student that Student's break was over and asked Student to ***. Student ***. Upset that the BCBA approached Student in the *** before Student was ready to return to Student's school work, Parent called the BCBA *** and began

[32] Tr. at 21, 25-27, 41, 112, 307, 326, 328.

[33] Pet. Exh. 8 at 16:00; Tr. at 107-08, 327-29, 333-34.

[34] Tr. at 79, 139, 207, 351-52.

[35] Jt. Exh. 2 at 11, 31-33; Tr. at 93-95, 437-38.

[36] Pet. Exh. 6 at 1; Tr. at 88-89, 95-96.

***.[37] Student began ***. Shortly thereafter, Parent arrived on campus and continued to ***.[38]

37. Student frequently called and texted Parent when Student was unhappy or frustrated at school. Although the District has a policy that students cannot use their cell phones during the day, it agreed to modify that policy for Student at Parent's request. Student's texts and phone calls to Parent, however, were disruptive and interfered with instruction.[39]

38. In mid-September, the Assistant Principal, BCBA, and *** teacher worked together to shape an updated classroom schedule that included 45 minutes of instructional time followed by a break in order to build capacity for the *** students to attend classes in the general education setting (which are 90 minutes long). The schedule included the term "whole group instruction." This term refers to teaching the whole lesson or concept—not the number of students in the group.[40]

39. Along with the updated schedule, the District proposed a plan in which Student would have *** each day. The *** ensured that Student would still have access to Student's ***, but it also promoted a more appropriate frequency of communication between them.[41]

40. The updated schedule was shared and discussed with Student on September ***, 2022, and shared with Parent on September ***, 2022.[42]

41. At or about the same time, the *** teacher—in collaboration with the BCBA and Assistant Principal—***. Other items from the ***. Students had begun using the space to ***

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[37] While Parent recalls that she had a "spirited discussion" with the BCBA, the BCBA testified that Parent "was ***." Tr. at 212-13, 287.

[38] Pet. Exh. 5 at 14; Tr. at 212-13.

[39] Pet. Exh. 5 at 14; Pet. Exh. 6 at 1-2; Jt. Exh. 13; Tr. at 135, 211-13, 308-09, 317-18.

[40] Jt. Exh. 1 at 2-3; Pet. Exh. 5 at 19-20; Tr. at 155-57, 358-62, 389-91.

[41] Jt. Exh. 1 at 2-3; Tr. at 135-36, 309 .

[42] Jt. Exh. 1 at 2; Pet. Exh. 5 at 18-20.

***, and the District made these changes in an effort to encourage use of the *** for its intended purpose (helping students self-regulate and de-escalate).[43]

42. Although some items had been replaced with similar items, the *** was not removed, and Student still had access to it. Student, however, was upset with the changes and called Parent to pick Student up on September ***, 2022.[44]

43. That same day, the District convened a revision ARD committee meeting to offer Student an Accelerated Learning Plan as required by state law when a student does not meet passing standards on a STAAR test. Parent attended the meeting with an advocate. The committee rejected the Accelerated Learning Plan because it determined that the Student's IEP goals were primary and that the plan would interfere with the provision of a FAPE.[45]

44. During the meeting, Parent expressed her concerns with the appearance of the *** and modifications to the ***, the BCBA's use of *** to encourage Student to leave the ***, Student's texts to Parent for "help," and Student's requests for her to come get Student. The family's advocate focused on the aesthetics of the ***, questioning the ***. [46]

45. Parent asked the *** teacher to *** and include Student in ***. The teacher indulged Parent's request and ***.[47]

46. With regard to the ***, the classroom schedule was posted for the students so they knew when to expect scheduled breaks throughout the day. There were also *** that served as visual supports and others that reflected "non- negotiable" expected behaviors. The students in the ***—including Student—identified these non-negotiable expectations. They applied to everybody and served as a "social contract." The *** provided a visual reminder of each student's safe space.[48]

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[43] Jt. Exh. 1 at 3; Tr. at 102-05, 189.

[44] Jt. Exh. 1 at 2-3; Pet. Exh. 6 at 2; Tr. at 93, 190, 437-38.

[45] Jt. Exh. 1 at 2.

[46] Jt. Exh. 1 at 3; Pet. Exh. 8.

[47] Pet. Exh. 8 at 32:00; Tr. at 119-20.

[48] Jt. Exh. 1 at 3; Pet. Exh. 8 at 10:53-11:28, 13:43, 21:39-23:00; Tr. at 310-11, 386, 427, 440-41.

47. No changes were made to Student's IEP, and the September ***, 2022 ARD committee meeting ended in agreement.[49]

48. Parent voiced concerns that Student was isolated from Student's peers, and both Parent and Student expressed a desire for Student to attend more classes in the general education setting. The District attempted to reassure Parent that Student was not the only student in the room and that *** other students consistently accessed the ***.[50]

49. Meanwhile, the Assistant Principle worked with the BCBA and the Director of Special Education to develop a *** plan aimed at enabling Student to attend classes in the general education setting by increasing the number of days per week spent in a particular class over time. *** was Student's favorite subject, and the plan began with that subject. Once Student was attending *** class for five days a week, another core class would be introduced. [51]

50. The Assistant Principal and *** teacher met with Parent and Student on September ***, 2022, to discuss Parent's concerns and the *** plan.[52]

51. During the meeting, the District offered Student the opportunity to attend a *** class with the *** teacher in the general education setting. *** was a 30-minute period in which students worked on social-emotion learning concepts. Student chose to attend the *** class offered in the *** instead.[53]

52. The District also offered Student other small group opportunities outside the ***, including ***. *** offered an opportunity for Student to eat lunch with peers while the *** met once a week before school. During this time, students met in groups *** and interacted socially. The *** was organized and supervised by the LSSP who was on hand to facilitate the application of appropriate social skills. Student did not participate in either activity.[54]

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[49] Jt. Exh. 1 at 8.

[50] Pet. Exh. 4 at 18, 21, 28, 62; Pet. Exh. 5 at 14, 24, 28, 37; Pet. Exh. 8 at 16:00; Resp. Exh. 7 at 4; Tr. at 49, 61-62, 109, 218-19, 312-13, 340-41.

[51] Pet. Exh. 5 at 23-24; Tr. at 313-15, 344, 366-67.

[52] Pet. Exh. 9.

[53] Pet. Exh. 4 at 20; Pet. Exh. 9 at 26:00-27:45, 30:15-31:44, 33:16, 42:38; Tr. at 324-25, 349.

[54] Pet. Exh. 9 at 19:45-21:21, 22:09-23:10, 42:54; Tr. at 208, 324-25, 349, 459-60, 465-66.

53. Parent indicated to District staff members during the September *** meeting that she felt the *** teacher lacked adequate experience as a *** teacher and that she believed the BCBA used outdated strategies. Recognizing that it was not an appropriate conversation to have in front of Student, District staff did not respond and changed the topic of conversation.[55]

54. Parent informed the District that she would not agree to or support the *** introduced at the September *** ARD committee meeting or the *** plan proposed on September ***, 2022.[56]

55. Student was able to attend *** in the general education setting on multiple occasions between August ***, 2022, and mid-October 2022. Attending *** class in a general education setting was a significant step for Student. Student mastered multiple grade-level standards referred to as the Texas Essential Knowledge and Skills (TEKS) and received passing grades in *** for the first nine week grading period. Student also developed an ongoing friendship with one of Student's classmates.[57]

56. Student stopped attending classes in the District on October ***, 2022.[58]

57. Student did not make progress towards Student's IEP goals between the first day of school, August ***, 2023, and October ***, 2022.[59]

58. *** grade is a significant *** year for students, and it takes time for them to acclimate ***.[60]

59. The *** teacher cultivated a positive relationship with Student during the time Student attended school in the fall of 2022. Student opened up to the *** teacher and began sharing Student's likes and dislikes with her. Student advocated for ***self when Student did not want to do something, and they would discuss Student's options and alternatives. The *** teacher was able to create a relationship with Student in which Student felt comfortable asking her for what

[55] Pet. Exh. 9 at 41:00-42:00.

[56] Tr. at 314-16, 318.

[57] Jt. Exh. 1 at 2; Pet. Exh. 4 at 15, 24, 59, 66, 68; Resp. Exh. 3 at 11; Tr. at 132, 318-19, 321, 323, 370-71.

[58] Jt. Exh. 15; Tr. at 21.

[59] Jt. Exh. 9.

[60] Tr. at 307-08.

Student needed. Parent recognized that Student "loved" Student's teacher and would "defend her to the ends of the earth."[61]

60. Student benefitted from individualized instruction, and the *** provided an appropriate, flexible learning environment for Student.[62]

VI. DISCUSSION

A. Burden of Proof

The burden of proof in a due process hearing is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Accordingly, Petitioner in this case bears the burden of proving that the District failed to provide Student a FAPE in the least restrictive environment.

B. Relevant Timeframe

Petitioner filed a previous due process hearing request against the District on August 16, 2021, and a decision was issued on December 3, 2021. The hearing officer in that case determined that the IEP developed by Student's ARD committee in April 2021 was appropriate and offered Student a FAPE in the least restrictive environment. Because the April 2021 IEP was the IEP in place when Student returned to school fulltime in January 2022, the hearing officer need not address the appropriateness of the April 2021 IEP. Moreover, Petitioner indicated that Student did not intend to relitigate issues already decided in the previous decision.[63] The question then

[61] Pet. Exh. 8 at 33:00; Pet. Exh. 9 at 2:59-3:05; Tr. at 117, 132-33, 212, 346.

[62] Tr. at 202-03, 380-81, 422-23, 432-33.

[63] Order No. 3 at 2.

becomes whether the April 2021 IEP was properly implemented. Although Petitioner appears to concede that it was, this question is briefly addressed in Section VI(C)(3) below.

C. A School District's Duty to Provide a FAPE

School districts have 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. A school district's duty to develop and deliver an IEP falls under its broader statutory obligation to furnish a FAPE that emphasizes the special education and related services required to meet Student's needs and prepare Student for further education, employment, and independent living. *See* 20 U.S.C. §§ 1400(d)(1)(A), 1401(9); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209 (5th Cir. 2019); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). The IEP must be reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

1. Four-Factor Analysis

Petitioner argues that the District failed to provide Student a FAPE in the least restrictive environment because it failed to provide instruction in a setting that consistently included a small group of five or six students throughout the school day. Whether Student's program provided a FAPE, however, turns on a broader analysis of four factors:

- 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. by Barry F., 118 F. 3d 245, 253 (5th Cir. 1997); *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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

a. Individualized on the Basis of Assessment and Performance: May 2022 IEP

In meeting the obligation to provide a FAPE, a school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports, and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.320, 300.323(a). When developing a student's IEP, a school district must consider the student's strengths, Student's parent's concerns for enhancing Student's education, the results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R.

§ 300.324(a)(1). For Student, whose behavior impedes Student's learning and that of others, the District

must also consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i); *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

i. Student's IEP

The evidence in this case establishes that the IEP developed and agreed to by the ARD committee in May 2022 (and later reviewed and agreed to by the ARD committee on September ***, 2022) was individualized on the basis of assessment and performance. The IEP included four academic and three behavioral goals. The *** goal identified Student's ability to *** as Student's baseline and built on that baseline by measuring Student's ability to ***. This goal anticipated Student's need for assistive technology (including ***) and also specified that Student would receive support from the occupational therapist.

At the end of *** grade, Student was able to *** independently. Based on Student's then-present skill level, the May 2022 math goal measured Student's ability to ***. Student's IEP also included a *** goal which both measured Student's ability to ***.

Student's behavior and social skills goals were developed to target maladaptive behaviors identified through assessment and classroom performance. The behavior goals included self-regulation and listening to teachers and staff. The self-regulation goal required Student to report Student's feelings or ask for help while completing assignments when given positive reinforcement, wait

time, and visual support. Meanwhile, the second behavior goal required Student to follow teacher and staff directives when provided direct instruction, social stories, verbal and nonverbal reminders to stay on task, teacher feedback, and positive reinforcement. Finally, the social skills goal measured Student's ability to formulate a verbal response without using *** when provided with social stories and teacher modeling and upon receiving feedback from a teacher or peer.

Student's schedule of services included (1) *** instruction for 90 minutes every day in the ***; (2) *** instruction for 90 minutes every other day in the ***; and (3) *** in the general education setting for 45 minutes each daily. Student also received *** instruction for 30 minutes every day. For core classes, the IEP indicated that the Student would "work Student's way into" the general education setting with support from the ***. The District later developed a detailed plan to help Student consistently attend Student's core classes in the general education setting over time.

ii. Student's BIP

Student's BIP worked in tandem with Student's IEP and offered further behavioral support specific to Student's needs. It identified three targeted behaviors. These included self-regulation, work refusal, and arguing with a teacher or other person in a position of authority. With respect to each targeted behavior, the BIP provided a replacement behavior and identified the type of support to be provided in the ***, classroom strategies to avoid targeted behaviors and encourage replacement behaviors, types of rewards (or reinforcers), topics for *** lessons, and a plan for responding to targeted behaviors. Classroom strategies included direct *** instruction, visual supports, positive reinforcement, and providing Student with choices (shared control) when appropriate. The plan also included, among other things, frequent breaks, access to preferred items

(***), a token economy (earning *** for positive behavior), and acknowledgement of positive behavior through Student's behavior chart or a phone call home as reinforcers for replacement behavior. The BIP further recommended that the teacher begin the day by "front loading" or preparing Student for the day in advance, avoiding power struggles, giving warnings prior to transitions, and providing Student with a daily schedule.

iii. Conclusion

Student's IEP included academic and behavioral goals based on assessment and performance. It included appropriate accommodations and addressed the autism supplement. Student received direct occupational therapy services to support Student's needs in writing and psychological services to help support Student's social and emotional needs. Student received dyslexia services and had access to ***. Student also received accommodations for state- and district-wide assessments.

Notably, Petitioner does not dispute the appropriateness of Student's IEP goals, Student's BIP, or the accommodations identified in Student's IEP. *See generally Pet. Brief*. Rather, Petitioner argues, among other things, that there were "problems with the *** teacher" and disruptions to Student's environment and routine. *Pet. Brief* at 8-9, 20-21. Because Petitioner does not take issue with the program as it was developed and agreed to by Student's ARD committee, the hearing officer addresses Petitioner's arguments below through the lens of the law as it applies to Student's least restrictive environment and the District's implementation of Student's IEP. Furthermore, the hearing officer concludes, based on the evidence presented, that Student's May 2022 IEP was properly individualized on the basis of assessment and performance.

Neither the report provided by Petitioner's expert, Dr. ***, nor her testimony changes this conclusion. While Dr. *** conducted a file review of Student's educational records and interviewed Parent and Student, she did not conduct an independent educational evaluation, contact the District regarding any of the issues raised in her report, or attempt to gather additional information for a more comprehensive analysis of Student's program. Moreover, much of the information that served as the basis for her conclusion that the District failed to provide Student an appropriate program was not supported by the weight of other credible evidence in the record.[64]

b. Least Restrictive Environment: May 2022 IEP

The IDEA requires a student with a disability to be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the least restrictive environment requirement. 34 C.F.R. § 300.114(a)(2)(i)-(ii). 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

[64] *Compare* Pet. Exh. 2 at 3; Tr. at 242-43 (*** testimony) (opining that using breaks to de-escalate and as an reinforcement is contradictory), Tr. at 243 (*** testimony) (reviewing consequences with Student before Student's behavior escalates appears to be contrary to what is known [about Student]), Tr. at 253 (*** testimony) (Student does ***, so praising Student is inappropriate), Pet. Exh. 2 at 2 (Student did not receive extended school year services (ESY) during Summer 2022) *with* Tr. at 426 (BCBA testimony) (accommodations can also be used as reinforcement); Tr. at 437 (BCBA testimony) (giving Student options is a way of reviewing consequences with Student, and it has proven to be an effective technique); Tr. at 119 (teacher testimony)(teacher told Student she was proud of Student, and Student received it well); Tr. at 387 (teacher testimony)(ESY was not recommended because Student did not show regression after a break).

- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

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

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id*. This determination requires an examination of:

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

Id.

The evidence shows that Student is presently unable to be educated solely in a general education setting. The general education setting is overstimulating for Student, and Student's behaviors interfere with Student's learning and the learning of others. Student is smart, but Student struggles with maladaptive and, sometimes, aggressive behaviors when Student is asked to do something Student does not want to do, disagrees with someone or something, becomes frustrated, or is asked to do something by an unfamiliar adult. While these behavioral struggles necessitate a more structured environment than one that can be provided in the general education setting, they also require an environment

that offers flexibility on a daily basis to address Student's needs. For example, Student benefits from a daily schedule, visual supports, and knowing what to expect, but Student also often needs the flexibility of unscheduled breaks for de-escalation and self-regulation. In addition, Student requires specialized instruction as well as pacing that accounts for lost instructional time and time needed to complete work and master goals and concepts.

To address this need, the ARD committee placed Student in the *** which has a class size of *** students with opportunities to attend certain classes and participate in other activities in the general education environment. While in *** grade, Student was able to attend specials in the general education setting. The evidence shows that Student made friends and gained confidence during this time. During the two months Student attended school in *** grade, Student attended *** class in the general education setting on multiple occasions. In addition, the District developed a detailed plan to help Student build capacity to move into more general education classes over time. The District also offered Student other small group opportunities to interact with Student's peers, including ***, ***, and a *** class in the general education setting.

Petitioner agrees that Student cannot be educated solely in the general education setting and argues instead that Student should be educated in a small group with five peers. Student further contends that, because the District cannot ensure this precise number of students in a small group throughout the school day, Student should be placed in a nonpublic day school that presumably can. *Pet. Brief.* at 20. Petitioner's position, however, imposes upon the District an obligation that is not contemplated by the IDEA. An IEP need not be the best possible one nor must it be designed to maximize Student's potential. Rather, it must be reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Endrew F.*, 580 U.S. at 399; *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

The weight of the credible evidence here shows that the District offered a program in which Student would be educated with non-disabled students to the maximum extent appropriate. Student's placement was Student's least restrictive environment. 34 C.F.R. § 300.114(a)(2)(i)-(ii); *Daniel R.R.*, 874 F.2d at 1048.

c. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders: August 2022 – October 2022

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, Civil Action No. 4:16-CV-0058, 2017 WL 3017282, at *27 (S.D. Tex. June 15, 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The evidence shows that District staff worked closely with one another to provide services to Student in a coordinated, collaborative manner and attempted to do so with Parent as well. Student's *** and *** grade teachers met before school started in August 2022 to discuss Student's needs, and Student's *** grade teacher received substantial support and involvement from both the Assistant Principal and the BCBA. The Assistant Principal and the BCBA worked with the District's Director of Special Education to develop a detailed plan intended to transition Student from the *** to general education classes based on Student's needs and abilities.

The record also reflects that the District was responsive to Parent's concerns. Upon receipt of Parent's "Instruction Manual" for Student at the beginning of the 2022-23 school year, District staff reviewed the information, and the *** teacher shared pertinent parts of it with another teacher who worked with Student. In response to Parent's concerns that Student was isolated from Student's peers, the District developed a detailed *** and offered Student other small group opportunities in blended and general education settings. District staff communicated with Parent through a daily behavior chart and emails and held a meeting with Parent and Student to discuss concerns and explore possible solutions to those concerns. Parent attended ARD committee meetings with the support of an advocate. When faced with complaints regarding the *** of the ***, the District agreed to review the classroom aesthetic and ensure that it aligned with the program's instructional purpose while the *** teacher *** with Student's input.[65]

Unfortunately, Parent often failed to take a collaborative posture with the District. Parent criticized and had inappropriate conversations with staff members in front of Student; refused to support the District's efforts to establish appropriate *** use during the school day; criticized methods staff members used to implement strategies identified in Student's BIP to address targeted behaviors; and refused to consider the District's plan to transition Student into the general education setting. Parent's position hindered a collaborative approach to the implementation of Student's educational program.

[65] The Parent's and the advocate's focus on aesthetic issues during the September 2022 ARD committee meeting demonstrate a misunderstanding of the ARD committee's role in the educational decision-making process. Classroom *** is not an ARD committee decision. More importantly, the *** of the *** were consistent with the positive behavior supports and strategies identified in Student's BIP.

A preponderance of the evidence demonstrates that services were provided in a coordinated, collaborative manner to the extent possible. Petitioner failed to show that the District excluded Parent in bad faith or refused to listen to her.

d. Academic and Non-Academic Benefits: August 2022 – October 2022

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012). The progress must only show some meaningful development. *William V. as next friend of William V. v. Copperas Cove Indep. Sch. Dist.*, 826 F. App'x 374, 379 (5th Cir. 2020).

The evidence demonstrates that Student was making progress during the short time Student attended classes in the fall of 2022. Student was able to attend *** in the general education setting on multiple occasions, and attending *** class in a general education setting was a significant step for Student. Student earned passing grades in *** during the first nine-week grading period, and Student mastered multiple TEKS. The evidence also shows that the *** teacher was able to cultivate a positive relationship with Student and that Student developed an ongoing friendship with one of Student's classmates.

Unfortunately, Student did not show progress towards Student's annual IEP goals during this time. It takes time, however, for students to adjust to *** which, in turn, can impact their ability to make progress early in the year. Moreover, Student demonstrated success in *** grade with a program that was substantially similar to the one developed and implemented in *** grade. It is reasonable to conclude that Student would have experienced similar success had Student attended school beyond the first two months of the school year.

On balance, the hearing officer concludes that Student received academic and nonacademic benefit from the program provided by the District.

2. Implementation of the May 2022 IEP: August 2022 – October 2022

In deciding whether a school district failed to properly implement a student's IEP, the hearing officer must determine whether there was a significant or substantial failure to implement the IEP under the third *Michael F.* factor and whether the student received academic and nonacademic benefits from the IEP under the fourth factor. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). "What provisions are significant in an IEP should be determined in part based on whether the IEP services that were provided actually conferred an educational benefit." *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 587 (5th Cir. 2009).

Petitioner argues that the District denied Student a FAPE because there were "problems with the *** teacher" and disruptions to Student's environment and routine. *Pet. Brief* at 10, 20-21. More specifically, Petitioner points out that the *** teacher created a meet-and-greet activity for students during *** that included a ***. Petitioner also complains that the teacher *** Student, shortened Student's scheduled breaks to seven minutes, and made modifications to the *** in the ***.

While the hearing officer recognizes that *** likely would have gone more smoothly if the *** teacher had read Student's IEP before they met, the teacher was able to quickly modify the *** activity to accommodate Student's needs. And there is no indication in the record that the teacher compromised Student's personal space after the initial incident ***. With respect to the *** issue, the *** teacher provided

encouragement to Student at the end of the school day by telling Student she was proud of Student. The evidence shows that Student responded well to similar comments in the past from other District staff and that Student had begun to open up to the *** teacher. Petitioner's complaints in this regard do not rise to the level of significant or substantial.

As for changes to the *** and Student's scheduled breaks, the evidence indicates that Student received both scheduled and unscheduled breaks and that Student was able to take unscheduled breaks when Student needed them to de-escalate or self-regulate. And while some items in the *** were removed or replaced, Student did not lose access to the ***. Notably, these changes were made in collaboration with the BCBA to manage the use of the *** for its intended purpose and to help the students build capacity to move into the general education setting. These types of changes relate to educational methodology, and the District has the discretion to make them. *See, e.g.*, *Wood v. Katy Indep. Sch. Dist.*, 163 F. Supp. 3d 396, 418-19 (S.D. Tex. 2014); *Clear Creek Indep. Sch. Dist. v. J. K.*, 400 F. Supp. 2d 991, 995 (S.D. Tex. 2005).

Finally, Petitioner points to the ***'s Instructional Schedule and argues that its use of the term "whole group instruction" establishes that Student's instruction in the *** needed to include more than one or two students in order to properly implement Student's IEP. *See Pet. Brief* at 4-
5. This argument is not persuasive. The BCBA (and others) explained that "whole group instruction" refers to teaching the whole lesson or concept—not the number of students in the group, and even when Student received instruction one-on-one, there were other opportunities to generalize skills throughout the day. Moreover, Student benefitted from individualized instruction.

The evidence presented thus does not support a claim that the District failed to properly implement Student's March 2022 IEP.

3. Implementation of the April 2021 IEP: January 2022 – May 2022

Although Petitioner identified the relevant timeframe as approximately December 2021 through October 2022 (when Student stopped attending school), Petitioner provided no argument in Student's closing brief that the District failed to provide Student a FAPE in the least restrictive environment during Student's *** grade year. Petitioner thus appears to have abandoned Student's claim against the District as it applies to this portion of the relevant time period. Nonetheless, the hearing officer addresses the issue briefly.

As noted above, a prior decision by another hearing officer determined that the April 2021 IEP was appropriate and provided Student a FAPE. In the absence of an allegation that the District was obligated to review and revise the IEP, the question becomes whether the District failed to properly implement the April 2021 IEP in spring 2022. Petitioner did not present any evidence to support such a claim. The evidence indicates that Parent was pleased with Student's *** grade *** teacher and Student's success in the *** and that Student received academic and non-academic benefits from the program. Student earned good grades, mastered Student's IEP goals, passed the *** STAAR, and made adequate yearly progress on the *** STAAR. Student was able to attend certain classes in the general education setting, made friends, and gained confidence.

4. Conclusion

When the four requirements set forth in *Michael F.* are met, a school district satisfies its FAPE obligation. The weight of credible evidence here shows that Student's program was appropriately individualized; it was delivered in the least restrictive environment; and Student made academic and non-academic progress. The evidence also shows that District staff collaborated with one another extensively to offer services in a coordinated, collaborative manner,

and that it attempted to do so with Parent, her advocate, and Student. Although the District's efforts in this regard were often unsuccessful and, at times, met with open hostility during the 2022-23 school year, a balancing of the *Michael F.* factors establishes that Student received a FAPE from the program developed and implemented by the District during the relevant timeframe. The program was reasonably calculated to enable Student to make progress appropriate in light of Student's unique circumstances.

D. Private Placement

Petitioner must meet a two-part test in order to secure private placement at District expense. First, Petitioner must prove the District's proposed program was not appropriate under the IDEA. Second, Petitioner must prove the private placement is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cty. v. Carter*, 510 U.S. 7 (1993).

The District's program was appropriate, and Student received a FAPE. The hearing officer therefore need not address whether private placement at *** is appropriate.

VII. CONCLUSIONS OF LAW

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

2. The District provided Student a FAPE during the relevant time period in the least restrictive environment, and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S.

176, 188, 203-04 (1982); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F.*, 118 F. 3d 245, 253 (5th Cir. 1997)

3. Petitioner is not entitled to private placement at District expense. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cty. v. Carter*, 510 U.S. 7 (1993).

VIII. ORDERS

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

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

SIGNED May 30, 2023.

Stacy May
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. §§ 300.514(a), 300.516; 19 Tex. Admin. Code § 89.1185(n).