

SOAH DOCKET NO. 701-23-05447.IDEA
TEA DOCKET NO. 088-SE-1122

<p>STUDENT, B/N/F PARENT AND PARENT, Petitioner</p> <p>v.</p> <p>LITTLE ELM INDEPENDENT SCHOOL DISTRICT, Respondent</p>	§ § § § § § § §	<p style="text-align: right;">BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS</p>
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DECISION OF THE HEARING OFFICER

*** (Student), by next friends *** and *** (Parents, and collectively, Petitioner), brings this action against the Little Elm 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 issues in this case are whether the District failed to timely and appropriately evaluate Student in all areas of suspected disability and whether the District failed to timely and appropriately identify Student as a student in need of special education and related services.

The Hearing Officer concludes the District denied Student a free appropriate public education (FAPE) by failing to appropriately evaluate Student and find Student eligible for special education under the autism criteria. The Hearing Officer further concludes Student’s educational program was not reasonably calculated to provide Student a FAPE in light of Student’s circumstances.

I. DUE PROCESS HEARING

The due process hearing was conducted on April 18-19, 2023 via the Zoom videoconferencing platform. Student was represented throughout this litigation by Student’s legal counsel, Jordan McKnight of the Law Office of Jordan McKnight. *** (Dad) and ***

(Mom), Student's parents, also attended the hearing. The District was represented throughout this litigation by its legal counsel, Dean Micknal of Leasor Crass, P.C. In addition, ***, the District's Executive Director of Special Populations, and ***, the District's Assistant Director of Special Populations, attended the hearing as the party representatives.

The parties offered joint and separately disclosed exhibits. Petitioner offered testimony of one of Student's former teachers, two District occupational therapists, Student's campus principal, a District speech language pathologist (SLP), Dr. *** (a private psychologist, Licensed Specialist in School Psychology (LSSP) and Board Certified Behavior Analyst (BCBA)), and Dad. Respondent offered testimony of a District educational diagnostician, one of Student's former teachers, a District LSSP, Student's campus assistant principal, a campus special education teacher, and the District's Executive Director of Special Populations. The hearing was recorded and transcribed by a certified court reporter. Both parties timely filed written closing briefs. The Decision in this case is due June 8, 2023.

II. ISSUES

A. Petitioner's Issues

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

Free Appropriate Public Education (FAPE):

Whether the School District failed to provide Student with a FAPE for the relevant time period, including failure to provide related services.

Child Find:

1. Whether the School District failed to timely and appropriately evaluate Student for special education and related services.

2. Whether the School District failed to timely and appropriately identify Student for special education and related services.

B. Respondent's Legal Position and Additional Issues

Respondent did not file any response to Petitioner's complaint. Respondent's counsel indicated the School District provided the proper Prior Written Notice for the allegations in Petitioner's complaint.

III. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. The District 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 including autism and Attention Deficit Hyperactivity Disorder (ADHD), and a Functional Behavior Assessment, at District expense.
2. The District find Student eligible for special education under the disability condition of autism and provide an IEP with appropriate supports including those required by 19 Tex. Admin. Code § 89.1055(e).
3. An Admission, Review, and Dismissal (ARD) Committee meeting to occur after completion of IEEs to establish supports, accommodations, specific and measurable goals, and an appropriate behavior intervention plan (BIP) to address Student's unique needs.
4. Provide for the participation, at District expense, of each evaluator that conducts the IEEs at an ARD committee meeting to review the evaluations.

5. Compensatory education and related services to address Student's areas of disabilities and/or needs to include, but not limited to private tutoring, speech therapy, occupational therapy (OT), and physical therapy (PT).
6. Reimbursement of any and all of parents' expenses related to educational or diagnostic services.
7. Reimbursement of all costs and representation fees that the parent has incurred in filing their due process.
8. Any and all other remedies that Petitioner may be entitled to under the law.

B. Respondent's Requested Relief

An Order dismissing all claims arising under laws other than the IDEA.

IV. FINDINGS OF FACT

1. Student enrolled in the District in February 2019 as a ***. Student transferred from a school district in ***. In ***, Student was classified as a *** with a disability and received physical therapy, OT, and speech/language therapy. Student lives with Parents, ***. Student struggles with maintaining friendships. Student is smart and is a loving child with a sensitive heart.¹
2. The District held a transfer ARD Committee meeting on February ***, 2019. The Committee reviewed Student's IEP from ***. Parents indicated Student was to be evaluated for autism by Student's school district prior to leaving ***. The Committee decided to discuss an evaluation at the annual meeting in 30 days to allow time for the family and Student to transition. The ARD Committee adjusted Student's speech therapy, OT, and PT from twice a week, which Student received under the *** IEP, to once per week because Texas had a 3 hour school day as opposed to a *** hour school day in ***. Dad signed receipt of "explanation of procedural safeguards was provided" but did not sign the page indicating receipt of an actual copy of the procedural safeguards.²

¹ Joint Exhibit (JE) 6 p. 8,11; JE 8 p. 1; JE 10 p. 1, 4; Transcript (Tr.) Volume (Vol.) 1 p. 109, 154.

² JE 8 p. 7; JE 10 p. 3, 5, 12, 23; Tr. Vol I p. 83-84; Tr Vol. II p. 435.

3. On April ***, 2019, an annual ARD Committee met with Dad in attendance. Student qualified for special education as a student with speech impairment. Student's IEP contained updated present levels of academic achievement and functional performance (PLAAFPs) based on teacher observation. Student did not like to *** so Student would refuse and go to the side of the room. Student would say no when Student did not want to do an activity. Student *** for sensory input and was fidgety at times. Student was scheduled to receive social skills training, speech therapy, PT, and OT. Dad requested an autism evaluation and the Committee agreed to an updated full and individual evaluation (FIE) in the areas of autism, PT, OT, speech, and cognition/achievement. The ARD Committee meeting ended in agreement. Dad signed that he received the notice of procedural safeguards and consent for the evaluation.³

2019 – 2020 School Year - ***

4. A multidisciplinary team conducted Student's FIE, dated October ***, 2019. Sources of data were the 2017 *** FIE, parent input, teacher input, classroom observations, and multiple assessments. An SLP assessed Student's language skills using the Comprehensive Assessment of Spoken Language, Second Edition (CASL-2) and the Goldman-Fristoe Test of Articulation 3 (GFTA-3). During the CASL-2, Student was easily distracted by the stimulus material and objects around the room. The SLP indicated Student's below average score in expressive language and inference and Student's deficient range score in *** should be interpreted with caution due to Student's distractibility and the fact that these sections were administered at the end of testing. Overall, Student exhibited age appropriate language skills. The GFTA-3 measures speech sounds in the area of articulation. Student scored in the below-average range on the GFTA-3, but when combined with teacher input and informal observation, Student did not appear to need speech therapy services targeting articulation.⁴
5. Student demonstrated average visual motor, fine motor, and visual motor coordination. Parents and teacher reported concerns with regulation, organization, social skills, and behavior/self-control; however, the evaluator determined these concerns were not a result of any difficulties with motor proficiency.⁵

³ JE 2; JE 11 p. 1, 2, 3, 9, 19.

⁴ JE 3 p. 1, 4, 5, 7.

⁵ JE 3 p. 9, 11.

6. Student demonstrated problems in sensory processing, with social interaction, hearing, touch, body awareness, and planning and ideas. The evaluator observed Student's over-responsiveness to auditory and visual stimulation. It did not appear Student's sensory processing impacted Student's ability to engage, but it could impact Student's ability to handle frustration and regulate ***self. The occupational therapist determined these difficulties could be mitigated with classroom strategies.⁶
7. The District sent Parents forms to complete to assess Student's emotional functioning, which were not returned. Parents completed the Sensory Processing Measure Home Form; however, ten responses were left blank.⁷
8. The LSSP administered the Autism Diagnostic Observation Schedule, Second edition (ADOS-2). The ADOS is an observational assessment of communication, social interaction, play, and restricted and repetitive behaviors. The evaluator concluded Student did not demonstrate characteristics of a student with an autism spectrum disorder (ASD).⁸
9. The FIE included the Autism Spectrum Rating Scales (ASRS) as an additional autism assessment. The ASRS is a tool that helps identify symptoms, behaviors, and associated features of ASD. The teacher form for the ASRS indicated Student used verbal and non-verbal communication for social contact, related well to children, used language appropriately, and did not engage in stereotypical behavior. However, it also indicated Student engaged in unusual behavior, had difficulty relating to adults, had difficulty providing appropriate emotional responses to people in social situations, had difficulty tolerating changes in routine, overreacted to sensory stimulation, and had problems with inattention and/or motor and impulse control. The FIE found that, despite scores in the elevated or slightly elevated ranges on the ASRS, the predominant features impacting Student were Student's attention span and distractibility.⁹
10. The evaluators determined Student did not meet the criteria as a student with an ASD because Student showed appropriate communication skills and did not demonstrate restricted, repetitive patterns of behavior, interests, or activities of abnormal intensity. The evaluators also determined Student did not need OT and recommended classroom strategies for Student's

⁶ JE 3 p. 14.

⁷ JE 3 p. 12-13.

⁸ JE 3 p. 15-16.

⁹ JE 3 p. 17-18.

teacher to develop sensory processing, self-regulation, and attention skills in the classroom.¹⁰

11. The District held a review ARD Committee meeting on November ***, 2019. Dad attended the meeting. The FIE was reviewed. The meeting ended in agreement, with Student dismissed from special education services. Dad signed receipt of prior written notice.¹¹

2020-21 School Year - *** Grade

12. Parent obtained a private OT evaluation in September 2020 and Student began private OT services to address muscle weakness, delayed milestones of childhood, unspecified lack of expected normal physiological in childhood, and unspecified disturbances of skin sensation. Dad notified Student's teacher of a scheduling conflict with class due to an OT appointment on December ***, 2020. Student received OT until August 2021 and was discharged due to the therapist's inability to contact the family.¹²
13. Parent emailed Student's teacher and notified her of possible *** on January ***, 2021. The teacher responded with her plans to address the situation.¹³
14. In February 2021, Student ***. Dad arrived at school to pick Student up because Student was sick. Student's teacher sent Student to the office, but Student did not go to the office and instead ***. Student's teacher and assistant principal ended up ***. Dad notified Student's teacher and the assistant principal that Student previously had an IEP. Parent, Student's teacher, and the assistant principal discussed putting a buddy system in place to prevent this type of incident in the future; this was never reduced to writing.¹⁴
15. Student participated in a dyslexia screener in March 2021. The screener included handwritten notes indicating Student received private OT, had sensory issues, was not autistic, exited speech in ***, and received no Student Support Team (SST) services. Student was not at risk for dyslexia. Student's teacher emailed Parents on April

¹⁰ JE 3 p. 24.

¹¹ JE 12 p. 1, 10, 12.

¹² Petitioner's Exhibit (PE) 1 p. 1-4; PE 8.

¹³ PE 9; PE 10.

¹⁴ Tr. Vol I p. 114-117; Tr Vol. II p. 116, 311-315.

***, 2021 and expressed she noticed a “drastic change” in Student on that day. Student did not participate in class, ***, and refused to do anything asked of Student. Student’s teacher indicated this behavior was related to Student’s frustrations at home rather than schoolwork.¹⁵

16. For *** graders, the District used *** with *** being below standard, *** being approaching standard, and *** being meets standard. Student received *** in the third quarter in some of the writing process and conventions categories, but received *** in the fourth quarter. Student received all *** in all other subjects for the entire year. Student received *** in following general areas: follow instructions; work independently; complete work and stay on task; organize myself, my materials, and my belongings; participate appropriately in group activities; respect adults, peers, and school property; listen attentively without causing interruptions; willing to attempt new and unfamiliar tasks (received a *** for the third quarter); make appropriate transitions between activities; use technology appropriately; accept consequences for personal actions; and speak at appropriate times.¹⁶
17. Student was a quiet student, who became more comfortable with raising Student’s hand and sharing without being prompted in the latter part of the year. Student preferred working by ***self and was a well-mannered, “sweet” student in class. Student’s teacher noticed sensory difficulties with ***. During these incidents, Student would withdraw and stop working, which she observed a handful of times in spring of 2021. She did not observe an academic need for special education services. Student did not like to write, which is common for *** graders. Student preferred to tell the teacher stories orally and she noted work refusal during writing assignments.¹⁷

2021-22 School Year – *** Grade

18. On September ***, 2021, Student’s teacher emailed Parents to discuss strategies to help Student complete tasks Student did not want to complete. The teacher also notified Parents Student had a hard time with directions that day and ***. Parent responded and indicated an interest in a discussion. Parent expressed concerns about Student’s frustration with transitions and adapting to what others want to do if it

¹⁵ PE 11; PE 24; Tr. Vol. II p. 304-05.

¹⁶ JE 18 p. 1, 3; JE 19.

¹⁷ Tr. Vol. II p. 294-296, 299, 302-03.

differs from what Student had in mind. Parent indicated Student may be privately evaluated for Attention Deficit Disorder (ADD) or ADHD.¹⁸

19. Student's teacher emailed Parent on September ***, 2021, letting Parent know he sent home a parent input form and the District's plan to begin the SST process. The teacher indicated if Parent had concerns about evaluation or diagnosis, he could seek that outside of school and if anything came of it, then the Section 504 process would begin.¹⁹
20. The SST is a group of teachers, District administration, and parents that meet every 6-8 weeks to discuss a student's goals and progress. The first meeting was held on November ***, 2021 and Student entered Tier 2: Skill Building. Student's teacher initiated the SST because of his concern with Student's lack of participation in activities.²⁰
21. Student's teacher completed a teacher input form on November ***, 2021, indicating he tried several classroom strategies to help Student meet Student's educational/behavioral goals such as choice in seating and activities and opportunity to complete assignments at later times. At this time, when Student's assignments were completed, Student demonstrated success, but when things challenged Student, Student did not attempt them.²¹
22. During the initial SST meeting on November ***, 2021, Student's *** grade teacher indicated Student was reluctant to participate in activities, especially if Student is unfamiliar with a routine, and refused new tasks. Dad noted Student was very concrete, had sensory issues especially with ***, and responded to reinforcers. The second SST meeting was scheduled for January ***, 2022.²²
23. Student's Tier 2: Skill Building goals were following directions when asked with 1-2 prompts and focusing on ***. Accommodations included reminders of expectations, check list for compliance with task,

¹⁸ JE 27 p. 1-2; PE 12; PE 13.

¹⁹ JE 28.

²⁰ JE 29; Tr. Vol. I p. 182; Tr. Vol. II p. 429..

²¹ JE 6 p. 46.

²² Respondent's Exhibit (RE) 4.

visual schedule, peer partner support for safety, ideas to choose from when writing, and finish folder.²³

24. Student's teacher emailed Parents on January ***, 2022 to notify them Student was having difficulty completing work since the winter break and was upset by requests to work independently. The teacher sent another email the following day to inform Parent of more task refusal. On February ***, 2022, Student's teacher emailed Parents to notify them Student did not want to do Student's work and said things like "****." The teacher let Student know Student is liked, and this helped Student at times to complete Student's work and was not helpful at other times.²⁴
25. On March ***, 2022, the District sent a letter to Dad with a Notice of Intervention Services that included information on special education evaluations. The second SST meeting did not occur until March ***, 2022. The accommodations were continued and Tier 2: Skill Building would continue through at least October 2022. According to the assistant principal and special education teacher, the District is required to do SST interventions before initiating an evaluation.²⁵
26. Student's teacher completed a teacher input form dated March ***, 2022, which noted classroom strategies including flexible seating, short directions with multiple prompts, and adjusted assignments to narrow choices and give more time. Even with these strategies, Student chose not to participate in more than 80% of activities. *** assignments interested Student and when Student participated, Student performed well.²⁶
27. On April ***, 2022, in an email exchange between Dad and Student's teacher, Dad asked about a possible re-evaluation for autism because it had been over a year since the last evaluation. On April ***, 2022, dad emailed the District to follow up on the autism evaluation discussed at the March ***, 2022 SST meeting.²⁷
28. The District sent Parents evaluation consent forms on May ***, 2022. Parent provided consent on May ***, 2022.²⁸

²³ RE 4 p. 1; PE 21 p. 1.

²⁴ PE 15; PE 16; PE 17.

²⁵ RE 5; JE 6 p. 1; JE 30 p. 1; Tr. Vol. II p. 408, 418.

²⁶ JE 6 p. 45.

²⁷ JE 31; JE 32 p. 1.

²⁸ RE 1; JE 4; JE 33 p. 1.

29. In *** grade Student received *** for the entire year for following instructions; working independently, completing work, and staying on task; participating appropriately in group activities; listening attentively without causing interruptions; attempting new and unfamiliar tasks; using technology appropriately, and speaking at appropriate times. Student received *** for the entire year in *** out of *** categories, one *** category, and *** categories.²⁹

2022-23 School Year - *** Grade

30. Student was diagnosed with ADHD on September ***, 2022 and Parents provided this information to the District. On September ***, 2022, Parent emailed Student's teacher and notified her about seeking a counselor for Student to assist with managing Student's emotions. Parent received multiple assignments during the year in ***. Student had "meltdowns" at home with crying and wanting to be alone.³⁰
31. An LSSP, educational diagnostician, and SLP conducted the FIE, with the final report dated October ***, 2022. The evaluation included observations, teacher and parent input, and used a variety of assessment tools in the following areas: speech and language, emotional/behavioral, cognitive/intellectual, and educational/developmental performance.³¹
32. In the area of language proficiency, teacher and parent reported Student had difficulty using appropriate eye contact, understanding others' body language, using appropriate body language, and understanding/using appropriate physical space boundaries. The teacher reported Student gets frustrated, had difficulty controlling Student's emotions, and gave up when things got challenging. The SLP used the CASL -2 to assess Student's language skills. Student was distracted throughout the assessment and needed multiple reminders to stay on task. Student scored in the average range in all areas tested and demonstrated a relative weakness in pragmatic language. Student scored in the below average range for articulation; however, when combined with teacher input and informal observation, the evaluator determined Student did not need speech therapy. The District concluded Student did not require specially designed instruction from an SLP.³²

²⁹ JE 19.

³⁰ PE 6; PE 19; Tr. Vol 1. 126, 130.

³¹ JE 6.

³² JE 6 p. 2, 3, 7, 31.

33. The Behavior Assessment System for Children, Third Edition (BASC-3) was used to evaluate Student to understand Student's behaviors and emotions. Dad and teachers reported Student struggled with maintaining necessary levels of attention, interacting successfully with adults and peers, and working with others. Two teachers indicated Student significantly struggled with evading others to avoid social contact, adapting to changing situations, and organizational and/or study habits. The Conners, Third Edition assesses ADHD and its most common comorbid problems and disorders. Dad and Student's teachers reports rated inattention, hyperactivity/impulsivity, executive functioning, and peer relations as very elevated.³³
34. The October 2022 FIE used the ADOS-2, Module 3 to assess Student's characteristics of ASD. The LSSP found Student's scores met the minimum autism spectrum cutoff and Student displayed a low to moderate level of autism spectrum related symptoms as compared to children who have an ASD of the same age and language level.³⁴
35. The Social Responsiveness Scale – Second Edition (SRS-2) is a behavior rating scale designed to facilitate the differential diagnosis and classification of ASDs and aid in the design of treatment plans. The assessment has five subscale areas: social awareness (AWR), social cognition (COG), social communication (COM), social motivation (MOT), and restricted interests and repetitive behaviors (RRB). Dad rated COG, COM, and MOT as moderate and AWR and RRB as severe. This means Student may struggle with interpreting social cues, reciprocal social communication, and the motivation to engage in social-interpersonal behavior. However, Dad's report indicated Student significantly struggled with picking up on social cues and had highly restricted interests.³⁵
36. Two teacher's reports rated COM, MOT, and RRB as severe, indicating deficiencies that lead to substantial interference with every day social interactions and which are typically associated with a diagnosis of autism. They reported Student significantly struggled with interpreting social cues, reciprocal social communication, and motivation to engage in social-interpersonal behavior. Student displayed the following difficulties: inability to maintain attention on tasks, difficulty remaining organized, emotional regulation, and social interaction. The FIE acknowledged Student showed characteristics related to autism, such as social awareness and social interactions with peers and adults, and concluded these characteristics are also related to ADHD, especially in *** children. The

³³ JE 6 p. 9, 11, 13-14, 16.

³⁴ JE 6 p. 20-21.

³⁵ JE 6 p. 21-22.

FIE determined the predominant feature impacting Student was ADHD and Student met criteria as a student with an Other Health Impairment (OHI) due to ADHD.³⁶

37. District evaluators used the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to assess Student's general intellectual ability. Student's full scale IQ score was ***, which is in the average range. The Woodcock-Johnson Tests of Achievement, Fourth Edition measures academic achievement. Student scored in the average range on all subtests, except math problem solving which fell in the low range. The educational diagnostician indicted Student's low score was due to Student being highly distracted instead of a true weakness. Under adaptive behavior, the evaluation report stated, "teachers and parent did not report any concerns or difficulties with self-care and everyday living skills." However, in other parts of Parents' report they indicated Student struggles with performing basic everyday tasks in a safe and efficient manner.³⁷
38. On October ***, 2022, Dad emailed the District and requested a hard copy of the District's FIE to review before the ARD Committee meeting scheduled on November ***, 2022. Parents received the FIE via email on October ***, 2022. Student's inclusion teacher emailed Parents the proposed accommodations and social skills goal for the proposed IEP. She indicated Student was doing quite well in Student's classes and the District had "no major concerns." Student's proposed social skill goal was "within 36 instructional weeks, using 1 to 2 step directions and checks for understanding, Student will demonstrate measurable progress in interpersonal skills. Success will be measured using daily work and teacher observations at a rate of 75%."³⁸
39. An initial ARD Committee meeting convened on November ***, 2022. The committee found that Student qualified for special education services as a student with an OHI due to ADHD. Parents attended the meeting via Zoom. Student's IEP included PLAAFP statements for physical, behavioral, discipline, functional, and academic areas. Student was performing well in *** and math and was reading on grade level.³⁹
40. The educational diagnostician began the ARD Committee meeting by saying Student met the eligibility criteria for OHI due to ADHD. The cognitive and achievement sections of the October 2022 FIE were discussed, but the committee did not discuss the various autism

³⁶ JE 6 p. 23-24.

³⁷ JE 6 p. 11, 24-26, 30.

³⁸ JE 34; JE 35; JE 36.

³⁹ JE 13 p. 1-2, 11; JE 14 p. 5; PE 22.

assessments. The LSSP who performed the autism section of the FIE did not attend the meeting because of a scheduling conflict. One of Student's general education teachers indicated Student had improved with getting work done with little prompting. Student did get off task, told stories, and had trouble with undesired tasks. Student liked to work alone and at times refused group work. The teacher called Student's group to her desk to facilitate Student working with the group. Student made progress in talking and sharing in ***. Student's reading teacher indicated Student gave her a "hard time" when it is not a subject Student was interested in. The District's main concern was Student's social skills, specifically Student's peer-to-peer interactions.⁴⁰

41. The IEP proposed to educate Student in the general education setting with the following accommodations: clarification of directions, frequent breaks, positive reinforcers, preferential seating, reminders to stay on task, repeated directions, and teacher table when needed. No explanation of teacher table was provided. The IEP proposed 15 minutes per week of indirect special education consult services for math and *** and 15 minutes per week of direct social skills instruction. The proposed IEP did not include any written academic or non-academic goals. The ARD Committee meeting ended because Parents wanted to review the proposed IEP and FIE before agreeing or disagreeing with Student's proposed program. The meeting was scheduled to reconvene on November ***, 2022.⁴¹
42. Parent emailed the District on November ***, 2022 with an addendum to the proposed IEP and notified the District they did not plan to attend the November ***, 2022 reconvene meeting. The District responded via email asking for clarification regarding their disagreement with the proposed IEP and to clarify if they were waiving their right to reconvene on November ***, 2022. The email indicated the IEP would be implemented beginning November ***, 2022. Parents signed a receipt of procedural safeguards.⁴²
43. When Parents returned the proposed IEP paperwork, they marked "agree" and "yes" under the consent for initial provision of special education and related services; however, they wrote asterisks next to the checked boxes with "per IEP addendum to the ARD dated 11/***/22." Parents' addendum was a handwritten piece of paper that indicated they agreed that Student qualified for special education, but did not agree OHI was sufficient as to eligibility and wanted Student to be eligible under the autism criteria. Parents wrote their

⁴⁰ PE 22; Tr. Vol II p. 339-40.

⁴¹ JE 13 p. 5, 9, 11, 13, 14; Tr. Vol. II p. 254.

⁴² JE 13 p. 9; JE 37.

agreement was “not a blanket agreement to programming, IEP, goals, and/or accommodations to our *** educational support and Student’s educational setting environment.” The District interpreted Parents’ addendum as lack of consent to implement the IEP.⁴³ Parents filed this Complaint on November 14, 2022.

44. Student received the following grades during the first quarter of the 2022-23 school year:
***.⁴⁴
45. A private psychologist, LSSP, and BCBA evaluated Student for autism in February 2023. The private evaluation consisted of input from dad, multiple assessments, and a review of Student’s *** evaluation from 2017, and the 2019 and 2022 District FIEs. No teacher input or classroom observation was used in the evaluation due to Parents’ request to not involve the school. The Adaptive Behavior Assessment System – Third Edition (ABAS) summarizes performance across all skill areas including conceptual abilities, social skills, and practical living skills. Student’s overall adaptive behavior was characterized as lower functioning than almost all individuals Student’s age, meaning Student cannot be self-reliant without significant supports in place.⁴⁵
46. The private evaluator used the Pervasive Developmental Disorder Behavior Inventory (PDDBI), the SRS-2, the Social Language Development Test, and the ADOS-2, Module 3 to assess autism. The PDDBI is a questionnaire and was completed by Dad. The SRS-2 measures social cognition, social communication, social motivation, and autistic mannerisms. The results of the report were clinically significant and highly suggestive of deficiencies in reciprocal social behavior that lead to severe interference with everyday social interactions, which is highly associated with the clinical diagnosis of an ASD.⁴⁶
47. The Social Language Development Test – Elementary: Normative Update is a diagnostic test of social language skills, including nonverbal communication. The tasks focus on taking someone else’s perspective, making correct inferences, negotiating conflicts with peers, being flexible in interpreting situations, and supporting friends diplomatically. Results indicated Student was in the borderline impaired or delayed range, had significant social

⁴³ JE 13 p. 9, 12, 14; Tr. Vol 2 p. 258.

⁴⁴ JE 20.

⁴⁵ JE 7 p. 1-2, 5, 7; Tr. Vol. I p. 23, 63, 65.

⁴⁶ JE 7 p. 8-14; TR. Vol. I p. 38.

weaknesses, including taking someone else's perspective, making correct inferences, and supporting peers.⁴⁷

48. On the ADOS-2, scores between 10 and 13 are typical of individuals with mild to moderate concerns related to ASDs, while scores of 14 or higher are characteristic of individuals with moderate to severe concerns related to ASDs. Student's overall score was ***. Student demonstrated moderate deficits in language and communication and reciprocal social interaction. Student also demonstrated some unusual sensory interests in play materials, but no unusual repetitive hand or finger mannerisms or complex mannerisms.⁴⁸
49. The Sensory Profile Assessment was designed to measure the effect of sensory processing on functional performance. Student scored "much more than most people" on the low registration, which means Student will tend to miss or take longer to respond to stimuli that others notice. Student scored "much more than most people" on the sensory sensitivities. People with sensory sensitivities have low neurological thresholds that cause them to respond readily to sensory stimuli and includes distractibility and discomfort caused by intense stimuli, which can cause a significant challenge and daily distress. Student scored "much more than most people" on sensory avoiding.⁴⁹
50. The private evaluator used the Social Affective Test as part of Student's autism assessment. Scores indicated deficits in belief, intention, deception, emotion, imagination/pretending, imitation, and general difficulty understanding others' thoughts, ideas, and feelings. Student had difficulty comprehending abstract meaning in figurative language. These deficits contribute to Student's inability to relate emotion to social context. These deficits are a core issue in an autism diagnosis and are responsible for pragmatic and social relating difficulties.⁵⁰
51. The private evaluator tested Student's executive functioning. Scores were clinically elevated on the Shift scale and the Emotional Control scale. This suggests significant problem-solving rigidity combined with emotional dysregulation. Student's elevated scores on scales reflecting problems with fundamental behavioral and/or emotional regulation suggest that global problems with self-regulation are having a negative effect on active

⁴⁷ JE 7 p. 12-13.

⁴⁸ JE 7 p. 14-15.

⁴⁹ JE 7 p. 15-16.

⁵⁰ JE 7 p. 18.

cognitive problem-solving. Additionally, Student's scores indicate Student has marked difficulties adjusting to changes flexibly.⁵¹

52. The essential features of an ASD are persistent impairment in reciprocal social communication and social interaction along with restricted, repetitive patterns of behavior, interests, or activities. Student demonstrated these core diagnostic features. The private evaluator diagnosed Student with autism, ***, and Attention/Hyperactivity Disorder - Combined Presentation.⁵²
53. Recommendations included counseling, OT, and consultation with Parents to help implement applied behavior principles to deal with Student's outburst and disobedience. The private evaluator suggested strategies of following through with directives; reinforcing socially acceptable behavior; loss of privilege; redirection to another activity and waiting for appropriate behavior; weekly social skills group; use of social stories and social mapping to assist with social interactions with peers and adults; opportunity to retreat to quiet location; teach the principle of restitution after an event to pay back in service; participation in sensory integration activities throughout the day; look for signs of stress/anxiety and lower demands temporarily; create self-modeling clips for Student to view for behavior regulation; utilize self-monitoring devices such as MotivAider; utilize circumscribed interests to create mnemonic devices for self-talk; directly teach peer interaction; teach pivotal response behaviors; use of schedules and visual supports; create a predictable environment with routine; and teach self-management of anxiety, attention control, hyperactivity, impulsivity, and behavior regulation in general.⁵³
54. The private evaluator suggested Student's IEP should include goals related to regulating Student's behaviors, developing social skills like social communication and social understanding, and provide for Student's sensory needs like sensory breaks or sensory integration activities throughout the day. The evaluator also recommended minimal unstructured time, speech and language services, and to incorporate the autism supplement in Student's IEP.⁵⁴

⁵¹ JE 7 p. 18, 20.

⁵² JE 7 p. 33.

⁵³ JE 7 p. 34-35; Tr. Vol. I p. 55.

⁵⁴ Tr. Vol. I p. 62-63.

55. As of the date of the due process hearing, Student has not received any special education services.⁵⁵

V. DISCUSSION

A. Duty to Provide FAPE

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

The district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982). The basic inquiry is whether the IEP proposed by the school district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

⁵⁵ Tr. Vol. 2 p. 278.

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE *and* to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Schaffer*, 546 U.S. 49 at 62; *Andrew F.*, 137 S. Ct. at 999.

C. Statute of Limitations

Under the IDEA, a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint unless the State adopts an alternate limitations period. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1)-(2). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

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

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

20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); 19 Tex. Admin. Code § 89.1151(d). Parents bear the burden of establishing an exception to the limitations period. *G.I. v. Lewisville Indep. Sch. Dist.*, No. 4:12-cv-385, 2013 WL 4523581, *8 (E.D. Tex. Aug. 23, 2013).

Petitioner filed this case on November 14, 2022, and raised the withholding exception to the two-year limitations period. Petitioner argues that claims challenging the February 2019 IEP, October 2019 FIE, and Student's November 2019 discharge from special education should be considered because the District withheld required information by failing to provide prior written notice of its refusal to initiate an evaluation in April 2019 and by altering the services provided in the April 2019 IEP. Petitioner also argues Parents did not receive the notice of procedural safeguards. The District contends Petitioner failed to prove an exception applies, and that any claims accruing before November 14, 2020 are time-barred.

Prior written notice is required when a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). When a student transfers from another state with an IEP in place, the new school district must provide the student with a FAPE, including services comparable to those described in the student's IEP from the former state. 34 C.F.R. § 300.323(f). Procedural safeguards must be given to parents once per school year and must be given upon initial referral or parent request for evaluation. 34 C.F.R. § 300.504(a)(1).

When Student transferred to the District in February 2019, the District convened an ARD Committee meeting and adopted the IEP in place in ***. During the April 2019 annual meeting, Student's IEP was adjusted from 30 minutes twice a week for PT, OT, and speech therapy to 30 minutes once a week. First, the District did not change the services in the April 2019 IEP but instead adjusted these services to fit in the three-hour school day in Texas. This did not result in a reduction

of services requiring prior written notice. Second, Petitioner incorrectly states the District refused to initiate an evaluation in April 2019. Indeed, the evidence showed that Parent requested—and the District agreed to—an updated evaluation at that time, and that the District obtained parental consent for an FIE and provided Parent a notice of procedural safeguards on April ***, 2019. Parent also signed receipt of prior written notice on November ***, 2019, when Student was discharged from services. The hearing officer finds the District provided prior written notice at all times required under the IDEA.

Petitioner’s argument that the withholding exception applies because Parent did not actually receive a copy of the notice of procedural safeguards in February 2019 is equally unavailing and unsupported by the record, which showed that Parent signed he received the procedural safeguards notice though he did not sign the page indicating receipt of an actual copy. However, receipt of the notice is not the appropriate standard to trigger this exception. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008) (“When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance. Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA”). Here, the evidence supports the reasonable inference of actual or constructive knowledge of parent and student procedural rights, including the right to file a due process hearing request, beginning in February 2019.

Moreover, even if the District withheld information it was required to provide under the IDEA in 2019, Petitioner offered no evidence the failure to provide these notices prevented Parents from requesting a hearing earlier. Having concluded the withholding exception does not apply, the relevant time period for Petitioner’s claims began on November 14, 2020, two years prior to the date of filing. Nonetheless, facts outside the limitations period may be considered when determining whether the District had reason to suspect that Student had a disability under the IDEA and a

corresponding need for special education services upon commencement of the relevant timeframe. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 793 n.11 (5th Cir. 2020).

D. Child Find Under the IDEA

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). A school district, like Respondent, has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its jurisdiction, including children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a), (c)(1); *Richard R.*, 567 F. Supp. 2d at 949-50.

The Child Find obligation is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect special education services may be needed to address the disability. *Richard R.*, 567 F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001). When these suspicions arise, the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability. *Richard R.*, 567 F. Supp. 2d at 950. A two-part inquiry is required to resolve a Child Find claim. The first inquiry is whether the school district had reason to suspect the student has a disability. The second inquiry is whether the school district had reason to suspect the student may need special education and related services as a result of the disability. *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 467 (N.D. Tex. 2016), *aff'd in part and rev'd in part*, 865 F.3d. 303, 320 (5th Cir. 2017).

A school district must "identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate

a disability.” *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *O.W.*, 961 F.3d at 790-91. A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period or ceases to take such steps. *O.W.*, 961 F.3d at 793.

The evidence showed the District violated its Child Find obligation by failing to identify and evaluate Student sooner than May 2022. In this case, Student transferred to the District in February 2019 with an IEP from ***. The District provided special education services to Student as a student with speech impairment until November ***, 2019, when Student was dismissed from special education with Parents’ agreement after the October 2019 FIE found Student’s sensory processing, self-regulation, and attention issues could be effectively addressed in the classroom. During the 2020-21 school year, Student’s *** grade teacher reported Student had some issues with task refusal and sensory difficulties, but Student received *** on Student’s report card. At the beginning of Student’s *** grade year, Student’s teacher noted Student’s refusal to complete work. Teacher and Dad emailed to discuss strategies to help Student in class and dad mentioned obtaining a private ADD/ADHD evaluation. In November 2021, Student’s teacher initiated the SST due to Student’s lack of participation in activities. Teacher testified he was trained to initiate response to intervention services before requesting a special education evaluation. SST services started on November ***, 2021. The SST provided accommodations to Student; however, it is unclear from the record how or if these strategies were implemented in the classroom. Student’s lack of participation and group work refusal did not improve, and Student’s teacher noted in March 2022, that even with the accommodations, Student still failed to complete 80% of Student’s work. Parents asked for an evaluation in April 2022.

The evidence showed the District had reason to suspect the Student was a student with a disability in February 2019 when Student transferred to the District with an IEP from ***. Student was later dismissed from special education by agreement. The evidence showed the District had reason to suspect the student may need special education and related services as a result of a disability by the beginning of spring semester of 2022 during Student's *** grade year. SST interventions began in November 2021 after Student's work refusal continued from the beginning of the school year. In the spring of 2022, the interventions aimed at increasing participation proved unsuccessful, and Student continued to not participate. The District finally initiated an evaluation only after Dad requested one in April 2022, and the evaluation was completed on October ***, 2022. A delay is reasonable if the District takes proactive steps between notice and referral. The District's SST interventions were proactive steps, but once it was clear those interventions were not working, the District should have acted more expeditiously to evaluate Student. A second SST meeting was scheduled for January 2022, but did not occur, during which time Student continued to struggle with the same issues. The failure to have this meeting meant Student's progress on the SST interventions were not discussed until the meeting in March 2022. It was clear by January 2022, Student was struggling, not making progress with the strategies, and an evaluation was needed. The District should have proposed an evaluation, but instead it waited until the Parents requested an evaluation in April 2022. The four month delay between January 2022 and May 2022 to initiate the evaluation was unreasonable. Therefore, the Hearing Officer concludes the District violated its Child Find obligation.

E. Evaluation under the IDEA

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 evidence showed the October 2022 FIE used a variety of assessment tools and strategies, including teacher and parent input, and evaluator observations. The LSSP, educational diagnostician, and SLP conducted tests in the areas of speech and language, emotional/behavioral, cognitive/intellectual, and educational/developmental performance. Each evaluator used a variety of assessment tools and strategies, rather than a single measure or assessment including parent and teacher input; testing observations; and standardized assessments and other technically sound instruments to assess Student's abilities and needs.

The evaluation only found Student eligible for special education under the OHI classification for ADHD and not autism. This conclusion reached for OHI is correct; however, the conclusion to not add the classification of autism is not supported by the District's own evaluation. Student has deficiencies in social communication that lead to substantial interference with everyday social interactions, which are typically associated with a diagnosis of autism. The District's own data conclusively indicated Student was on the autism spectrum and showed many characteristics of a child on the autism spectrum, but despite these results, failed to find Student eligible for special education services under the classification of autism.

Additionally, the District did not complete an OT evaluation or an FBA assessment in October 2022. The District was aware since Student's *** grade year Student has sensory issues. Student's

*** grade teacher noticed it herself and was informed by Dad Student attended OT. Student's main issues seem to be Student's task refusal and Student's unwillingness to work with peers; however, the District did not conduct an FBA, which could have helped determine the antecedents to Student's behavior and strategies to deal with them. While the District's October 2022 FIE used multiple assessment tools, teacher and parent input, and direct observation, it failed to include all the assessments Student needed and failed to determine Student met the criteria for eligibility as a Student with autism.

F. Identification

Petitioner alleges that the District failed to identify Student as eligible for special education under the IDEA under the eligibility classification of autism. A critical distinction exists between the Child Find obligation and whether a school district should have identified a student as eligible for special education under one of the enumerated disability classifications under the IDEA. Questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student meets the criteria of one or more of the enumerated disability classifications and demonstrates a need for special education. *See* 34 C.F.R. § 300.8(a), (c)(1-13). To be eligible for special education services, a student must both have a qualifying disability and be in need of special education services to address the disability, not simply be likely to benefit from special education services. *Alvin Ind. Sch. Dist. V. A.D. ex rel Patricia F.*, 503 F.3d 378, 382 (5th Cir. 2007).

Under the IDEA, autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction. 34 C.F.R. § 300.8(c)(1)(i). Characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory

experiences. *Id.* Respondent argues that Student need not be identified as a student with autism and can have Student's individual needs met regardless of the eligibility classification.

The evidence showed Student exhibits common characteristics of autism. While Student does not demonstrate repetitive activities or stereotyped movements, Student does have difficulty with transitions and has sensory difficulties. Student demonstrated deficits with social interactions with peers and understanding others' thoughts, ideas, and feelings, which are core indicators of autism. The credible evidence showed that both the District's FIE and the private evaluator found Student has autism. Not only is Student on the autism spectrum, but Student also is in need of special education services to address these issues as evidenced by Student exhibiting the same behaviors for Student's entire *** grade year with no improvement from the SST interventions and continuing to exhibit the same behaviors into Student's *** grade year.

The Hearing Officer concludes the District failed to properly include the eligibility classification of autism on Student's IEP.

G. FAPE

The Four Factors Test

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

1. Whether the program is individualized on the basis of the student's assessment and performance;
2. Whether the program is administered in the least restrictive environment;
3. Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
4. 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). Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide 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, 300.320, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress, not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

The District's obligation when developing Student's IEP is to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(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 when developing Student's IEP and BIP. 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).

The evidence showed the District failed to develop an IEP for Student that was appropriately individualized. The proposed IEP found Student eligible for special education as a student with an OHI due to ADHD. It included PLAAFPs, stated Student would be educated in general education, would receive 15 minutes per week of direct social skills training, and listed Student's accommodations. The proposed IEP, however, did not include a written statement of annual goals and how they will be measured. The District emailed parent the proposed social skills goal, but for some unknown reason this goal is not actually included in the proposed IEP. During the meeting the ARD Committee discussed only two elements of the District's October 2022 FIE and did not discuss the autism components of the evaluation, despite the evaluation data which indicated Student has an ASD.

The proposed IEP included similar accommodations to the ones previously attempted by Student's *** grade teacher, which proved unsuccessful. Because the District failed to find Student eligible under the classification of autism, the ARD Committee failed to discuss the autism supplement. The District argues a student need not be classified by their disability as long as Student receives individualized special education services. This argument is fundamentally correct; however, the District's failure to review the autism supplement during the ARD Committee meeting further proves Student's IEP was not individualized on Student's specific needs because none of Student's autism-related deficits were addressed. The October 2022 FIE and the private evaluation both identified concerns with Student's social skills and the proposed IEP only included a vague social skills goal insufficient to further Student's progress in light of the identified deficits. Student needs

a much more robust set of services to meet Student's deficits with pragmatic language, lack of participation, inability to work with peers, inability to understand social communication and social norms, sensory issues, and lack of self-regulation. Based on Student's deficits and the credible evidence, Student's IEP should include speech therapy, OT, counseling, and a BIP.

The evidence showed the District's proposed IEP was not reasonably calculated to provide an educational benefit due to its lack of services and accommodations to address Student's identified needs.

2. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment requirement." 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require a school district's continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005(c).

To determine whether a school district is educating a student with a disability in the least restrictive environment, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and

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

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

The evidence showed Student is educated entirely in general education classes and the restrictiveness of Student's educational placement was not contested in this case. The District's proposed IEP called for Student to be educated with Student's non-disabled peers to the maximum extent appropriate.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 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 showed Parents or Dad attended every ARD Committee meeting for Student starting with the transfer ARD Committee meeting in February 2019. Parents and teachers stayed in communication through emails. SST meetings included Student's teacher, Dad, and District

administrators who had the goal of working with Student to assess Student's needs and help Student achieve Student's goals. The fact the Parents disagreed with the eligibility determinations and the District's proposed IEP does not equate to a failure to collaborate. Parents were offered an opportunity to reconvene to further discuss areas of disagreement as to Student's eligibility and services. However, Parents declined to participate in further discussions concerning eligibility.

Parents' IEP addendum indicated they felt the proposed IEP did not address Student's needs and they declined to reconvene. The District interpreted Parents' IEP addendum as lack of parental consent to implement Student's IEP. While it is true Parents declined the reconvene, the District never reached out to Parents to discuss the issue further. However, Petitioner failed to demonstrate that the District excluded them in bad faith or refused to listen to them. After the November ***, 2022 ARD Committee meeting it appears communication from both sides ceased.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P.*, 703 F.3d at 813-14. A school district responsible for making FAPE available to a child with a disability must obtain informed consent from the parent before the initial provision of special education and related services and make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services. 34 C.F.R. § 300.300(b)(1)-(2). However, a school district will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent. 34 C.F.R. § 300.300(b)(3)(ii).

Petitioner argues Parents consented to the initial provision of special education services and the District's failure to implement the IEP has denied Student a FAPE. Parents' IEP addendum was confusing and failed to provide definitive consent for special education services. Because the District has been unable to implement the proposed IEP, Student's actual academic and non-academic benefit cannot be determined. However, the proposed IEP fails to include enough services and/or accommodations based on Student's identified needs as discussed above; therefore, was not reasonably calculated to provide an educational benefit.

5. Conclusion as to the Four Factors

The weight of the credible evidence showed that Student's proposed educational program was not appropriate. Petitioner met Petitioner's burden of proving the District denied Student a FAPE under the IDEA. A preponderance of the evidence showed that Student's proposed IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188-89, 203-04; *Andrew F.*, 137 S. Ct. at 999.

VI. 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. Petitioner did not meet Petitioner's burden of proving that the withholding exception to the statute of limitations applies in this case. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); 19 Tex. Admin. Code § 89.1151(d).
3. The District did not provide Student a FAPE during the relevant time period, and Student's IEP was not reasonably calculated to address Student's needs in light of Student's unique circumstances. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188, 203-04 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

4. The District failed to comply with its Child Find obligation. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).
5. Student is eligible for special education and related services as a student with autism. 34 C.F.R. § 300.8(c)(1)(i-ii); 19 Tex. Admin. Code § 89.1040(c)(1).
6. Student continues to be eligible for special education and related services as a student with an other health impairment. 34 C.F.R. § 300.8(c)(9); 19 Tex. Admin. Code § 89.1040(c)(8).

VII. RELIEF AND ORDERS

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

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

Petitioner seeks compensatory services to in the areas of private tutoring, speech therapy, OT, and PT. Petitioner brought forward no expert testimony or evidence explaining the nature, scope,

and duration of the compensatory services Student requires to remedy the denial of FAPE in this case. Without this evidence, the Hearing Officer is unable to award compensatory services in those areas.

The District's proposed IEP offered 15 minutes per week of social skills training. While this Hearing Officer found the proposed IEP lacking because it is not individualized based on Student's performance and assessment, it is clear Student is in need of some type of social skills training based on Student's deficits in that area. At minimum, an IEP should have been in place starting in the spring of 2022. Petitioner is entitled to certain programmatic revisions as set forth below and is further entitled to compensatory awards in the form of social skills training and reimbursement for the privately obtained autism evaluation to compensate for the District's failure to appropriately serve Student's autism-related needs during the relevant time period. Petitioner is further entitled to independent evaluations at District expense in the areas of behavior, OT, and speech.

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

1. The District shall convene an ARD Committee meeting no later than August ***, 2023, for the purpose of accepting Student's eligibility as a student with autism and maintaining Student's eligibility as a student with OHI of ADHD.
2. At the ARD Committee meeting required by Item 1, above, Student's IEP shall be modified to include an autism supplement and the ARD Committee shall consider the strategies required by 19 Tex. Admin. Code § 89.1055(e)(1)-(11).
3. At the ARD Committee meeting required by Item 1, above, the ARD Committee shall consider the private evaluation of Dr. *** and modify Student's IEP to address Student's autism needs.

4. The District must deliver to Petitioner no later than 5:00 p.m. on June ***, 2023, a set of reasonable criteria for the selection of an independent BCBA or other qualified evaluator to conduct an FBA and make recommendations for behavioral interventions in the educational environment.
5. Petitioner shall select a provider who fits the reasonable criteria set by the District no later than 5:00 p.m. on June ***, 2023. If Petitioner does not provide the name of evaluator to the District by that time and day, the District shall select an evaluator who meets its criteria by July ***, 2023.
6. Within 15 days of receipt of the written FBA report from the independent evaluator, the District shall convene an ARD Committee meeting to review the evaluation and implement any programmatic, training, and/or service recommendations and make any necessary modifications to Student's IEP and development of a BIP, if necessary. The District shall invite the independent evaluator to the ARD Committee meeting, and the meeting shall occur at a time when the evaluator can participate. Participation of the independent evaluator shall be at District expense.
7. The District must deliver to Petitioner no later than 5:00 p.m. on June ***, 2023, a set of reasonable criteria for the selection of an independent qualified evaluator to conduct an OT evaluation.
8. Petitioner shall select a provider who fits the reasonable criteria set by the District no later than 5:00 p.m. on June ***, 2023. If Petitioner does not provide the name of evaluator to the District by that time and day, the District shall select an evaluator who meets its criteria by July ***, 2023.
9. Within 15 days of receipt of the written OT report from the evaluator, the District shall convene an ARD Committee meeting to review the evaluation and implement any programmatic, training, and/or service recommendations and make any necessary modifications to Student's IEP. The District shall invite the independent evaluator to the ARD Committee meeting, and the meeting shall occur at a time when the evaluator can participate. Participation of the independent evaluator shall be at District expense.
10. The District must deliver to Petitioner no later than 5:00 p.m. on June ***, 2023, a set of reasonable criteria for the selection of an independent qualified evaluator to conduct a Speech Therapy evaluation.

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11. Petitioner shall select a provider who fits the reasonable criteria set by the District no later than 5:00 p.m. on June ***, 2023. If Petitioner does not provide the name of evaluator to the District by that time and day, the District shall select an evaluator who meets its criteria by July ***, 2023.
12. Within 15 days of receipt of the written speech report from the evaluator, the District shall convene an ARD Committee meeting to review the evaluation and implement any programmatic, training, and/or service recommendations and make any necessary modifications to Student's IEP. The District shall invite the independent evaluator to the ARD Committee meeting, and the meeting shall occur at a time when the evaluator can participate. Participation of the independent evaluator shall be at District expense.
13. The District shall provide Student with 240 minutes of compensatory social skills training. These services may be provided by a District special education teacher to be allocated at the discretion of the District. These services must be provided within the 2023-24 school year. These services may be provided to Student during ESY in summer of 2023 if Parents consent to enrollment in ESY.
14. Petitioner is entitled to reimbursement from the District in the amount of \$*** for the cost of private autism evaluation from ***.
15. The District providing any special education services listed above to Student is contingent upon Parents' written consent for initial provision of special education and related services.

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

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

SIGNED June 8, 2023.



Kasey M. White
Special Education Hearing Officer
For the State of Texas

VIII. 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).