

**SOAH DOCKET NO. 701-23-04999.IDEA  
TEA DOCKET NO. 074-SE-1122**

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

v.

**FRISCO INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

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

The issues in this case are whether the District denied Student a free, appropriate public education (FAPE) by failing to appropriately evaluate Student, develop an appropriate educational program, and address bullying at school. The Hearing Officer concludes the District procedurally and substantively complied with the IDEA and that Student’s educational program was reasonably calculated to provide educational benefit in light of Student’s circumstances.

**I. DUE PROCESS HEARING**

The due process hearing convened on May 2, 2023, via the Zoom videoconferencing platform. The hearing adjourned later that day after Petitioner moved to convert the hearing to an in-person format to allow for in-person translation of the proceedings. The hearing reconvened on

August 17-18, 2023, with a \*\*\* interpreter present to interpret for Student's parents. The hearing was recorded and transcribed by a certified court reporter.

Petitioner was represented throughout this litigation by Jordan McKnight of the Law Office of Jordan McKnight. Student's parents (Parents) attended, as did Petitioner's advocate, Debra Liva. Respondent was represented throughout this litigation by Jennifer Carroll of Walsh, Gallegos, Treviño, Russo and Kyle, P.C., and \*\*\*, Assistant General Counsel for the District. \*\*\*, Executive Director of Special Education, and \*\*\*, Managing Director of Special Education, attended as party representatives for Respondent.

The parties offered joint and separately disclosed exhibits. Petitioner offered testimony of Parents; Dr. \*\*\*, licensed specialist in school psychology (LSSP); \*\*\*, speech language pathologist (SLP); and \*\*\*, educational diagnostician. Respondent offered the testimony of Student's Parent, \*\*\*; \*\*\*, \*\*\* Principal; \*\*\*, the \*\*\* teacher; and \*\*\*, Managing Director of Special Education.

The parties timely filed written closing briefs. The Hearing Officer's decision is due on October 6, 2023.

## II. ISSUES PRESENTED

### A. Petitioner's Claims

The relevant time period includes the two-year period before the case was filed. Petitioner raised the below legal issues for decision:

1. Whether the District failed to timely and appropriately evaluate Student in all areas of suspected disability and need.
2. Whether the District denied Student a FAPE by:
  - a. failing to provide an appropriate individualized education program (IEP) that addressed Student's unique needs and provided meaningful educational benefit;
  - b. failing to provide appropriate and sufficient related services, including speech therapy, counseling, and psychological services;
  - c. failing to educate Student in the least restrictive environment; and
  - d. failing to address Student's behavioral needs.
3. Whether the District denied Student a FAPE by failing to address bullying of Student.
4. Whether the District violated Student's rights under statutes other than the IDEA.

**B. Requested Relief**

Petitioner seeks the following items of relief:

1. Private placement at District expense or, alternatively, placement on a different campus in the District.
2. An order directing the District to provide an independent educational evaluation (IEE) in all areas of actual or suspected need, including but not limited to cognitive, achievement, a complete psychological evaluation for all suspected or known disabilities, functional behavior assessment (FBA), attention deficit hyperactivity disorder (ADHD), assistive technology, and counseling.
3. An order directing the District to convene an admission, review, and dismissal (ARD) committee meeting after the IEE is complete to establish supports, accommodations, specific and measurable goals, and an appropriate behavior intervention plan (BIP) to address Student's unique needs.

4. An order directing the District to provide for each IEE evaluator to participate in the ARD committee meeting to review the evaluation result at its expense.
5. Compensatory education and related services to address Student's disabilities and/or needs, including but not limited to private tutoring, \*\*\*, private counseling, and private speech therapy.
6. Reimbursement of parental expenses for educational or diagnostic services.
7. Any and all other remedies that Petitioner may be entitled to under the law.

**C. Respondent's Legal Position**

Respondent generally and specifically denied the allegations and maintains it provided Student a FAPE consistent with its obligations under the IDEA at all relevant times. Respondent raised a counterclaim to defend the appropriateness of its evaluation and raised the affirmative defense of the statute of limitations. Respondent's plea to the jurisdiction as to claims or requested relief under statutes other than the IDEA was granted in Order No. 2.

**III. FINDINGS OF FACT**

**Background Information**

1. Student is \*\*\* years old and lives with Parents \*\*\*. Student has attended school in the District since \*\*\*, most recently at \*\*\*. Student receives special education and related services as a student with autism and a speech impairment. These eligibility categories were confirmed in an October 2019 full individual evaluation (FIE).<sup>1</sup>
2. \*\*\* is the home language noted on the home language survey. Student's Parent speaks English, but \*\*\* is Parent's native language. Student understands some words and concepts

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<sup>1</sup>JE 1 at 1; Tr. at 230.

better in \*\*\* than in English. Student's Parent understands some English but does not speak English "perfectly."<sup>2</sup>

### 2020-21 School Year

3. Student's ARD committee convened for Student's annual meeting on September \*\*\*, 2020. The September 2020 IEP included \*\*\* and speech goals, as well as goals in all core academic subjects.<sup>3</sup>
4. At that time, Student had no reported behavioral incidents. Student's behavior did not impede Student's learning or that of others, and Student did not require a BIP. The committee considered Student's need for assistive technology and found Student did not require it.<sup>4</sup>
5. The September 2020 IEP included accommodations to support classroom instruction.<sup>5</sup>
6. The ARD committee developed a \*\*\* plan. Student would continue to live with Parents and participate in a \*\*\* training program after \*\*\*.<sup>6</sup>
7. The September 2020 IEP called for placement in a \*\*\* classroom for all core subjects, with services in the general education setting for selected \*\*\*.<sup>7</sup>
8. Student received direct speech therapy for 40 minutes each nine weeks and speech therapy consult services 45 minutes per nine weeks. Student received \*\*\* instruction in the \*\*\* classroom, and \*\*\* services to support transitions throughout the school day in the classroom and cafeteria. The meeting ended in agreement.<sup>8</sup>

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<sup>2</sup> Transcript (Tr.) at 483, 338, 233.

<sup>3</sup> JE 2 at 1, 10-14.

<sup>4</sup> JE 2 at 8-14.

<sup>5</sup> JE 2 at 14.

<sup>6</sup> JE 2 at 6-8.

<sup>7</sup> JE 2 at 20-23, 27.

<sup>8</sup> JE 2 at 22, 27, 33.

9. Student mastered Student's IEP goals in \*\*\*. Student regularly attended classes and maintained all As and Bs on Student's report card.<sup>9</sup>
10. Student participated in State of Texas Assessment of Academic Readiness (STAAR) \*\*\* tests and met satisfactory performance standards in \*\*\*.<sup>10</sup>

### 2021-22 School Year

11. The ARD committee convened for Student's annual meeting on September \*\*\*, 2021. The September 2021 IEP included new goals in the areas of \*\*\*. Accommodations were reviewed and adopted without changes.<sup>11</sup>
12. The ARD committee modified Student's \*\*\* plan to reflect Student's interest in \*\*\*.<sup>12</sup>
13. Student's behavior did not impede Student's learning or that of others and Student did not require a BIP. The committee considered Student's need for assistive technology and found Student did not require it.<sup>13</sup>
14. The September 2021 ARD committee recommended that Student continue to receive instruction in the \*\*\* classroom, with general education \*\*\*. The IEP called for continued direct and consult speech for 40 minutes per nine weeks and 45 minutes per nine weeks, respectively. Student continued to receive \*\*\* services in the classroom and cafeteria. The meeting ended in agreement.<sup>14</sup>
15. In response to Parents' request for additional speech therapy in October 2021, the District added an additional speech goal and two additional direct sessions of speech therapy time per nine weeks as reflected in the April 2022 draft schedule of services. The previous

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<sup>9</sup> JE 13 at 6; JE 15 at 1-16; JE 16 at 2-8.

<sup>10</sup> JE 3 at 4.

<sup>11</sup> JE 3 at 9-14.

<sup>12</sup> JE 3 at 5.

<sup>13</sup> JE 3 at 7-8.

<sup>14</sup> JE 3 at 20-25, 31, 36.

speech language pathologist recommended that therapy change to focus on generalization of skills in the classroom. When services shift from working directly with student on particular skills to generalizing skills, the schedule of services should shift from direct speech therapy to indirect/consult time to train the teacher to carry over skills Student has already learned into the classroom environment.<sup>15</sup>

16. The ARD committee convened on April \*\*\*, 2022, for Student's annual meeting.<sup>16</sup>
17. A review of existing evaluation and data (REED) was conducted, and the committee did not recommend additional assessments.<sup>17</sup>
18. The April 2022 IEP included new goals in \*\*\*. A \*\*\* representative attended the meeting to share the \*\*\*. The ARD committee added a new \*\*\* goal.<sup>18</sup>
19. Student's behavior did not impede Student's learning or that of others and Student did not require a BIP. The committee considered Student's need for assistive technology and found Student did not require it. \*\*\* services limited to the classroom and cafeteria continued.<sup>19</sup>
20. Direct speech therapy services were modified from 40 minutes each nine weeks to 20 minutes two times per nine weeks and consult speech services were reduced from 45 minutes to 40 minutes per nine weeks to facilitate generalization of skills in the classroom. Parents expressed that they wanted Student to take \*\*\* next school year. The ARD committee meeting ended in agreement.<sup>20</sup>
21. On April \*\*\*, 2022, a campus clerk emailed the special education teacher asking if Parents required an interpreter for meetings. The teacher responded, "No, I speak fluent \*\*\*,

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<sup>15</sup> JE 9 at 2; RE 7 at 28; Tr. at 108, 196.

<sup>16</sup> JE 4.

<sup>17</sup> JE 4 at 30; JE 5.

<sup>18</sup> JE 4 at 11-16, 30.

<sup>19</sup> JE 4 at 17, 38.

<sup>20</sup> JE 4 at 26, 30, 33.

and [Student's Parent] understands English. In the past, I have translated anything she needed to clear up." An interpreter was not present at the April \*\*\*, 2022 meeting.<sup>21</sup>

22. Student had good attendance and achieved As and Bs on Student's report card. Student made progress on Student's IEP goals and objectives. Student participated in the STAAR \*\*\* test and met performance standards in \*\*\*.<sup>22</sup>

### 2022-23 School Year

23. On or around September \*\*\*, 2022, Student was involved in an incident \*\*. The District investigated and found the \*\* actions constituted bullying. The \*\* who engaged in the bullying conduct were given consequences consistent with the District's Student Code of Conduct. Student was offered general education counseling services.<sup>23</sup>
24. On September \*\*\*, 2022, Parents submitted a Documentation of Need for Interpretation form to the District.<sup>24</sup>
25. The District proposed an ARD committee meeting for September \*\*\*, 2022. At Parents' request, the meeting was rescheduled for October \*\*\*, 2022.<sup>25</sup>
26. On September \*\*\*, 2022, Student's parents revoked consent for District personnel to speak to Student outside of Student's "regular school education." Parents also revoked consent for counseling and psychological services, indicating they would seek their own services.<sup>26</sup>
27. On October \*\*\*, 2022, a revision ARD committee meeting convened. A new REED was conducted. The REED stated that, "Although [Student] has continued to progress on Student's IEP and appears to be comfortable in Student's typical daily routine at school, due to parents'

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<sup>21</sup> Petitioner's Exhibit (PE) 20 at 1; Tr. at 215.

<sup>22</sup> JE 13 at 6; JE 15 at 1-16; RE 7 at 6; RE 11 at 11-17; RE 13 at 2.

<sup>23</sup> JE 6 at 1, 3; PE 12.

<sup>24</sup> PE 24 at 1.

<sup>25</sup> RE 1 at 1; RE 2.

<sup>26</sup> RE 1 at 5.



- concerns that [Student] might be having difficulty processing the incident, it is recommended that a counseling evaluation be conducted to determine whether counseling as a related service should be provided.” Parents stated they would consider a counseling evaluation and disclosed that Student was receiving outside counseling services.<sup>27</sup>
28. Parents requested an increase in speech therapy time and an additional speech goal was added to the IEP. The ARD committee also recommended two additional direct speech therapy sessions per progress reporting period.<sup>28</sup>
29. Parents expressed concern that Student may have ADHD. Staff reported they did not see characteristics of ADHD. Parents also expressed concerns that Student’s behaviors were regressing at home. The District proposed in-home parent training, which Parents agreed to consider. The meeting ended in agreement.<sup>29</sup>
30. The District provided a Notice of Proposal to Conduct an Evaluation as a result of the REED. Parents did not provide consent for the evaluation then and have yet to do so.<sup>30</sup>
31. On March \*\*\*, 2023, the District attempted to schedule Student’s annual meeting. Petitioner declined to participate in an ARD committee meeting before the due process hearing. Parents also declined to provide consent for District staff to speak with any private evaluators or service providers regarding the development of Student’s IEP.<sup>31</sup>
32. Student’s annual ARD committee meeting convened on April \*\*\*, 2023. Parents declined to attend.<sup>32</sup>
33. The District attempted to hold a reconvene meeting on April \*\*\*, 2023. Parents declined to attend.<sup>33</sup>

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<sup>27</sup> JE 8; JE 9.

<sup>28</sup> JE 9 at 2.

<sup>29</sup> JE 9 at 2, 4.

<sup>30</sup> JE 7 at 1-5.

<sup>31</sup> RE 5; RE 6 at 1-2.

<sup>32</sup> RE 6; RE 7.

<sup>33</sup> RE 5; RE 6; RE 8.

34. Student's teachers tracked Student's progress on Student's IEP goals using data collection sheets. Student made progress towards each of Student's IEP goals during the 2022-23 school year. Student mastered the \*\*\* goal of \*\*\*. The ARD committee proposed a new \*\*\* goal to \*\*\* at the April 2023 meeting.<sup>34</sup>
35. Student had good attendance and achieved As and Bs on Student's report card. Student made progress on Student's IEP goals and objectives, mastering all academic goals prior to the April 2023 annual meeting.<sup>35</sup>
36. The September 2020, September 2021, and April 2022 IEPs included an Autism Supplement.<sup>36</sup>
37. Student's needs exceed what can be provided in the general education classroom or by the general education teachers in academic areas. Student has a Full-Scale IQ of \*\*\*, which is considered far below normal limits. Student's adaptive behavior is also significantly below age expectations.<sup>37</sup>
38. The Texas Essential Knowledge and Skills (TEKs) objectives for Student's grade level exceed Student's present level of performance, and the curriculum modifications required for Student to achieve the goals and objectives in the IEP cannot be implemented in the general education classroom without elimination of essential components of the curriculum.<sup>38</sup>
39. Student engages with nondisabled peers in \*\*\* and actively participates in \*\*\*. Student participated in \*\*\*.<sup>39</sup>

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<sup>34</sup> RE 11 at 11-17.

<sup>35</sup> JE 13 at 3; JE 15 at 16; JE 16 at 15-24; RE 7 at 3-5; RE 11 at 11-17; RE 13 at 2.

<sup>36</sup> JE 2 at 31-33; JE 3 34-36; JE 4 at 36-38.

<sup>37</sup> JE 1 at 20.

<sup>38</sup> JE 4 at 23.

<sup>39</sup> JE 13 at 3-5; RE 15; RE 16; RE 17; RE 18; RE 19; RE 20; RE 21; RE 22; RE 23; RE 24.

#### IV. DISCUSSION

Petitioner alleges the District failed to appropriately evaluate Student, develop an appropriate IEP, and address bullying of Student at school. Petitioner seeks private placement at District expense or on a different campus in the District; an IEE at public expense; revisions to Student's IEP; compensatory education; and reimbursement for parentally obtained services and evaluations.

##### **A. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the IEP and/or placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).<sup>40</sup> The burden of proof in this case is on Petitioner to show that the District failed to provide Student with a FAPE and to offer a program that was reasonably calculated to provide Student with the requisite educational benefit.

##### **B. Free, Appropriate Public Education**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). A school 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.

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<sup>40</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009).

A school district is responsible for providing a student with specially designed personalized instruction with sufficient support services to meet the student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). The central inquiry is whether a school district provided an educational program that "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

#### 1. Evaluation Under the IDEA

Petitioner alleges the District failed to timely and appropriately evaluate Student in all areas of suspected disability and need. Respondent's counterclaim asserts that Student's FIE was appropriate.

In conducting an evaluation under the IDEA, a school district must (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b). The student must also be assessed in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4).

The October 2019 FIE was conducted by a multidisciplinary group of professionals, assessed Student in all areas of suspected disability, included informal and formal measures of Student's academic and non-academic needs, considered parental input, and made specific recommendations for related services and other supports to include in Student's program. While Petitioner characterizes the approach to the FIE as "flippant," this characterization is not supported by the record. To the contrary, the FIE adequately assessed Student's educational strengths, deficits, and needs.

It is also difficult to reconcile Petitioner's claim that the District failed to appropriately evaluate Student with Parents' failure to consent when the District proposed further evaluation in the wake of the bullying incident to determine whether Student's educational needs had changed. Toward that end, the District provided a Notice of Proposal to Conduct an Evaluation as a result of the REED. Because Parents did not provide consent for the evaluation at the time and have yet to do so, the District was under no obligation to further evaluate Student. 34 C.F.R. § 300.300(c).

Petitioner asserts that the District failed to timely and appropriately evaluate Student in all areas of suspected disability and need, without providing any evidence of what areas of disability were overlooked. It is undisputed that Student receives special education services as a student with autism and a speech impairment, as was confirmed by the October 2019 FIE. When a REED was conducted in April 2022, the ARD committee, including Parents, agreed Student did not need new formal/informal evaluation data gathered through a new FIE.

In response to parental concerns after the bullying incident, a new REED was conducted in October 2022. The District proposed a counseling evaluation. Parents, however, did not provide consent for this evaluation. In response to a parental report that Student's behavior at home was

regressing, the ARD committee offered in-home parent training. Parents, once again, did not consent to an evaluation for these services.

Overall, the evidence showed that the October 2019 FIE met the IDEA's requirements. This factor squarely favors Respondent.

## 2. Educational Program

Having concluded the District's evaluation of Student was appropriate, the analysis turns to Petitioner's challenges to Student's educational program. Petitioner alleges the District failed to develop an appropriately individualized IEP and challenges its failure to provide appropriate and sufficient related services and failure to address Student's behavioral needs.

A hearing officer applies a four-factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

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

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997); *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. Michael Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

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

In meeting the obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). The District's obligation when developing Student's IEP is to consider Student's strengths, Parents' concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(1).

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 inquiry in this case is whether the IEPs proposed and implemented by the school district were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Andrew F.*, 580 U.S. at 399.

## 1. Speech Services

Petitioner alleges the District did not base Student's program on assessment and data because Student's April 2022 IEP was modified in the area of speech when the ARD committee reduced Student's speech services by an additional five minutes of consult per nine weeks.

In response to Parents' request for additional speech therapy in October 2022, the District added an additional speech goal and two additional direct sessions of speech therapy time per nine weeks. The additional sessions are noted in the April 2022 draft schedule of services. The District's speech language pathologist credibly explained that the previous speech language pathologist recommended that the focus of Student's speech therapy services change to skills generalization in the classroom. She explained that, when services shift from working directly with a student on particular skills to generalizing those skills, the schedule of services will—as it did here—change from direct speech therapy to indirect/consult time focused on train the teacher to carry over skills Student already learned into the classroom. Accordingly, the modification of Student's IEP in the area of speech from direct speech therapy to indirect/consult time was appropriate to ensure Student continued to make progress in this area.

## 2. \*\*\*

The evidence showed that Student's IEPs were individualized on the basis of assessment and performance in the area of \*\*\*. Student's September 2020, September 2021, and April 2022 IEPs included \*\*\* goals, and progress reporting data showed Student made progress on, and even mastered, these goals well within the annual review period. Student also received \*\*\* instruction as part of the \*\*\* classroom.



Petitioner failed to present sufficient evidence to support this claim, and the record supports the conclusion that Student's IEPs were individualized on the basis of assessment and performance in this area.

### **3. Counseling and Psychological Services**

The evidence showed that Student's IEPs were individualized on the basis of assessment and performance in the area of counseling and psychological services. This is at least in part because the evidence further showed that Parents were offered general education counseling services and a counseling evaluation after the incident, which Parents did not agree to. Indeed, on September \*\*\*, 2022, Parents revoked consent for staff to speak with Student outside of Student's "regular school education" and also revoked consent for counseling and psychological services, indicating they would seek their own services.

On October \*\*\*, 2022, the District convened a revision ARD committee meeting. A new REED was conducted. The REED stated that, "Although [Student] has continued to progress on Student's IEP and appears to be comfortable in Student's typical daily routine at school, due to parents' concerns that [Student] might be having difficulty processing the incident, it is recommended that a counseling evaluation be conducted to determine whether counseling as a related service should be provided." Parents stated they would consider a counseling evaluation and disclosed that Student was receiving outside counseling services.

Petitioner failed to present sufficient evidence to support this claim, and the record supports the conclusion that Student's IEPs were individualized on the basis of assessment and performance in this area. The record further supports the conclusion that Petitioner was offered

counseling and psychological services after the incident, Petitioner revoked consent for such services, and that these services have yet to be provided only because Petitioner has refused them.

#### **4. Assistive Technology**

Petitioner alleges the District failed to appropriately consider Student's need for assistive technology. A student's IEP must consider whether Student needs assistive technology and services.

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C.F.R. § 300.324(a)(2)(v). The evidence showed the District appropriately considered Student's potential assistive technology needs and found, during meetings in September 2020, September 2021, and April 2022, that Student did not require it. Petitioner otherwise failed to present sufficient evidence to support this claim. The record thus supports the conclusion that Student's IEPs were individualized on the basis of assessment and performance in this area.

#### **5. Behavior**

Appropriate behavioral supports and interventions are important components of a FAPE. A need for special education and related services is not limited to academics but also includes behavioral progress and learning appropriate social skills. *Venus Indep. Sch. Dist. v. Daniel S. ex rel. Ron S.*, No. CIV. A. 301CV1746P, 2002 WL 550455, at \*11 (N. D. Tex. Apr. 11, 2002). For a student whose behavior impedes their learning or that of other students, the IEP must consider positive behavioral interventions and supports and other behavioral strategies. 34 C.F.R. § 300.324(a)(2)(i).

The IDEA does not define an FBA or prescribe what steps are required to complete one. Instead, FBA requirements are left to state law or local policy. The mere fact that an FBA could maximize a student's educational benefit does not mean that an FBA is required for a student to

receive FAPE. *A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist.*, 553 F.3d 165 (2d Cir. 2009) (the failure to perform an FBA did not render the IEP inadequate under the IDEA where the school district showed the IEP adequately addressed the student’s behavior); *J.C. v. New York City Dep't of Educ.*, 643 Fed. Appx. 31 (2d Cir. 2016) (a school district’s decision to forgo an FBA when the student began to act out at school did not rise to the level of a denial of a FAPE because the IEP adequately identified the behavioral issues and implemented strategies to address them).

In this case, the record supports the conclusion that Student’s IEPs were individualized on the basis of assessment and performance in this area. In ARD committee meetings in September 2020, September 2021, and April 2022, the committee considered whether Student’s behavior impeded Student’s learning or that of others and consistently concluded it did not. Petitioner failed to present sufficient evidence to support this claim.

## 6. Autism Supplement

For students with autism in Texas, the ARD committee must also consider whether the student’s IEP should include the following: extended educational programming; daily schedules reflecting minimal unstructured time and active engagement in learning activities; in-home and community-based training; positive behavior support strategies based on relevant information; futures planning for post-secondary environments; parent/family training and support; suitable staff-to-student ratios; communication interventions; social skills supports; professional educator/staff support; and teaching strategies based on peer-reviewed, research-based practices for students with autism. 19 Tex. Admin. Code § 89.1055(e). This regulation is commonly referred to as “the Autism Supplement.”

Student's September 2020, September 2021, and April 2022 IEPs included an Autism Supplement addressing the required regulatory components and Student's program was appropriate in this regard.

Overall, the evidence showed that Student's educational programs during the relevant time period were individualized on the basis of assessment and performance.

**b. Least Restrictive Environment**

The IDEA requires a student with a disability to be educated with non-disabled peers to the maximum extent appropriate. Special classes, separate schooling, and other removal from the regular education environment may occur 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. 34 C.F.R. § 300.114(a)(2). This is known as the "least restrictive environment" requirement. 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).

Petitioner alleges the District failed to educate Student in the least restrictive environment. Student's IEPs called for placement in a \*\*\* classroom for all core subjects, with services in the general education setting for \*\*\*. The evidence supports the conclusion that Student's needs exceed what can be provided in the general education classroom or by the

general education teachers in academic areas. This is consistent with the FIE data indicating that Student has a Full-Scale IQ of \*\*\* and adaptive behavior significantly below age expectations.

The District has created opportunities for Student to engage with nondisabled peers in \*\*\*, including active participation in the \*\*\*. The TEKS objectives for the student's assigned grade level exceeds Student's present level of educational performance and the modifications required Student to achieve the goals and objectives in the IEP cannot be implemented in the general education classroom without elimination of essential components of the curriculum. As such, Student's unique and individual needs support placement in the \*\*\* Classroom.

Overall, the evidence showed that Student's educational placement was the least restrictive environment appropriate to Student's needs and Student was provided an inclusive education to the maximum extent appropriate.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. bnf S.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 record evidenced coordinated and collaborative relations between the parties before the incident. Parents participated in meetings, their input was solicited and considered, and the District appropriately responded to parental concerns.

Though Petitioner argues the District failed to appropriately respond to the incident, the record firmly supports the opposite conclusion. The record evidenced significant efforts by the District to engage Parents after the incident, which were successful to the extent that Parents participated in the October 2022 revision meeting. On March \*\*\*, 2023, the District attempted to schedule an annual meeting. Petitioner declined to participate in an ARD committee meeting before the due process hearing. Parents also declined to provide consent for District staff to speak with any private evaluators or service providers regarding the development of Student's IEP.

The District must offer a student with a disability a FAPE and make reasonable efforts to engage the parents of these students. However, as in this case, when parental communications and behavior (i.e., not showing up to properly noticed ARD committee meetings on two occasions in the spring of 2023) clearly demonstrated that Parents would not further engage on the issues until hearing, the District developed an IEP in April 2023 without parental input only because Parents refused to attend.

In this case, Parents' resistance to meet with the District to discuss their concerns with Student's program fell well below the coordinated and collaborative vision contemplated by the IDEA.

Petitioner alleges the District failed to ensure access to the IEP development process by not providing a \*\*\* language interpreter for Parents at ARD committee meetings, and specifically that “[Student’s] parents had limited ability to collaborate with the District because the District was not providing an interpreter in their first language of \*\*\*.” Petitioner further asserts the District “unilaterally” held meetings without an interpreter and/or qualified interpreter present.

A school district must take whatever action is necessary to ensure that the parent understands the proceedings of an ARD committee meeting, including arranging for an interpreter for parents whose native language is other than English. 34 C.F.R. § 300.322(e). Liability for a procedural violation only arises if the procedural deficiency impeded the 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).

Student’s Parent testified that Parent does not speak English “perfectly” and Parent would have “preferred an interpreter.” The evidence, however, did not support the contention that Parent could not participate in the development of Parent’s Student’s’s educational program. In addition, Student’s Parent participated in all ARD committee meetings. Parent testified that Parent was proficient in English though \*\*\* is Student’s native language and testified that it would have been better to have an interpreter. However, the weight of the credible evidence did not establish that the District violated the IDEA.

In conclusion, this factor favors the District. To the extent there was lack of collaboration, it was attributable to Parents for the reasons discussed. Petitioner failed to establish that the District excluded Parents in bad faith or refused to listen to them.

**d. Academic and Non-Academic Benefits**

Whether a student received academic and non-academic benefit 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).

**1. Academic Progress**

Student made academic progress during the relevant time period. Student attended regularly, achieved As and Bs on Student's report cards, and met expectations on STAAR \*\*\* testing. Student made progress on Student's IEP goals and objectives, mastering most well within the annual review period.

**2. Non-academic Progress**

Student also made non-academic progress. Student participated in \*\*\*.

**e. Conclusion as to the Four Factors**

The weight of the credible evidence showed that Student's educational program was individualized on the basis of assessment and performance, offered an educational placement in the least restrictive environment, and that the District made appropriate efforts to ensure Student's program was coordinated in a collaborative manner by key stakeholders. A preponderance of the



evidence demonstrated that Student's IEPs were reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188-89, 203-04; *Endrew F.*, 580 U.S. at 399.

### C. Bullying as a Denial of FAPE

Bullying is the unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior must be repeated, or have the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally and excluding someone from a group on purpose. *Government Accountability Office*, Report on Bullying (June 2012) (<http://www.gao.gov/assets/600/591202.pdf>).

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013) (bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied). Bullying may lead to a denial of a FAPE if school personnel were deliberately indifferent to, or failed to take reasonable steps, to prevent bullying that adversely affects or results in the regression of educational benefit or substantially restricts the student with a disability from accessing educational opportunities. *T.K. and S.K. ex rel. K.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 316 (S.D.N.Y. 2011). The bullying need not be outrageous, but sufficiently severe, persistent, or pervasive to create a hostile environment for the student with a disability. Petitioner need not show that the bullying prevented all opportunity for an appropriate education—only that it is likely to impact the student's opportunity for an appropriate education. *T.K.* at 317.

Petitioner failed to present sufficient evidence to support the contention that the bullying in this case resulted in regression or substantially restricted Student's access to Student's educational program.

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To the contrary, Student's academic and non-academic performance remained consistent during the relevant time period, including after the incident.

Petitioner also failed to present sufficient evidence that the District's response to the incident violated the IDEA. The District promptly began an investigation. The \*\*\* who bullied Student were given consequences consistent with the District's Student Code of Conduct. Student was also offered general education counseling services in the wake of the incident. In this case, the District notably made no attempt to explain or otherwise condone the \*\*\* behavior, which was egregious and undoubtedly harmful to Student.

That said, the record evidenced swift and appropriate actions by District personnel to consider Student's needs after the incident. The District attempted to schedule an ARD committee meeting for September \*\*\*, 2022, but the meeting was rescheduled for several weeks later at Parents' request. At the same time Parents declined the District's invitation to meet earlier to discuss Student's program after the incident, Parents revoked consent to speak to Student outside of Student's "regular school education" and also revoked consent for counseling and psychological services.

On October \*\*\*, 2022, a revision ARD committee meeting convened to discuss parental concerns following the incident. To address these concerns, a new REED was conducted. The REED stated that, "Although [Student] has continued to progress on Student's IEP and appears to be comfortable in Student's typical daily routine at school, due to parents' concerns that [Student] might be having difficulty processing the incident, it is recommended that a counseling evaluation be conducted to determine whether counseling as a related service should be provided." Parents stated they would consider a counseling evaluation and disclosed that Student was receiving outside counseling services. To date, Parents have not consented to a counseling evaluation.

While the bullying incident, \*\*\*, highlighted the incident and bullying of students with disabilities, the District's response \*\*\* did not deprive Student a FAPE under the IDEA.

## V. CONCLUSIONS OF LAW

1. As the challenging party, Petitioner has the burden of proof to establish a violation of the IDEA. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. Respondent's evaluation of Student was appropriate. 34 C.F.R. §§ 300.304(b); (c)(4).
3. Student's educational programs during the relevant time period were reasonably calculated to confer educational benefit in light of Student's circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 203-04 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).
4. Petitioner did not meet Petitioner's burden of proving that Respondent's response to bullying of Student denied Student a FAPE. *Schaffer*, 546 U.S. at 62.
5. Respondent complied with the IDEA's procedural requirements. 19 Tex. Admin. Code §89.1011(c)(1); 34 C.F.R. §§ 300.300(a)(1)(i), 300.613(a), 300.513(a)(2).
6. Petitioner did not meet Petitioner's burden of proving that Respondent denied Student a FAPE.  
*Schaffer*, 546 U.S. at 62.

## VI. ORDERS

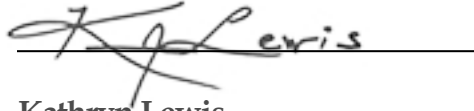
Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Petitioner's requested relief is DENIED.

It is further ORDERED that Respondent's counterclaim is GRANTED.

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SIGNED October 6, 2023.

A handwritten signature in black ink, appearing to read 'K. Lewis', is written over a solid horizontal line.

Kathryn Lewis  
Special Education Hearing Officer  
For the State of Texas

## VII. 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).