

**Before the  
State Office of Administrative  
Hearings**

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**STUDENT, by next friends PARENT and PARENT,  
Petitioner  
v.  
Frisco Independent School District,  
Respondent**

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**DECISION OF THE HEARING OFFICER**

\*\*\* (Student), by next friends \*\*\* and \*\*\* (Parents and, collectively, Petitioner), brings this action against the Frisco Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issue in this case is whether the District provided Student a free and appropriate public education (FAPE) during the relevant time period. The Hearing Officer concludes the District provided Student a program that met Student's unique needs and offered Student a FAPE.

**I. DUE PROCESS HEARING**

The due process hearing was conducted via Zoom videoconference October 16-17, 2023, and recorded and transcribed by a certified court reporter. Petitioner was represented by Janelle Davis from Janelle L. Davis Law, PLLC. Parents also attended the due process hearing. Respondent was represented by Jennifer Carroll and Andrea Gulley from Walsh Gallegos Treviño Kyle & Robinson, P.C., and \*\*\*, Assistant General Counsel for the District. \*\*\*, Executive Director of Special Education for the District, and \*\*\*, Managing Director of Special Education for the District, attended the hearing as party representatives for Respondent.

Respondent prepared 54 joint exhibits for the parties, which were all admitted. Petitioner offered 15 exhibits, and 10 of them were admitted over any objections by Respondent. Petitioner offered the testimony of Dr. \*\*\*, an expert in neuropsychology, special education, and autism, who testified about the findings and conclusions of her independent educational evaluation (IEE) of Student; \*\*\*, the Principal at \*\*\* in the District, who testified about Student's individualized education Plan (IEP) and Admission, Review, and Dismissal (ARD) committee meetings; \*\*\*, a District licensed specialist in school psychology (LSSP), who testified about the findings and conclusions of Student's full individual evaluation (FIE); and Student's Parent, who testified about Student's disability, Student's educational needs, and parental requests made to the District.

Respondent offered 18 exhibits, and 17 were admitted over any objections from Petitioner. Respondent offered the testimony of \*\*\*, Managing Director for Special Education Services for the District, who testified about the District's proposed program for Student and proposed ARD committee meetings; and \*\*\*, an expert in school psychology and a District LSSP, who testified about the District's FIE

and the IEE.

Both parties filed written closing briefs in a timely manner. The Decision in this case is due December 15, 2023.

## **II. ISSUES**

Petitioner raised the following IDEA issues from the 2021-2022 and 2022-2023 school years for decision in this case:

1. Whether the District failed to provide Student a FAPE by failing to provide an IEP with appropriate, individualized, and measurable goals; necessary behavioral supports; and appropriate related services.
2. Whether the District failed to implement Student's IEP with fidelity, including failing to provide qualified instructors and professionals to work with Student.
3. Whether the District failed to provide Student's education in Student's least restrictive environment.
4. Whether the District failed to make Parents meaningful participants in planning Student's educational services.
5. Whether the District failed to provide Student extended school year (ESY) services when such services were necessary to provide Student a FAPE.
6. Whether the District failed to conduct an appropriate functional behavioral assessment (FBA) and implement an appropriate behavior intervention plan (BIP).
7. Whether the District failed to provide appropriate compensatory services after the impact of the COVID-19 pandemic.
8. Whether the District failed to provide an appropriate and timely re-evaluation of

Student.

### III. REQUESTED RELIEF

Petitioner requested the following items of relief:

1. Order the District to provide a private placement for the remainder of the 2022-2023 school year and then as determined by an ARD committee.
2. In the alternative, order the District to establish individualized and measurable goals related to Student's academic achievement, and in particular, Student's independent reading ability and fluency.
3. Order the District to provide compensatory education and related services specific to Student's academic progress, including speech therapy and direct occupational therapy.
4. Order the District to provide an IEE for all suspected or known disabilities, including evaluations for autism, attention deficit hyperactivity disorder (ADHD), occupational therapy to include sensory processing and/or handwriting, speech therapy, an FBA by a board certified behavior analyst (BCBA), and a physical education evaluation at District expense with no limitations.
5. Order the District to conduct an ARD committee meeting after completion of the IEEs to review the evaluations and establish specific and measurable goals to address Student's unique needs.
6. Order the District to provide ESY services.
7. Order the District to develop a \*\*\* plan for Student's \*\*\* to  
  
\*\*\*, which should include \*\*\*.
8. Order the District to provide any and all other remedies Petitioner may be entitled to under the law.

#### IV. FINDINGS OF FACT

1. Student is a \*\*\* year-old \*\*\* grader who attends \*\*\* in the District. During the 2021-2022 and 2022-2023 school years, Student attended \*\*\* in the District. Student is currently eligible for special education services under the categories of speech impairment, other health impairment (OHI) for ADHD, and autism.<sup>1</sup>
2. Student attended \*\*\*, moving to the District for \*\*\* grade for the 2018-2019 school year.<sup>2</sup>
3. On October \*\*\*, 2018, The District conducted an FIE for Student. The FIE included formal speech and language evaluations; an OHI letter from Student's physician, which documented Student's ADHD and difficulty focusing in a classroom setting; formal evaluations for autism; formal adaptive behavior assessments; formal cognitive ability assessments; an educational achievement assessment; and an occupational therapy evaluation. The FIE determined Student was eligible for special education services in the categories of speech impairment, OHI for ADHD, and autism.<sup>3</sup>
4. In spring of 2021 (\*\* grade), Student did not pass the State of Texas Assessments of Academic Readiness (STAAR) \*\*\*.<sup>4</sup>

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<sup>1</sup> Joint Exhibit (JE) 8 at 1; JE 38; JE 50.

<sup>2</sup> JE 5.

<sup>3</sup> JE 5.

<sup>4</sup> JE 6 at 5.

## The 2021-2022 School Year

5. On October \*\*\*, 2021, Student's ARD committee, including Parents, conducted a review of existing evaluation data (REED) for Student. The REED included a review of the 2018 FIE, a review of Student's school performance, and information from teachers and related service providers.<sup>5</sup>
6. The REED indicated Student has adequate expressive language for social and academic settings, although, for academically expressive tasks, Student may require a visual aid to keep Student's thoughts organized. In the area of receptive language, the REED indicated Student is able to answer questions appropriately and follow directions but requires visual support to enhance Student's focus in this area. In the area of pragmatic language, Student interacts appropriately with peers and teachers in the classroom environment. The REED recommended Student continue receiving direct speech therapy related to expressive, receptive, and pragmatic language.<sup>6</sup>
7. As part of the REED, the 2018 OHI letter from Student's physician was reviewed, and it was confirmed Student continued to be eligible under OHI with ADHD. Student also continued to exhibit characteristics associated with, and meet eligibility requirements for, autism. The REED indicated Student was below grade level in reading, writing, and math.<sup>7</sup>
8. In October of 2021, through the REED, the District determined that an FIE with new formal assessments was not necessary because Student's special education eligibility was not in question.<sup>8</sup>
9. On November \*\*\*, 2021, the District convened Student's ARD committee for Student's annual meeting. The committee determined Student continued to be eligible for special education services in the categories of speech impairment, OHI for ADHD, and autism. The committee identified Student's present levels of academic achievement and functional performance (present levels) as average

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<sup>5</sup> JE 5.

<sup>6</sup> JE 5 at 2-4.

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

<sup>8</sup> JE 6 at 23.

cognitive abilities; weaknesses with social interactions consistent with Student's autism identification; difficulty maintaining focus as a result of ADHD; a speech impairment in the areas of expressive, receptive, and pragmatic language; slightly below average reading level; on-level math performance; appropriate behavior for following school and class rules; slightly below average language performance; and appropriate voice, fluency, and articulation.<sup>9</sup>

10. The ARD committee developed one reading goal, one writing goal, four speech goals, and one behavior goal for Student. The ARD committee placed Student in special education resource for 60 minutes per week for reading instruction and 60 minutes per week for writing instruction and provided Student with 14 thirty-minute small group speech therapy sessions each nine weeks.<sup>10</sup>
11. The ARD Committee determined ESY and COVID-19 compensatory services were not necessary.<sup>11</sup>
12. From Student's 2021-2022 IEP, Student did not master Student's one reading goal, mastered Student's one writing goal, mastered two of Student's four speech and language goals, and did not master Student's one behavior goal. In spring of 2022, Student failed \*\*\* STAAR test. Student received passing grades for all of Student's classes for the 2021-2022 school year.<sup>12</sup>

### **The 2022-2023 School Year**

13. On October \*\*\*, 2022, the District convened Student's ARD committee for Student's annual meeting. Student's present levels were identified as below average cognitive skills; adaptive skills within normal levels; an expressive language speech impairment impacting Student's ability to effectively communicate at school; difficulty maintaining focus related to Student's ADHD; deficits in basic reading comprehension; deficits in written expression; a weakness in \*\*\*; and adequate functional skills. The ARD committee

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<sup>9</sup> JE 6 at 1-4.

<sup>10</sup> JE 6 at 7-10, 18.

<sup>11</sup> JE 6 at 23-24, 28.

<sup>12</sup> JE 9 at 3-6; JE 12 at 42.

developed three reading goals, three writing goals, four math goals, three speech goals, and two behavior goals.<sup>13</sup>

14. Student's proposed IEP included 14 thirty-minute speech therapy sessions each nine weeks and indirect occupational therapy services. For the remainder of the 2022-2023 school year, the District recommended placing Student in special education resource classes 60 minutes per week for reading, 60 minutes per week for writing, and 60 minutes per week for math. For the fall of the 2023-2024 school year, when Student would begin \*\*\*, the District recommended placing Student in general education classes with 75 minutes per week of inclusion support for math and 150 minutes per week of inclusion support for \*\*\*. The ARD committee decided Student did not qualify for ESY services. Parents disagreed with the proposed IEP and placement.<sup>14</sup>
15. As part of the ARD committee meeting, the District conducted a REED. At Parents' request, the District initiated an FIE.<sup>15</sup>
16. As part of the 2022 REED, the ARD committee determined Student continued to meet eligibility for a speech impairment and continued to need direct speech therapy in the areas of expressive, receptive, and pragmatic language. Student has difficulty with articulation, and struggles with pragmatic language in classroom interactions, social interactions, and personal interactions. Student also struggles with sensory processing and \*\*\*, qualifying Student for continued indirect occupational therapy services.<sup>16</sup>
17. The District completed the FIE on December \*\*\*, 2022. The evaluators assessed Student to have a communication disorder in the area of expressive language with adequate receptive and pragmatic language abilities.<sup>17</sup>

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<sup>13</sup> JE 9 at 7-14, 22.

<sup>14</sup> JE 9 at 7-14, 22.

<sup>15</sup> JE 8 at 2.

<sup>16</sup> JE 8 at 4, 11.



<sup>17</sup> JE 12 at 12.

18. The FIE confirmed Student continued to have an OHI for ADHD, which impacts Student's ability to maintain focus at school. Formal testing from the FIE indicated Student has moderate struggles with executive functioning consistent with Student's ADHD diagnosis.<sup>18</sup>
19. According to the FIE, Student has few behavioral characteristics that are similar to those exhibited by children with autism but does display some atypical behaviors related to emotional responses and fixed interests. According to the FIE, Student exhibits few significant patterns related to autism: Student's verbal and nonverbal communication skills are within typical range; Student can relate to others; can identify Student's own emotions; is able to engage in imaginative play; and has no restrictive or repetitive behavioral patterns. The FIE evaluators concluded Student did not meet the criteria for an autism identification because Student demonstrated effective verbal and nonverbal communication and reciprocal social interactions and communication. Student makes eye contact with others, speaks in a normal tone of voice, and does not use language in an odd manner.<sup>19</sup>
20. The FIE evaluators did not assess Student using formal testing for autism, basing the conclusions related to Student's autism identification on autism rating scales, informal data, and observations. The District evaluators suggested the rating scales completed by both Parents and teachers indicated Student has appropriate social skills, can initiate communication with peers, and displays appropriate body language and facial gestures.<sup>20</sup>
21. The FIE used formal measures to evaluate Student's cognitive functioning, and measured Student's intellectual functioning in the extremely low range. However, the evaluators noted that it is highly likely Student's measured intellectual functioning is not an accurate reflection of Student's cognitive ability because Student displayed a lack of motivation and attention during formal testing. Formal

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<sup>18</sup> JE 12 at 14, 23.

<sup>19</sup> JE 12 at 26-29.

<sup>20</sup> Respondent's Exhibit (RE) 64; Transcript (TR) at 123-25, 143-46.

testing also indicated Student's adaptive behavior skills are comparable to Student's same- aged peers.<sup>21</sup>

22. The FIE included formal academic achievement testing, which indicated Student has academic weaknesses in reading comprehension, written expression, math computation, and math problem solving. Student also performed below average in the areas of oral expression and phonological processing with low performance in listening comprehension.<sup>22</sup>
23. As part of the FIE, a formal occupational therapy evaluation was conducted. Student scored above average in the visual-motor area, low in the visual-spatial area, and very low in the fine motor area. Student may have difficulty with the fine motor and visual motor skills needed for \*\*\*. Student has moderate difficulties in the sensory processing area of vision, likely related to distractibility associated with Student's ADHD. Student has significant difficulties in the areas of planning and ideas. Student's muscle tone, range of motion, and strength are within normal limits. When observed, Student demonstrates age appropriate fine motor skills and can produce quality written work.<sup>23</sup>
24. The District proposed an ARD committee meeting for January \*\*\*, 2023, to review the FIE and continue Student's annual ARD committee meeting. Parents declined the meeting, requesting additional time to review the FIE. District personnel met with Student's Parent to review the FIE on January \*\*\*, 2023, instead of convening an ARD committee meeting.<sup>24</sup>
25. Parents requested an IEE at District expense, which was granted by the District on January \*\*\*, 2023.<sup>25</sup>

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<sup>21</sup> JE 12 at 36 40.

<sup>22</sup> JE 12 at 48.

<sup>23</sup> JE 12 at 52-60.

<sup>24</sup> TR at 187, 241.

<sup>25</sup> JE 15.

26. The District proposed ARD committee meetings for February \*\*\* and February \*\*\*, 2023, but Parents declined to meet.<sup>26</sup>
27. The District proposed a written amendment to Student's IEP on February \*\*\*, 2023, because the draft proposed plan and placement from October 2022 had not yet been implemented and Student's IEP from October 2021 was still in place. Parents declined to agree to a written IEP amendment.<sup>27</sup>
28. The District proposed an ARD committee meeting for May \*\*\*, 2023, but Parents again declined to attend.<sup>28</sup>
29. Parents requested an ARD committee meeting be held on May \*\*\*, 2023. The District noticed a meeting for that date, sent out a draft IEP, and sent instructions for joining the meeting by videoconference. Parents' advocate indicated Parents would not be attending the scheduled ARD committee meeting. The District then rescheduled the meeting for May \*\*\*, 2023, a new date proposed by Parents' advocate. Parents' advocate confirmed Parents would attend the May \*\*\*, 2023 meeting.<sup>29</sup>
30. In advance of the May \*\*\*, 2023 ARD committee meeting, the District speech language pathologist emailed Parents to request input on Student's speech goals. Parents then refused to attend the May \*\*\*, 2023 ARD committee meeting, because the speech language pathologist directly emailed Parents without copying the advocate or Parents' lawyer.<sup>30</sup>
31. The District convened Student's ARD committee meeting without Parents in attendance on May \*\*\*, 2023. The ARD committee reviewed the FIE, and proposed continuing Student's eligibility in the categories of speech impairment, OHI for ADHD, and autism. The ARD committee discussed the FIE autism-related findings and determined the FIE was lacking a parent

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<sup>26</sup> JE 18; JE 19; TR at 248.

<sup>27</sup> JE 20; JE 22; JE 23; TR at 252.

<sup>28</sup> JE 24; JE 25; TR at 252-53.

<sup>29</sup> JE 29; JE 30; JE 31; JE 33; JE 34; JE 35; JE 36; TR at 254-56.

<sup>30</sup> JE 37; TR at 256.

interview, classroom observations, and formal autism assessments. The ARD committee proposed additional autism-related evaluations to address gaps in the FIE and parental concerns. The ARD committee determined that an FBA was not necessary because Student's behavior was not interfering with Student's learning.<sup>31</sup>

32. The ARD committee identified Student's present levels as below average cognitive abilities; adaptive skills within normal limits; a speech impairment in the area of expressive language; impaired ability to maintain focus and alertness in the classroom; impaired verbal communication skills and social interaction skills; deficits in basic reading comprehension; deficits in written expression; deficits in math computation and problem solving; difficulty following multistep directions; difficulty with organization of classroom materials; and difficulty with conversational norms. The ARD committee developed two reading goals, three writing goals, four math goals, three speech goals, three functional behavioral goals, two social skills goals, and two study skills goals.<sup>32</sup>
33. The ARD committee proposed providing Student 150 minutes per week of inclusion support for \*\*\*; 75 minutes per week of inclusion support for math; 40 minutes of speech therapy each week; 30 minutes of social skills pull out services per week; 30 minutes per week of social skills inclusion support; and 30 minutes of occupational therapy each semester. The ARD committee determined Student did not need ESY services.<sup>33</sup>
34. For the 2022-2023 school year, Student did not master Student's reading goal, mastered Student's writing goal, mastered Student's four speech goals, and mastered Student's behavior goal. While Student did not master Student's reading goal, Student's developmental reading level was on grade level at the end of the school year.<sup>34</sup>

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<sup>31</sup> JE 38; TR at 256-57.

<sup>32</sup> JE 38; TR at 256-57.

<sup>33</sup> JE 38; TR at 256-57.

<sup>34</sup> JE 38.

35. The District proposed a plan for assisting Student with the \*\*\*, \*\*\*.<sup>35</sup>
36. In spring of 2023, Student passed \*\*\* STAAR test \*\*\*.<sup>36</sup>
37. On August \*\*\*, 2023, Dr. \*\*\* completed an IEE of Student. Based upon Student's formal behavioral and psychological testing and review of the OHI letter from Student's physician, Dr. \*\*\* concluded Student had ADHD, combined presentation. She also concluded Student is experiencing \*\*\*.<sup>37</sup>
38. On formal cognitive testing, Dr. \*\*\* found Student: had very low overall cognitive abilities; slightly below average verbal comprehension abilities; significantly below average visual-spatial abilities; below average fluid reasoning abilities; slightly below average processing speed; and struggled to process cognitive information for learning and problem solving. Based upon formal achievement testing, she concluded Student did not meet the profile for a learning disability. Dr. \*\*\* observed that Student does however demonstrate academic struggles in reading, written language, and math reasoning. Based upon Student's academic struggles and cognitive weaknesses, she recommended during her testimony that Student be identified with a learning disability.<sup>38</sup>
39. Dr. \*\*\* assessed Student's adaptive behavior to be below average with Student's communication and academic skills, independent choice making, and self-control all measuring below average. She utilized formal autism evaluation tools and determined Student exhibits the marked cognitive rigidity and adherence to routine and sameness that is characteristic of children with autism. Dr. \*\*\* assessed Student to have a pattern of developmental

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<sup>35</sup> TR at 257-58.

<sup>36</sup> TR at 281.

<sup>37</sup> JE 43 at 8, 15-17; TR at 29.

<sup>38</sup> JE 43 at 15-17; TR at 32.

differences in the areas of language and communication, social relating, and emotional responding that are similar to others diagnosed with autism. Student's thinking is rigid and inflexible.<sup>39</sup>

40. Dr. \*\*\* did not observe Student at school or solicit input from District personnel for Student's IEE.<sup>40</sup>

## V. DISCUSSION

### A. 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. *Id.*; *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

### B. DUTY TO PROVIDE A 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). The district has a duty to

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<sup>39</sup> JE 43 at 35, 43-45.

<sup>40</sup> JE 43; TR at 155.

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.

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 implemented by the District "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 580 U.S. at 399, 403.

### C. EVALUATIONS

A school district must ensure a reevaluation of a student with a disability occurs when it determines the student's educational needs warrant such a reevaluation. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1). A school district must also conduct a reevaluation at least once every three years, unless the school district and the student's parent agree it is unnecessary. 34 C.F.R. § 300.303(b)(2).

Here, the District conducted an evaluation of Student when Student arrived in the District in 2018. Thus, the District was due to reevaluate Student in 2021. Having determined a full reevaluation was unnecessary, the District instead completed a REED in 2021. Parents indicated at hearing that they believed a REED was not sufficient. However, Petitioner presented no evidence of documented parental objection to the REED in 2021.

In 2022, Parents requested that the District conduct a full evaluation. Based upon this request, the District did complete a new FIE in 2022. Like the 2018 FIE and 2021 REED, the District's 2022 FIE established Student's continued eligibility under speech impairment and OHI for ADHD and Student's need for regular, direct speech therapy services. Both the 2021 REED and 2022 FIE found Student to be below grade level in reading, writing, and math. The District's conclusions related to Student's cognitive abilities and adaptive behavior were also consistent across the 2021 and 2022 evaluations.

Unlike the 2018 FIE and the 2021 REED, the 2022 FIE led the evaluators to conclude Student did not meet eligibility criteria for autism. However, the District ultimately concluded that the 2022 FIE had gaps in the area of autism-related assessments. As such, Student's ARD committee continued Student's autism eligibility, and more significantly, continued services to support Student's autism.

Based upon the evidence presented, Petitioner did not prove the District failed to conduct a necessary reevaluation. The District accurately concluded Student's educational needs had not changed substantially from 2018 to 2021. Moreover, when Parents requested a full evaluation in 2022, the District responded by promptly conducting an FIE reevaluation.

#### **D. APPROPRIATE PROGRAM**

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

- Whether the program is individualized on the basis of the student's assessment and performance;



- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Whether positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F.*, 118 F. 3d 245, 253 (5th Cir. 1997); *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765-66 (5th Cir. 2018).

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

## **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, 300.320, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the 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 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 evidence showed that, in both 2021-2022 and 2022-2023, the District developed IEPs for Student individualized to meet Student’s evaluated needs. Both IEPs addressed Student’s identified speech impairment through frequent, direct speech therapy services and multiple goals related to Student’s particular speech deficits. The District also consistently addressed Student’s deficits in reading and writing through specific goals and resource instruction at the \*\*\* level and proposed substantial inclusion support at the \*\*\* level.

Petitioner contends the District’s failure to identify Student under the learning disability category caused a deficit in Student’s program. However, Petitioner’s own expert had to bend the eligibility category during her testimony to conclude Student met eligibility for a learning disability. Dr. \*\*\*’s actual evaluation instruments do not support identifying Student with a learning disability. Regardless, the District recognized Student’s reading and writing deficits and consistently addressed these needs.

During the relevant time period, Student began to display problems with math calculation. As a result, the District began to address this need in Student’s IEP

through proposed goals and inclusion support for math.

The District's 2022 FIE caused some legitimate concern for Parents by reaching the conclusion Student no longer met eligibility criteria for autism. However, ultimately, the District never changed Student's eligibility or programming based upon this conclusion. Instead, Student's ARD committee, the entity charged with making eligibility determinations, continued Student's autism eligibility and found the FIE had gaps in the area of autism assessment. Moreover, the District did not remove autism-related services from Student's IEP.

If Student displayed behavior that impeded Student's learning and that of others, the District would also have to consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP. 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). Petitioner raised as issues for this case appropriate behavior supports for Student and the need to conduct an FBA. However, the evidence presented showed Student's behavior was not interfering with Student's learning and that Student displayed appropriate behavior for following school and class rules. Accordingly, the District did not have to provide additional behavioral supports, such as an FBA and BIP.

Petitioner also seemingly takes issue with the District providing Student indirect occupational therapy instead of direct occupational therapy. However, Petitioner failed to produce evidence to support the claim that Student needed direct services. The District's provision of indirect services is supported by occupational therapy assessments and Student's function in the classroom.

## 2. Least Restrictive Environment

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

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

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

Here, for the 2021-2022 and 2022-2023 school years, Student was primarily educated in general education classes with only 120 minutes per week of resource instruction outside the general education setting. Student struggled with reading and written expression, and it was necessary to provide Student with specialized instruction outside the general education setting to address these areas of need. As a student with a speech impairment, Student also required regular, individualized speech therapy outside the general education setting.

For \*\*\* in the 2023-2024 school year, the District has proposed an entirely mainstream placement for Student with inclusion support for English and math. Student will again receive direct speech therapy to address Student's critical communication needs. The evidence showed, for \*\*\*, Student required services outside of the general education setting for speech therapy, reading, and writing instruction. For \*\*\*, the District has proposed an entirely mainstream placement with pull outs only for direct speech therapy and social skills instruction. The District's program educated Student in the mainstream to the maximum extent appropriate and represents Student's least restrictive environment. 34 C.F.R. § 300.114(a)(2)(i), (ii); *Daniel R.R.*, 874 F. 2d at 1048.

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

The evidence showed that the District attempted to collaborate with Parents and considered their input. The District, at Parents' request, conducted a full reevaluation of Student in 2022 and, based upon parental concerns, did not remove Student's autism identification. The District attempted multiple times to convene Student's ARD committee in spring of 2023 to update the IEP based upon the findings of the 2022 FIE, but Parents refused to participate in ARD committee meetings. It was not reasonable for Parents to refuse to participate in the May \*\*\*, 2023 ARD committee meeting after the District speech pathologist contacted them directly for their input on IEP goals. Even after special education litigation is instituted, the IEP process continues and school personnel must continue to contact parents directly. Parents received bad advice when they were told to renege their participation in the May \*\*\*, 2023 ARD committee meeting.

#### **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.*, 703 F.3d at 813-14. The evidence showed Student made appropriate progress during the 2021-2022 and 2022-2023 school years. Over these two school years, Student made progress in speech, mastering Student's IEP goals in this area and progressing beyond needing speech therapy for pragmatic and receptive language. By the conclusion of the 2022-2023 school year, Student was reading on grade level and progressed to meeting standards on the reading portion of the STAAR test. Student also consistently mastered Student's writing goals.

Petitioner alleges Student failed to make progress under Student's IEP and, thus, did not benefit from Student's program. To support this allegation,

Petitioner points out Student has struggled on the STAAR test \*\*\* and continues to require specialized instruction for reading, writing, and math. However, disability remediation, as Petitioner requests, is not the goal of the IDEA. Rather, overall educational benefit is the IDEA's statutory goal. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012) (rejecting the argument that a student's IEP was insufficient because it failed to enable him to write and spell better where he earned passing marks and advanced from grade to grade). In this case, Student is receiving passing grades and making improvements in reading and speech.

#### **E. FAILURE TO IMPLEMENT STUDENT'S IEP**

When determining whether a school district failed to adequately implement a student's IEP, a hearing officer must determine whether a FAPE was denied by considering, under the third *Michael F.* factor, whether there was a significant or substantial failure to implement the IEP and whether, under the fourth *Michael F.* factor, there have been demonstrable academic and non-academic benefits from the IEP. *Spring Branch Indep. Sch. Dist. v. O.W. by next friend Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1389 (2021).

Petitioner alleged in the Complaint and in their closing brief that the District failed to implement Student's IEP. However, Petitioner presented no evidence of any specific portions of the IEP that were not implemented. For example, Petitioner did not offer evidence pointing to speech therapy sessions that were missed, special education instruction not delivered, or accommodations not provided. To prevail on an implementation claim under the IDEA, Petitioner must have shown 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). Here, Petitioner has not shown that the District failed to implement significant or substantial portions of Student's IEP and, as detailed above, Student received benefit from Student's IEP.

#### **F. ESY**

State and federal regulations require the ARD Committee to determine a student's need for ESY services. 34 C.F.R. § 300.106; 19 Tex. Admin. Code § 89.1065. ESY is necessary when benefits accrued to the child during the regular school year will be significantly jeopardized if the child is not provided an educational program during the summer months. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986).

Under state regulations, ESY services must be provided when a student has "exhibited, or reasonably may be expected to exhibit, severe or substantial regression" in one or more critical areas addressed in his IEP "that cannot be recouped within a reasonable period of time." 19 Tex. Admin. Code § 89.1065(2). "Severe or substantial regression means that the student will be unable to maintain one or more acquired critical skills in the absence of ESY services." *Id.* The reasonable period of time for recoupment must be determined on the basis of needs identified in each student's IEP but, in any case, must not exceed eight weeks. 19 Tex. Admin. Code § 89.1065(3). In addition, if the loss of acquired critical skills would be particularly severe or substantial, or if such loss results, or reasonably may be expected to



result, in immediate physical harm to the student or to others, ESY services may be justified without consideration of the period of time for recoupment of such skills. *Id.*

Here, Petitioner alleges the District should have provided ESY services for Student. However, Petitioner presented no evidence indicating Student had exhibited regression following breaks in service. Moreover, there is no evidence in the record of Student experiencing a severe or substantial loss of a critical skill during breaks in school. Thus, Petitioner failed to meet Petitioner's burden to show Student needed ESY services.

#### **G. COVID COMPENSATORY SERVICES**

In 2021, the Texas legislature amended Chapter 29 of the Texas Education Code to require school districts to consider the impact of COVID-19 school closures on students with disabilities. Tex. Educ. Code § 29.0052. In relevant part, ARD committees were required to consider whether special education and related services to students under their IEPs during the 2019-2020 or 2020-2021 school year were interrupted, reduced, delayed, suspended, or discontinued; and whether compensatory educational services are appropriate for the student. *Id.* In this case, the evidence showed that the District did consider Student's need for COVID-19 compensatory services at an ARD committee meeting. At hearing, Petitioner presented no evidence documenting Student's need for compensatory services resulting from services for Student that were interrupted, reduced, delayed, suspended, or discontinued in the 2019-2020 or 2020-2021 school years. Thus, Petitioner did not meet Petitioner's burden to prove a need for COVID-19 compensatory

services.

## **H. FAPE CONCLUSION**

The District developed a program for Student that was reasonably calculated to provide Student educational benefit based upon Student's unique needs. *Andrew F.*, 580 U.S.at 399, 403. Student's IEP and program were developed using District evaluations and placed Student in Student's least restrictive environment. Parents, as well as key stakeholders from the District, provided input to develop Student's program and Student made progress in speech and reading. A review of the overall educational program shows Student was provided a FAPE and made progress with the program as it was developed and implemented. *Michael F.*, 118 F.3d at 253; *Hovem*, 690 F. 3d at 391.

## **I. PRIVATE PLACEMENT**

Petitioner must meet a two-part test in order to secure reimbursement from the District for Student's private placement. First, Petitioner must prove the District's proposed program was not appropriate under the IDEA. Second, Petitioner must prove private placement is appropriate. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993). Petitioner failed to meet their burden of proving the District's program was not appropriate under the IDEA. Additionally, Petitioner presented no evidence related to a proposed private placement for Student. Therefore, Petitioner is not entitled to private placement at District expense.

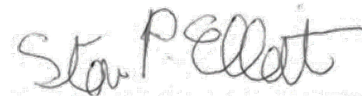
## **VI. CONCLUSIONS OF LAW**

1. The burden of proof is on Petitioner as the party challenging the appropriateness of the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. The District provided Student a FAPE during the relevant time period, and Student's IEP was 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*, 580 U.S. 386, 399, 403 (2017).
3. The District met its obligation to conduct necessary and timely evaluations of Student. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303.
4. Petitioner failed to show Student required COVID-19 compensatory services. Tex. Educ. Code § 29.0052.
5. Petitioner is not entitled to private placement at District expense. *Burlington Sch. Comm.*, 471 U.S. at 370; *Florence Cty. v. Carter*, 510 U.S. 7 (1993).

## VII. ORDERS

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

**SIGNED December 15, 2023.**



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Steve Elliot  
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).