

SOAH DOCKET NO. 701-23-10263.IDEA  
TEA DOCKET NO. 149-SE-0123

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

\*\*\* (Student), by next friend Parent (collectively, Petitioner), brings this action against the Joshua 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 presented in this case are whether the District denied Student a free, appropriate public education (FAPE) by failing to develop an appropriate educational program and failing to ensure Student’s safety needs were met 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 was conducted on June 8-9, 2023, via the Zoom videoconferencing platform. 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 Cynthia Buechler of Buechler and

SOAH DOCKET NO. 701-23-10263.IDEA  
TEA DOCKET NO. 149-SE-0123

PAGE 2

Associates. \*\*\*, the District's Director of Special Education, attended the hearing as the party representative.

The parties offered joint and separately disclosed exhibits. Petitioner offered testimony of Parents, \*\*\* and \*\*\*; \*\*\*, Student's \*\*\* teacher; and \*\*\*, a District police officer. Respondent offered testimony of \*\*\*, the campus assistant principal; \*\*\*, a District educational diagnostician; \*\*\*, inclusion teacher; \*\*\*, school counselor; and \*\*\*, the Director of Special Education.

The parties timely filed written closing briefs. The Hearing Officer's decision is due on August 4, 2023.

## II. ISSUES PRESENTED

### A. Petitioner's Claims

The relevant timeframe is the 2022-23 school year. Petitioner raised the following legal issues:

1. Whether the District denied Student a FAPE by failing to develop an appropriate individualized education program (IEP).
2. Whether the District failed to implement Student's IEP.
3. Whether the District denied Student a FAPE by failing to provide Student a safe and non-hostile educational environment and appropriately respond to and address Student's safety needs at school.

**B. Petitioner's Requested Relief**

1. Compensatory education and related services to address Student's area of disabilities and/or needs, including but not limited to tutoring, speech, social skills, Applied Behavioral Analysis therapy, and counseling.
2. An Independent Educational Evaluation (IEE) at District expense, to include a functional behavior assessment (FBA), cognitive and achievement testing, and speech therapy and counseling evaluations.
3. An order directing the District to convene an Admission, Review, and Dismissal (ARD) committee meeting upon completion of the IEEs to review the evaluations and establish specific and measurable goals to address Student's unique needs.
4. An order requiring the District to include a behavior intervention plan (BIP) based on an FBA in Student's IEP.
5. An order requiring the District to create a safety plan and provide Student appropriate support and supervision to protect Student \*\*\*.
6. A finding that Student was denied a FAPE.
7. Reimbursement of all expenses incurred by Parents in providing educational or related services to Student or in obtaining any evaluation.
8. Reimbursement of all costs and representation fees that Parents incurred in filing the due process hearing request (dismissed in Order No. 3).
9. Any and all other remedies that Petitioner may be entitled to under the law.

**C. Respondent's Legal Position**

The District generally and specifically denied the allegations and also raised the affirmative defense of the statute of limitations. Its jurisdictional challenges to Petitioner's non-IDEA claims and requests for representation fees and costs were granted in Order No. 3.

### III. FINDINGS OF FACT

#### Background Information

1. Student is \*\*\* years old and lives in the District with Parents, Student's \*\*\*, and \*\*\*. Student enjoys \*\*\*.<sup>1</sup>
2. Student has been diagnosed with Autism. Student has difficulty with communication and understanding social situations, social cues, what needs to be done in a situation, and appropriate reactions. Student may interrupt, change the subject, and speak too loudly or quietly.<sup>2</sup>
3. Student also has an attention deficit hyperactivity disorder (ADHD) diagnosis. ADHD causes Student to hyperfocus and, at the same time, have difficulty focusing, and Student needs consistent proximity control to stay on task. Student also has a speech impairment, with difficulty \*\*\*, even with private speech therapy provided by Parents.<sup>3</sup>
4. Student has a history of behavioral issues at school. Student gets in trouble with other students, struggles to let things go, and has difficulty following the rules. Once Student understands a rule, however, Student rigidly adheres to it, and it is not OK for Student or others to break it.<sup>4</sup>
5. Student attended \*\*\* Independent School District (ISD) from age \*\*\* through \*\*\* grade. Student received special education and related services as a student with autism, a speech impairment, and other health impairment due to ADHD (OHI).<sup>5</sup>
6. The \*\*\* ISD ARD committee conducted a review of existing evaluation data (REED) in November 2021. The ARD committee reviewed observation and therapy data, teacher reports, and prior testing, and did not recommend a formal evaluation. Student continued to be eligible for special education and related services.<sup>6</sup>

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<sup>1</sup> Transcript (Tr.) at 14, 31.

<sup>2</sup> Tr. at 16-18, 27-28.

<sup>3</sup> Joint Exhibit (Jt. Ex.) 8 at 12; Tr. at 16-17, 29-30.

<sup>4</sup> Tr. at 18.

<sup>5</sup> Jt. Ex. 5 at 2; Jt. Ex. 8 at 2, 34; Tr. at 18, 325.

<sup>6</sup> Jt. Ex. 8 at 1-2, 17, 23, 36-37, 40-42.

7. Teachers rated Student's \*\*\* as below average, and Student exhibited refusal when assigned a \*\*\* task. Student had difficulty \*\*\*. Student had a handwriting average of \*\*\* while same-age peers wrote \*\*\*. Parent reported a severe problem with \*\*\*, including \*\*\* very slowly, messy \*\*\*, and resistance to \*\*\*. The general education teacher reported that organizing thoughts for \*\*\* was a weakness and Student needed extra time to complete anything involving \*\*\*. The teacher listed it as an area of academic challenge.<sup>7</sup>
8. Per teacher ratings, Student's response to interactions initiated by peers fell in the average range. Programmatic recommendations included following the Autism Supplement; reminders to stay on task; breaking down assignments into smaller chunks; preferential seating; positive reinforcement of appropriate sound production \*\*\*; brief reminders of social cues as needed in structured activities, small groups, and the classroom; and instructional accommodations including adapted seating, headphones, and typing lengthy assignments.<sup>8</sup>
9. The January 2022 \*\*\* ISD IEP included a review of Student's present levels of academic achievement and functional performance (PLAAFPs). In speech, Student was engaged in therapy sessions and benefitted from frequent verbal and visual redirection to remain attentive to a structured game and appropriate turn-taking in conversation. In a structured therapy activity, Student was able to identify a problem and social solution about \*\*\*% of the time. Student had achieved \*\*\*.<sup>9</sup>
10. The PLAAFPs noted deficits in executive functioning and attention, including regulating behavior and cognitive functions, problem-solving deficits, and a processing speed deficit. Student also had deficits in verbal and nonverbal communication and social interaction significantly impacting educational performance. Strengths included basic \*\*\* skills and \*\*\* comprehension. The \*\*\* teacher reported that Student would\*\*\* and had trouble with Student's classmates. Teacher intervention was required on several occasions to resolve a verbal disagreement with another student. The \*\*\* teacher reported that Student's behavior was improving, Student required frequent reminders to follow directions, and responded to firm redirection. Allowing Student to sit away from the other students to cool down was a successful intervention. The \*\*\* teacher reported Student was doing better in class, showing increased task independence, and required less repetition of

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<sup>7</sup> Jt. Ex. 5 at 3, 5; Jt. Ex. 8 at 9-10, 14, 19-20, 28; Petitioner's Exhibit (P. Ex.) 3 at 5, 8-10; Tr. at 23-24, 33.

<sup>8</sup> Jt. Ex. 8 at 16, 37.

<sup>9</sup> Jt. Ex. 5 at 1-2.

instructions. Student may get frustrated with others and resist authority. “Student just doesn’t like being reminded what to do,” but otherwise the \*\*\* teacher saw significant growth and independence. Student’s classroom teacher reported Student made “tremendous strides” and continued to do so in \*\*\*. Student’s behaviors were also improving.<sup>10</sup>

11. On the 2021-22 school year fall \*\*\* test, Student scored \*\*\*, with strengths in \*\*\*. On the 2021-22 school year fall \*\*\* test, Student scored \*\*\*, with strengths in \*\*\*, and weaknesses in multiple areas. On the 2021-22 school year fall \*\*\* test, Student scored \*\*\*. Student scored highest in \*\*\*. On the 2021-22 school year fall \*\*\* test, Student scored \*\*\*. Student scored highest in the areas of \*\*\*, with weaknesses in \*\*\*. In the first, second, and third six weeks of school, Student had a \*\*\*,  
\*\*\*. Student achieved \*\*\* on Student’s previous year’s IEP goals.<sup>11</sup>
12. Student’s January 2022 \*\*\* ISD ARD committee found that Student’s behavior did not impede Student’s learning or that of others and Student was subject to the Student Code of Conduct.<sup>12</sup>
13. The January 2022 IEP included a \*\*\* goal focusing on \*\*\*; a \*\*\* goal focusing on \*\*\*; a speech therapy-articulation goal of demonstrating more age appropriate articulation skills to increase overall intelligibility; a speech therapy-language goal where Student would demonstrate strategies for more age appropriate social language skills to actively participate in activities with peers; and an adaptive behavior goal in which Student would follow the schedule and complete a daily checklist as Student completed assignments.<sup>13</sup>

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<sup>10</sup> Jt. Ex. 5 at 3-4.

<sup>11</sup> Jt. Ex. 5 at 3-4.

<sup>12</sup> Jt. Ex. 5 at 5.

<sup>13</sup> Jt. Ex. 5 at 7-9.

14. Student's January 2022 \*\*\* ISD IEP called for placement in the general education classroom with supports, to include \*\*\*.<sup>14</sup>

### 2022-23 School Year

15. Student enrolled in the District at the beginning of the 2022-23 school year. Student attended \*\*\* from August 2022 to November 2022.<sup>15</sup>
16. The District convened a transfer ARD committee meeting on August \*\*\*, 2022, and agreed to implement Student's January 2022 \*\*\* ISD IEP for 30 days and to reconvene a permanent placement ARD committee meeting by September \*\*\*, 2022. The meeting was held by phone, and Student's Parent participated. Parent reported that Student is easily distracted but "fairly normal" compared to same age peers. Student's Parent also stated that the family felt comfortable with the way the school was set up and that Student would be able to navigate the halls. The ARD committee further considered and concluded that Student did not require a BIP. Student's Parent agreed to the proposed program.<sup>16</sup>
17. The IEP goals and objectives from \*\*\* ISD were revised to make them more measurable and another speech goal was added. The September 2022 IEP also included a social skills goal. The ARD committee, including Student's Parent, agreed to adopt the revised goals and objectives and to the proposed accommodations.<sup>17</sup>
18. The ARD committee discussed the schedule of services and placement. In addition to the three sessions of 30-minute direct speech services that Student was receiving in \*\*\* ISD, the District speech language pathologist recommended adding two indirect speech sessions to facilitate generalization of skills. The ARD committee also recommended three, 30-minute sessions per week of direct social skills instruction. Services included \*\*\* in the general education classroom for 30 minutes 4 out of 5 days per week and speech/language therapy for 30 minutes 3 times per 6 weeks. Student's Parent agreed to the meeting discussions and to waive the 5-day waiting period.<sup>18</sup>

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<sup>14</sup> Jt. Ex. 5 at 12-16; Jt. Ex. 6 at 1.

<sup>15</sup> Jt. Ex. 7 at 6; Tr. at 18, 324.

<sup>16</sup> Jt. Ex. 6 at 1-2, 9.

<sup>17</sup> Jt. Ex. 7 at 11-13, 26.

<sup>18</sup> Jt. Ex. 6 at 1-2, 9; Jt. Ex. 7 at 22, 26.

19. Student's ARD committee convened on September \*\*\*, 2022, for a permanent placement and annual meeting. Student's Parent participated by phone. Based on the evaluation data reviewed, Student continued to be eligible for special education and related services as a student with autism, a speech impairment, and OHI due to ADHD.<sup>19</sup>
20. The September 2022 ARD committee reviewed Student's PLAAFPs. In \*\*\*, Student's \*\*\* grade was \*\*\*, and Student scored a \*\*\*% on the first six weeks district assessment. Student was capable of performing well and demonstrated mastery of the \*\*\*grade curriculum. At the same time, the \*\*\* teacher reported that Student struggled with behavior, \*\*\*, arguing with other students, and disrupting the classroom. Student had difficulty making friends in class. Student was argumentative with the general education and inclusion teachers when they attempted to intervene or assist Student to get on task. Student's behavior interfered with Student's success "along with the rest of the class."<sup>20</sup>
21. In \*\*\*, classroom teachers had been unable to assess Student's \*\*\* ability due to Student's refusal to \*\*\*. In \*\*\*, Student's current grade was a \*\*\*% and Student consistently had missing assignments. Student scored a \*\*\*% on the first six weeks district assessment. Student's teacher reported Student was successful when able to focus. Student struggled with basic \*\*\* and allowing Student to \*\*\* was beneficial. Student required "constant reminders" to stay on task and became frustrated when required to move on from a preferred task.<sup>21</sup>
22. In the area of behavior, Student was capable of following the District's Student Code of Conduct with behavioral support. Teachers reported behavioral concerns, including refusal to work, disruptive behavior, outbursts, and defiance. The behavioral specialist had to intervene on numerous occasions to remove Student from the classroom since school began. At the same time, there were days when Student was in a "good mood" and met classroom behavioral and academic expectations. In the area of \*\*\*, Student was often late to class, accumulating \*\*\* tardies during the first six weeks of school. Student had difficulty getting \*\*\*. Student had difficulty understanding social cues and would "\*\*\*." In \*\*\*, Student had a grade of \*\*\*% and achieved an \*\*\*% on the first six weeks district assessment. Student was capable of performing well and

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<sup>19</sup> Jt. Ex. 7 at 1, 4-5, 26.

<sup>20</sup> Jt. Ex. 7 at 5.

<sup>21</sup> Jt. Ex. 7 at 6-7.



showed mastery of the \*\*\*-grade curriculum. Student's teacher reported that Student struggled with behavior.<sup>22</sup>

23. At the September \*\*\*, 2022 ARD committee meeting, the committee reviewed the Autism Supplement. The committee agreed that Student could follow the general education schedule without support. It was also determined, based on Student's most recent evaluation, that Student did not demonstrate a need for support with transitions at school. The ARD committee found that Student was successful with a typical staff to student ratio in the general education setting.<sup>23</sup>
24. Student's scores on the State of Texas Assessment of Academic Readiness (STAAR) tests were reviewed. Student passed the \*\*\* STAAR and was within one or two questions of passing the \*\*\* STAAR. The prior school year, Student came within one or two questions of passing the \*\*\* STAAR. A comparison of Student's STAAR scores from the 2020-21 and 2021-22 school years in \*\*\* show more than a year's worth of academic growth. Student did not meet standards on STAAR testing in \*\*\* in May 2021. On the May 2022 administration, Student was approaching grade level standards in \*\*\* but continued to not meet standards in \*\*\*. Because Student did not meet standards in \*\*\*, the September 2022 IEP called for 30 hours of accelerated instruction in these subjects.<sup>24</sup>
25. The September 2022 ARD committee found that Student's behavior did not impede Student's learning or that of others, and Student's IEP did not include a BIP. Student was also subject to the District's Student Code of Conduct without modifications. The ARD committee considered Student's need for sensory programming, including \*\*\* and adapted seating.<sup>25</sup>
26. The ARD committee found that Student's disability affected Student's involvement in the general education curriculum and called for inclusion support, social skills instruction outside of the general education classroom, and speech services in the areas of articulation and pragmatics.<sup>26</sup>

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<sup>22</sup> Jt. Ex. 7 at 7.

<sup>23</sup> Jt. Ex. 7 at 26, 29-30.

<sup>24</sup> Jt. Ex. 7 at 8.

<sup>25</sup> Jt. Ex. 7 at 9, 25.

<sup>26</sup> Jt. Ex. 7 at 9.

27. The September 2022 IEP included a \*\*\* goal; two adaptive behavior goals targeting \*\*\* interrupting instruction and self-regulation and coping strategies to avoid engaging in unexpected and inappropriate behavior; and three speech therapy goals, one targeting articulation and two language goals targeting identifying socially acceptable solutions to problems and intonational patterns and voice volume. The September 2022 IEP did not include reading or \*\*\* goals.<sup>27</sup>
28. The IEP called for classroom, materials, assignments, and testing accommodations. Behavioral accommodations included cool off time with a behavior interventionist, clearly defined limits, providing a copy of a daily agenda or task checklist, frequent reminders of rules, if/then statements, positive feedback/praise for appropriate interactions with others, preferential seating to minimize distraction, reminders to stay on task, and use of timers to initiate work and set time limits.<sup>28</sup>
29. Apart from speech therapy and some social skills instruction, the schedule of services called for placement in the general education setting with inclusion support for 180 minutes per week out of 450 minutes per week in \*\*\*, social skills instruction in and out of the classroom for 30 minutes 3 times per week, and direct speech/language therapy services for 30 minutes 3 times per week per 6-week grading period in weeks, 1, 2, and 4, and indirect services in weeks 3 and 5 to facilitate generalization of skills.<sup>29</sup>
30. Student's Parent agreed with the proposed IEP and waived the five-day waiting period. The District provided prior written notice on September \*\*\*, 2022.<sup>30</sup>
31. On October \*\*\*, 2022, Student arrived on time to \*\*\*. \*\*\*.<sup>31</sup>

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<sup>27</sup> Jt. Ex. 7 at 11-13; Tr. at 24, 37-38.

<sup>28</sup> Jt. Ex. 7 at 14, 16-17.

<sup>29</sup> Jt. Ex. 7 at 22-23.

<sup>30</sup> Jt. Ex. 7 at 26-28.

<sup>31</sup> Tr. at 283-84, 406-09.

32. When Student returned to class \*\*\* teacher sent Student to the front office. In the hallway, a behavioral aide approached Student and took Student to the counselor, who interviewed Student about what had occurred. Student explained what happened, and the counselor determined that \*\*\*. Student was not upset, scared, or agitated, and Student returned to class. The counselor reported the incident to the assistant principal and Student was immediately called to the office and interviewed a second time. When asked if Student \*\*\*,<sup>32</sup>
33. \*\*\*. The assistant principal viewed the video footage, which showed Student \*\*\*,<sup>33</sup>
34. \*\*\* Student returned to class and completed the school day. The assistant principal contacted Student's Parent to report the incident. That evening, a District School Resource Officer (SRO) was contacted by the \*\*\*, who advised the SRO that Student's Parent reported that \*\*\*,<sup>34</sup>
35. The SRO contacted the assistant principal, who advised him what had occurred that day. The SRO then contacted Student's Parent, who was upset and alleged that \*\*\*. Student's Parent characterized the incident as \*\*\*. After being informed of the conversation with Student's Parent, the SRO's supervisor contacted Student's Parent and advised Parent that \*\*\*,<sup>35</sup>

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<sup>32</sup> Respondent's Exhibit (R. Ex.) 3 at 6; Tr. at 283-91, 406-09.

<sup>33</sup> R. Ex. 3 at 4; Tr. at 285-86.

<sup>34</sup> R. Ex. 2 at 2; R. Ex. 3 at 5; Tr. at 257-58, 287, 291.

<sup>35</sup> R. Ex. 2 at 2-3.

36. On October \*\*\*, 2022, the SRO began an investigation, obtaining written statements from the\*\*\*teacher, the counselor, and the assistant principal. Each educator reported that Student did not indicate that \*\*\*.<sup>36</sup>
37. On October \*\*\*, 2022, Student was interviewed by a \*\*\*. The SRO, \*\*\* watched the interview. While Student was being interviewed, Parents were asked to provide written statements \*\*\* and were provided the statement forms to complete.<sup>37</sup>
38. The interviewer established that Student knew what it meant to tell the truth. Student's account of what had happened was consistent with the statements Student made to District staff. Student \*\*\*. During the interview, Student was "very open and talkative" and did not require support. At the conclusion of the interview, Parents refused to provide \*\*\* statements.<sup>38</sup>
39. The SRO viewed the video, \*\*\*, \*\*\*.<sup>39</sup>
40. After October \*\*\*, 2022, Student did not attend school for more than two weeks. When Student returned, there was no difference in Student's demeanor. Student's case manager ensured that Student's IEP was appropriately implemented during Student's tenure in the District.<sup>40</sup>
41. On October \*\*\*, 2022, Student stopped attending school. Before Student withdrew, Student had all passing grades. In the first month of school, Student had \*\*\* tardies, mostly in \*\*\*. In the second six weeks, Student's tardies significantly improved with an \*\*\*% reduction. It is anticipated that \*\*\* grade students \*\*\* will have

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<sup>36</sup> R. Ex. 2 at 3; R. Ex. 3 at 4-9.

<sup>37</sup> R. Ex. 2 at 3-4.

<sup>38</sup> R. Ex. 2 at 4; Tr. at 259-60.

<sup>39</sup> Jt. Ex. 9; R. Ex. 2 at 3.

<sup>40</sup> Tr. at 287-88, 372-73, 378-82.

several tardies the first six weeks. Student's tardies significantly decreased the second six weeks of school.<sup>41</sup>

42. On October \*\*\*, 2022, Student's inclusion teacher contacted Student's Parent to inquire what \*\*\* could do to get Student back in school. Student's Parent complained about the tardies and alleged that Student \*\*\*. The inclusion teacher offered for the District to conduct an FBA and contacted Student's previous teacher in \*\*\* ISD at Student's Parent's request. Parent suggested similar accommodations to those the District was already providing.<sup>42</sup>
43. On October \*\*\*, 2022, the case manager and diagnostician called Student's Parent to confirm a good time for the ARD committee meeting Parents had requested. Student's Parent stated that Parent would speak to Parent's advocate and let the diagnostician know what time was workable on October \*\*\* 2022. The day of the meeting, Parents cancelled, and the diagnostician attempted to reschedule the meeting. On November \*\*\*, 2022, she sent an email asking Student's Parent if Parent wanted to reschedule. On November \*\*\*, 2022, the case manager called Student's Parent to check on Student but did not reach Parent.<sup>43</sup>
44. Student withdrew from the District on November \*\*\*, 2022. The Director of Special Education sent a letter to Parents letting them know that the school was ready, willing, and able to provide Student with an appropriate program. She received no response.<sup>44</sup>
45. On May \*\*\*, 2023, the District offered to conduct a full re-evaluation to include cognitive, achievement, occupational therapy, speech, psychological, assistive technology, and counseling assessments, as well as an FBA. The District included a consent form and Notice of Evaluation with this offer. The District also offered tutoring before and after school for 30 minutes a day during the summer and for 22 minutes during the school day for up to 30 hours when school is in session for the 2023-24 school year. The District received no response.<sup>45</sup>

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<sup>41</sup> Tr. at 289-90, 305.

<sup>42</sup> R. Ex. 3 at 1; Tr. at 379-82.

<sup>43</sup> R. Ex. 5 at 1-2.

<sup>44</sup> R. Ex. 6 at 1; Tr. at 419.

<sup>45</sup> R. Ex. 3 at 11; Tr. at 420-22.

46. The District scheduled an ARD committee meeting for May \*\*\*, 2023, to address Parents' concerns and consider Extended School Year (ESY) services. The meeting notice and correspondence were sent to Parents on May \*\*\*, 2023. The District received no response.<sup>46</sup>
47. On the day of the meeting, the school called Student's Parent, who advised them Parent would not be attending.<sup>47</sup>
48. While attending \*\*\* ISD, Student did not receive ESY services, and because Student attended school for only eight weeks, there was insufficient data to establish a need for ESY. The ARD committee agreed to conduct a full re-evaluation that included all the areas offered by the District in its May \*\*\*, 2023 correspondence with Parents. After Parents retained an advocate and an attorney, communications with the school ceased.<sup>48</sup>
49. Student continues to be homeschooled.<sup>49</sup>

#### IV. DISCUSSION

Petitioner alleges the District failed to develop and implement an appropriate IEP and failed to appropriately respond to and address Student's safety needs during the 2022-23 school year. Petitioner seeks compensatory educational services; an IEE; revisions to Student's IEP, to include a safety plan; 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). There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch.*

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<sup>46</sup> R. Ex. 3 at 12; Tr. at 122.

<sup>47</sup> R. Ex. 8; Tr. at 340-42.

<sup>48</sup> R. Ex. 8; Tr. at 340-42.

<sup>49</sup> Tr. at 23.

*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 that 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.

## B. FAPE

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

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." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

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

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the

- key stakeholders; and
- Whether positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).<sup>50</sup>

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).

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

In meeting the obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress, not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The inquiry in this case is whether the IEP proposed by the school district was reasonably calculated to

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<sup>50</sup> Even after the *Endrew F.* decision, 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). See also *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017).



enable Student to make progress appropriate in light of Student's circumstances. *Andrew F. ex rel. Joseph F.*

*v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

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). The IEP must consider the student's communication needs and whether Student needs assistive technology and services. 34 C.F.R. § 300.324(a)(2)(iv), (v).

Petitioner alleges the September 2022 IEP was not sufficiently individualized to meet Student's academic needs in the areas of \*\*\*. Petitioner further alleges the IEP failed to appropriately address Student's known behavioral issues and should have included a BIP. Finally, Petitioner alleges the September 2022 IEP failed to adequately address Student's safety needs at school.

**a. \*\*\***

Petitioner alleges the September 2022 IEP failed to adequately address Student's \*\*\* deficits. The \*\*\* ISD REED documented numerous issues with \*\*\*, and Parents reported continuing issues and that this was an area of great concern. While Student did not meet standards on STAAR testing in \*\*\*in May 2021 and Student's refusal behavior when presented a \*\*\* task is well-documented, the record was not clear on the question of whether Student's refusal behavior is an academic or behavioral need meriting further exploration given Student's capacity to perform grade level academic work.

Overall, the weight of the credible evidence established that the September 2022 ARD committee's decision to remove the targeted \*\*\* goal did not deny Student a FAPE and the September 2022 IEP adequately addressed Student's needs in this area.

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

Student passed the\*\*\* STAAR in 2021. On the May 2022 administration, Student was approaching grade level standards, with strengths in \*\*\*. On the 2021-22 school year fall \*\*\* test and fall \*\*\* tests, Student demonstrated strengths in several areas. Student also achieved an \*\*\*% in \*\*\* on Student's previous year's IEP goals. At the September 2022 ARD committee meeting, Student's \*\*\* grade was \*\*\*, and Student achieved a \*\*\*% on the first six weeks district assessment. Student was demonstrating mastery of the \*\*\*-grade curriculum.

Overall, the evidence showed that Student was capable of accessing grade level curriculum, and that the \*\*\* inclusion support Student received was appropriate to meet Student's needs in this area. Student's performance on state and district \*\*\* assessments showed an appropriate level of growth over time. Accordingly, Student did not require a \*\*\* goal to continue to access the grade level curriculum and the September 2022 IEP was appropriate to meet Student's needs in this area.

**c. \*\*\***

Student narrowly missed meeting standards on the \*\*\* STAAR test in 2021 and did not meet standards on the next administration. Because Student did not meet standards, the September 2022 IEP appropriately called for 30 hours of accelerated instruction to support academic growth in this area. A comparison of Student's STAAR scores from the 2020-21 and 2021-22 school years in

\*\*\* showed over a year's worth of academic growth, and on the 2021-22 school year fall \*\*\* test, Student demonstrated numerous strengths in addition to areas where improvement was needed. Student achieved an \*\*\*% on Student's previous year's \*\*\* IEP goals. In the 2022-23 school year, Student's grade of \*\*\*% and score of \*\*\*% on the first six weeks assessment reflected missing assignments, rather than lack of capacity to do the work. With support provided by the inclusion teacher and \*\*\*, Student could access grade level curriculum in this subject. Student's September 2022 IEP appropriately included a \*\*\* goal, and Student's program was tailored to meet Student's needs in this area.

**d. Social Skills**

Petitioner alleges the District failed to appropriately address Student's social skills needs. Student has longstanding deficits in this area. The September 2022 IEP included a social skills goal and recommended three, 30-minute sessions per week of direct social skills instruction in and outside of the classroom. The evidence showed that the September 2022 IEP was appropriately individualized to meet Student's needs in this area.

**e. Executive Functioning**

Petitioner alleges the September 2022 IEP failed to adequately address Student's executive functioning. The \*\*\* ISD REED documented executive functioning deficits but notably did not include a standalone goal or other interventions in this area. While this is an area that perhaps merits further exploration, Parents have to date resisted efforts to further evaluate Student. Petitioner failed to present sufficient evidence that the September 2022 IEP was not appropriate to meet Student's needs as to executive functioning.

**f. Behavior**

Appropriate behavioral supports and interventions are important components of 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 his or her learning or that of others, his or her 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 child's educational benefits 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 student's 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 FAPE because the student's IEP adequately identified the behavioral issues and implemented strategies to address them).

During the first few weeks of school, Student's present levels support the conclusion that Student's behavior interfered with Student's learning and that of Student's classmates. The data available to the September 2022 ARD committee supported a need for behavioral interventions beyond the supports available in the general education classroom, with Student's teachers consistently reporting that Student was capable of grade level academic work but struggling behaviorally. However, after discussing whether a BIP was needed, Student's ARD committee answered this question in

the negative. Though Student exhibited behaviors that impacted Student's learning, these behaviors did not significantly interfere with Student's ability to benefit from instruction, as evidenced by Student's academic potential and performance. The weight of the credible evidence supports the conclusion that the September 2022 IEP was appropriate to meet Student's needs in the area of behavior.

#### **g. 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."

Though identical to the Autism Supplement in the January 2022 \*\*\* ISD IEP, the September 2022 ARD committee considered its elements, including the appropriate staff to student ratio Student required to benefit from instruction, and Student's IEP included an Autism Supplement that addressed the elements required by state regulations.

#### **h. Safety Needs**

Petitioner alleges the District failed to ensure Student's safety needs were met at school. District educators credibly explained that it is not uncommon for students \*\*\* when the school year begins, as Student did. However, the number of tardies Student accumulated in the first six weeks of school was not inconsistent with Student's peers. Moreover, this claim hinges almost entirely on an

SOAH DOCKET NO. 701-23-10263.IDEA  
TEA DOCKET NO. 149-SE-0123

PAGE 22

isolated incident where Student \*\*\*. Apart from Student reporting that Student \*\*\*, Petitioner presented no credible evidence to support the theory that the incident \*\*\*—a characterization notably made by Student’s Parent, not Student. While the District’s explanation that \*\*\*, the record does not support Petitioner’s contention that Student’s safety needs at school were not met to the extent Student was denied a FAPE.

A Hearing Officer cannot predicate a finding of a denial of FAPE on the safety of the student unless the risk to the safety of the student resulted in a denial of FAPE. *J.N. v. Pittsburgh City Sch. Dist.*, 536 F.Supp.2d 564, 577 (W.D. Pa. 2008). The weight of the credible evidence demonstrated that Student’s September 2022 IEP was appropriate as to Student’s safety needs and Student received a FAPE from the District despite the potential need to revisit Student’s level of supervision during transitions.

Overall, the evidence showed that Student’s proposed program was individualized on the basis of assessment and performance.

## **2. 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).

Student’s September 2022 IEP called for a general education placement, with inclusion support in \*\*\*. This was the least restrictive environment appropriate to meet Student’s needs and offered an inclusive education to the maximum extent appropriate. No genuine dispute exists on this issue.

### **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. 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.*

While the District must consider and attempt to address parental concerns in developing a student's educational program, it is not obligated to chase parents who choose to withdraw their child from school and cease communication.

Petitioner points to the District's failure to convene a resolution meeting within 15 days as evidence of lack of collaboration. To the extent Petitioner alleges the District violated the IDEA by failing to hold a timely resolution session, this procedural claim was not specifically pled. 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). Petitioner presented no persuasive evidence that the late resolution session invitation rose to the level of a procedural violation causing a deprivation of FAPE. Moreover, the evidence showed that it was Petitioner who failed to engage in the collaborative dispute resolution process envisioned by the IDEA by refusing the District's albeit late invitation to convene to discuss Parents' concerns with Student's program.

The record further evidenced concerted attempts by the District to reengage Parents after Student withdrew from school. Petitioner, however, declined several invitations to further discuss Student's educational program. Whether on the advice of Petitioner's legal team or otherwise, Parents made this choice, even though this position is notably inconsistent with their stated goal that Student attend school in the District with appropriate programming.



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.

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

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

Student's brief tenure in the District and withdrawal after attending school for less than three months hinders an analysis of Student's response to the September 2022 IEP. During Student's enrollment, Student made academic progress, achieving passing grades in all subjects before Student withdrew. While Student made limited non-academic progress and continued to have behavioral issues and challenges interacting with peers and teachers, as discussed above, the September 2022 IEP was appropriate to meet Student's non-academic needs had Student continued to attend school.

#### **5. 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 IEP was 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. IEP Implementation

In determining whether a school district failed to adequately implement a student's IEP, a hearing officer must consider whether there was a significant or substantial failure to implement the IEP under the third *Michael F.* factor and whether the student received academic and nonacademic benefits from the IEP under the fourth factor. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). To prevail on Student's claim under the IDEA, Petitioner must show more than a *de minimis* failure to implement all elements of Student's IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Petitioner failed to present evidence that the District did not implement substantial or significant provisions of Student's IEP between Student's enrollment in August 2022 and Student's withdrawal in November 2022.

### 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. Student's educational program for the 2022-23 school year was 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).
3. Respondent implemented Student's educational program during the 2022-23 school year as required by the IDEA. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).
4. The District 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).

SOAH DOCKET NO. 701-23-10263.IDEA  
TEA DOCKET NO. 149-SE-0123

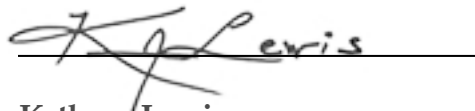
PAGE 27

5. Petitioner did not meet Petitioner's burden of proving that the District denied Student a FAPE.  
*Schaffer*, 546 U.S. at 62.

## VI. ORDERS

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

**SIGNED AUGUST 4, 2023**

A handwritten signature in black ink, appearing to read "K. Lewis", is written over a 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).