

SOAH Docket No. 701-23-17312.IDEA  
TEA Docket No. 249-SE-0423

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# **Before the State Office of Administrative Hearings**

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**STUDENT, by next friend PARENT,  
Petitioner**  
**v.**  
**Beaumont Independent School District,  
Respondent**

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## **DECISION OF THE HEARING OFFICER**

### **I. PROCEDURAL HISTORY**

\*\*\* (Student), by next friend \*\*\* (Parent or, collectively, Petitioner), filed a request for an impartial due process hearing (Complaint) under the Individuals with Disabilities Education Act (IDEA) on April 19, 2023, with notice issued by the Texas Education Agency (TEA) on the same day. The Respondent to the Complaint is the Beaumont Independent School District (Respondent or the District). Petitioner has been represented throughout this litigation by their legal counsel, Mark Whitburn. Respondent has been represented

throughout this litigation by its legal counsel, J. Erik Nichols and Matthew R. Acosta.

The main issue in this case is whether Student has received a free, appropriate public education (FAPE) in Student's least restrictive environment (LRE). The Hearing Officer concludes Student has received a FAPE and the District's proposed placement in a more restrictive setting is reasonably calculated to be appropriate to meet Student's needs.

## **II. ISSUES**

### **A. Petitioner's Issues**

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

1. Whether the District has provided Student a FAPE, in particular by providing Student an individualized education program (IEP) designed for Student to make sufficient progress in reading.
2. Whether the District has appropriately implemented Student's IEP.
3. Whether the District's proposed placement is in Student's LRE.
4. Whether the District has appropriately collaborated with Parent in planning Student's education and provided Parent appropriate data and information about Student.

### **B. Respondent's Position**

The District generally and specifically denied Petitioner's issues and denied responsibility for providing any of Petitioner's requested relief. Respondent also asserted the statute of limitations as an affirmative defense.

**IV. REQUESTED RELIEF**

Petitioner requested the following items of relief:

1. Order the District to educate Student in the general education classroom with appropriate supports and services.
2. Order the District to provide Student compensatory education services.
3. Order the District to provide funding for a private reading specialist to work with Student.
4. Order the District to provide any other relief the Hearing Officer may deem appropriate.

**V. DUE PROCESS HEARING AND SUMMARY OF TESTIMONY**

The due process hearing took place virtually via Zoom September 13-14, 2023. Petitioner continued to be represented by Mark Whitburn. In addition, Parent and Student's \*\*\* attended the due process hearing. Respondent continued to be represented by Erik Nichols and Matthew Acosta. In addition, \*\*\*, Senior Director of Special Programs for the District, attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

Both parties appeared in a timely manner for the due process hearing and announced ready through counsel on the record. The Hearing Officer admitted 53 joint exhibits without objection. Petitioner's exhibits 1-3 and 7-15 were admitted. Petitioner's exhibits 4-6 were not offered and were used solely for demonstrative purposes. Respondent's exhibits 1-6, 14-24, 26-36, 38-46, 48-52, and 55-58 were all admitted as well.

During the course of the hearing, a total of five witnesses testified. The first witness was Student's teacher from the 2022-23 and 2023-24 school years. The next witness was Student's inclusion teacher during the 2022-23 school year when Student was in \*\*\* grade. The third witness was Student's principal at \*\*\* from 2018-23. The fourth witness was the District's party representative who has been working with Student for more than a year. The fifth witness was the District's low-incidence disability specialist who supports the \*\*\* classroom, a self-contained classroom focused on students with disabilities who need to acquire prerequisite skills to better access the curriculum. Each witness testified that Student needs to be placed in the \*\*\* classroom for Student's academic subjects. No one testified that Student should remain in Student's current setting. No reports or evaluations offered into evidence indicated Student's current setting was appropriate for Student or that Student's education program was not appropriate for Student's needs.

The first witness testified that she cannot implement the curriculum in a general education or resource setting. Student requires not just accommodations or modifications, but a curriculum that completely differs from the curriculum given to other students. The second witness also testified that Student needs to be placed in the \*\*\* setting. She testified that Student is no longer making progress with Student's same-age peers and that the gap will continue to widen as the material becomes more challenging unless Student obtains some prerequisite skills. Student needs the more focused setting of the \*\*\* classroom where Student's own curriculum can be implemented.<sup>1</sup>

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<sup>1</sup> Transcript (TR) 231.

The third witness testified that Student needs to acquire a number of prerequisite skills before Student can meaningfully benefit from a mainstream or resource setting. Those prerequisite skills are best taught in the \*\*\* classroom. The fourth witness indicated that, while she has seen many cases in her years of experience that present a “gray area” where a Student’s needs are not necessarily clear, Student’s situation did not fall into a “gray area” where there was a doubt whether the \*\*\* setting was the best and most appropriate setting for Student. The \*\*\* setting will improve Student’s relationship with Student’s peers and Student’s ability to make progress. It is the most appropriate setting for Student. Finally, the fifth witness testified, based on her years of experience working with and supporting the \*\*\* classroom, that it would help Student gain Student’s prerequisite skills.<sup>2</sup>

Taken altogether, the witnesses made clear that the curriculum for Student should not be implemented in a general education or resource setting. Student requires not just accommodations or modifications, but a curriculum that completely differs from the curriculum given to other students. Student needs to be placed in the \*\*\* setting for delivery of appropriate instruction. Student no longer is making progress with Student’s same-age peers in the general education setting. If Student remains in the current placement, the gap for Student will continue to widen as the material becomes more challenging. Student needs the more focused setting of the \*\*\* classroom where Student’s own curriculum can be implemented.<sup>3</sup>

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<sup>2</sup> TR 319, 386.

<sup>3</sup> TR 231.

Student requires a number of prerequisite skills before Student can meaningfully benefit from a mainstream or resources setting. Those prerequisite skills are best taught in \*\*\*. Student's situation did not fall into a "gray area" where there was a doubt whether the \*\*\* setting was the best and most appropriate setting for Student. The \*\*\* classroom will improve Student's relationship with Student's peers and Student's ability to make progress. It is the most appropriate setting for Student at this time. The \*\*\* classroom will help Student gain Student's prerequisite skills.<sup>4</sup>

At the conclusion of the hearing, the parties requested an opportunity to file written closing briefs. Both parties filed thorough, timely written closing briefs on October 16, 2023. The decision of the Hearing Officer is due on November 6, 2023.

## **VI. FINDINGS OF FACT**

### **Student's educational background and evaluation history**

1. Student is \*\*\* years old and in the \*\*\* grade. Student resides in the District and receives special education and related services at \*\*\*. Student enjoys \*\*\*. Every witness indicated how likeable Student is and how Student's teachers enjoy Student. Student lives at home with Student's \*\*\*.<sup>5</sup>
2. Student began school during the 2017-18 school year at \*\*\* in the \*\*\* (\*\*\*). In October 2017, when Student was in the \*\*\* at \*\*\*, the District conducted an initial full and individual initial evaluation (FIE). The FIE was completed in

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<sup>4</sup> TR 319, 386.

<sup>5</sup> Joint Exhibit (J) 1, at 1; TR 111.

December 2017. The District found Student eligible for special education and related services under the eligibility categories of autism, speech impairment, and \*\*\*.<sup>6</sup>

3. While Student was in the \*\*\* program at \*\*\* in March 2019, a private evaluator conducted a comprehensive psychological evaluation at the request of Petitioner. The evaluator found Student qualified for special education as a student with a speech impairment given Student's deficit in verbal communication and delayed speech in social interactions. The evaluator also found Student qualified for special education as a student with \*\*\*, given Student's significantly below-average \*\*\*, as measured by the Stanford Binet Intelligence Scales, Fifth Edition. Student's Nonverbal IQ score was a \*\*\*, which falls in the range of \*\*\*. The evaluator noted that Student exhibited deficits in all areas of adaptive behavior: communication, use of community resources, social/interpersonal skills, home living, work, safety, self-care, self-direction, and leisure, as measured by the Vineland Adaptive Behavior Scales, Third Edition. The evaluator made a number of recommendations, including continued speech therapy, a consistent and predictable schedule, high impact visual aids with lively oral presentations, positive and immediate feedback, and a non-threatening learning environment.<sup>7</sup>
  
4. While Student was in the \*\*\* program in January 2020, the District conducted a Review of Existing Evaluation Data (REED). Student exhibited relative strengths in the areas of \*\*\*, classroom and campus navigation, social participation, emotional regulation, and activities of daily living. Student exhibited delayed fine motor skills and weak postural control and core strength. Student was unable to \*\*\*, all skills Student's peers without disabilities were likely able to do. Student needed assistance \*\*\*. The District maintained Student's eligibility as a student with a speech impairment and \*\*\*. The District also added the

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<sup>6</sup> J1, at 2, 7; J5, at 32.

<sup>7</sup> J1, at 2, 4, 7-9.



eligibility category of autism, which had been removed following the 2019 private evaluation that recommended removing that label.<sup>8</sup>

5. In November 2021, when Student was a \*\*\* grader at \*\*\*, the District conducted an occupational therapy evaluation in response to teacher concerns of Student's difficulties staying on task. The evaluator noted that Student's strengths included object recognition, \*\*\*. However, Student's greatest barrier was attending to tasks. Because Student struggled to pay attention, Student often missed instruction and was typically behind on classwork, all of which interfered with Student's functional performance in school. The evaluator noted that Student was unmotivated to perform non-preferred tasks. Student exhibited weaknesses in figure ground, sequential order, and visual memory, as measured by the Test of Visual Perceptual Skills. The evaluator recommended Student continue occupational therapy services— one 30-minute session weekly for at least 30 sessions per school year.<sup>9</sup>
6. Additionally, in November 2021, an outside evaluator conducted a comprehensive psychological evaluation. Student exhibited \*\*\*. The evaluator made a number of recommendations, including participation in group or individual social skills sessions to assist with self-expression, as well as breaking down assignments into smaller increments to maintain Student's attention and decrease academic frustration, among others.<sup>10</sup>
7. In December 2021, the District conducted a REED and reevaluation. The District performed a number of standardized assessments, including the Woodcock-Johnson Tests of Cognitive Abilities, Fourth Edition; the Wechsler Intelligence Scale for Children, Fifth Edition; and the Adaptive Behavior Assessment System, Third Edition. The District conducted interviews with Student's parent and teachers. District evaluators reviewed the 2017 FIE, 2019 psychological evaluation, 2021 occupational therapy

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<sup>8</sup> J5, at 36, 40, 70-72.

<sup>9</sup> J3, at 16-17, 20.

<sup>10</sup> J4, at 28-30.

evaluation, and 2021 psychological evaluation. The District evaluators also observed Student in-person in class several different times.<sup>11</sup>

8. Student was found to have an Intelligence Quotient of \*\*\*, consistent with Student's most recent REED in January 2020 and indicative of low \*\*. Student exhibited weaknesses in every area of cognitive processing ability, including cognitive processing speed, auditory processing, and long-term retrieval, among several others. Student's performance in the Nonverbal Index (measurement of general intellectual functioning that minimizes expressive language demands) was in the Very Low range compared to other children of Student's age. Student also scored Extremely Low, Low, or Below Average in almost every adaptive behavior: communication, functional academics, self-direction, leisure, community use, school living, and self-care. The District determined that Student continued to meet the criteria for autism and speech impairment and, therefore, continued to qualify for special education under these eligibility categories.<sup>12</sup>
9. The evaluator made a number of recommendations, including dynamic seating, frequent breaks, checks for understanding, and hands-on learning activities, among others. Recommendations for Student's IEP included short and simple directions, picture cues, additional time for written assignments, emphasis on patterns and visual details, and a number of others.<sup>13</sup>
10. Finally, in February 2022, an addendum to the REED indicated that Student continued to qualify for special education as a student with \*\*. In addition to Student's low scores in general \*\*, Student exhibited adaptive behavior deficits in the areas of functional academic performance and communication, as measured by the Vineland Adaptive Behavior Scales, Third Edition. Specifically, Student scored in the \*\* percentile rank in Student's overall level of adaptive functioning;

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<sup>11</sup> J5, at 32, 62, 64-65.

<sup>12</sup> J5, at 62-65, 70-71.

<sup>13</sup> J5, at 72-73.

\*\*\* percentile rank in the areas of communication and daily living skills; and  
\*\*\* percentile rank in socialization.<sup>14</sup>

### **Student's education experience**

11. On March \*\*\*, 2021, the District held an annual admission, review, and dismissal (ARD) Committee meeting to review Student's IEP, which Student's parent attended. The IEP contained two math goals, one \*\*\* goal, a speech therapy goal, and an occupational therapy goal. Each goal was measurable, challenging, and based on Student's present level of academic achievement and functional performance (PLAAFP). The IEP contained nine accommodations which were consistent with the recommendations of Student's evaluations. Student was assigned to a general education setting with support from special education staff for \*\*\* and math. Student was pulled into a special education setting for \*\*\* one time per week to work on some of Student's skills. Student was to continue receiving speech and language therapy and occupational therapy services. At the time, the ARD Committee noted Student was attending mainstream classes and making progress. Student "rarely" displayed non-compliant behaviors. The meeting ended in agreement.<sup>15</sup>
12. On November \*\*\*, 2021, when Student was in \*\*\* grade at \*\*\*, the District held an ARD Committee meeting to review Student's IEP. Parent attended the ARD Committee meeting. The ARD Committee added one accommodation to address a \*\*\*. Student was making "great progress" in all subject areas and in Student's related service areas of speech—which Student received in one 30 minute session per week—and occupational therapy—which Student received 30 minutes eight times per nine weeks. Both of those amounts of related services were consistent with Student's evaluation recommendations. The meeting ended in agreement.<sup>16</sup>
13. On March \*\*\*, 2022, the District held an annual ARD Committee meeting. The meeting also provided the opportunity to consider the December 2021

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<sup>14</sup> J5, at 62, 64-66, 71.

<sup>15</sup> J11, at 176-180, 188.

<sup>16</sup> J12, at 208.

reevaluation. Parent attended the meeting. Based on the reevaluation, the ARD Committee added \*\*\* as an eligibility category in addition to autism and speech impairment. The IEP contained two \*\*\* goals, two math goals, a speech therapy goal, and an occupational therapy goal. Each goal was measurable, challenging, and based on Student's PLAAFPs. The IEP contained 17 accommodations. Most of those were continued from Student's prior IEP. Based on the evaluation, the District added the accommodations of grading on mastery of skill, \*\*\*, extra time for oral response, modified curriculum, oral administration of tests, providing verbal cues and prompts, \*\*\*, and frequent structured movement breaks. Student made progress during the academic year and Student's behavior was "appropriate for participation in the [mainstream] academic environment" in which Student was being educated. Student was to be educated in the general education setting except for \*\*\* minutes per week of special education resource instruction in \*\*\* and math. The meeting ended in agreement.<sup>17</sup>

14. While Student made progress academically, Student's standardized testing revealed Student's abilities fell well below those of Student's same-age peers. Student performed "well below" Student's same-age peers on Student's standardized reading tests during the 2020-21 school year. During the 2021-22 and 2022-23 school years, Student performed "well below" Student's same age peers on each benchmark test administered in each subject area tested. The tests were administered three times each school year. Student's teachers also noted that Student was performing well below grade level in class. While Student made progress on Student's IEP goals, those goals were so far below grade level that they did not indicate Student was truly receiving academic and non-academic benefit from Student's education. While there are other students in Student's class who are performing below grade level and receiving accommodations or modifications, Student stood out in receiving minimal benefit from Student's setting. Student could only \*\*\* as \*\*\* and \*\*\* grade students can. Student \*\*\* on Student's own without significant assistance. Student requires one-on-

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<sup>17</sup> J13, at 223, 231, 238-239.

one support to complete Student's work and teachers work one-on-one with Student far more than with anyone else.<sup>18</sup>

15. In August and September of 2022, the District held four ARD Committee meetings to plan for the upcoming 2022-23 school year, each of which Parent attended. On August \*\*\*, the ARD Committee met to review Student's IEP accommodations. The ARD Committee added new ones, including encouragement to verbalize steps needed to complete assignments, extra time for completing assignments, and reduced length of assignments. The ARD Committee also removed the \*\*\* accommodation in accordance with updated District guidance on \*\*\*. On September \*\*\*, the ARD Committee met to add new \*\*\* and math goals. Student was beginning to struggle with paying attention and with some of the more difficult concepts being introduced in \*\*\* and math. The ARD Committee increased \*\*\* resource time from 30 minutes to \*\*\* minutes per day and math resource time from 30 minutes to \*\*\* minutes per day. Each meeting ended in agreement.<sup>19</sup>
16. On February \*\*\*, 2023, the ARD Committee met to discuss Student's progress and occupational therapy services, at Student's parent's request. As a \*\*\*-grader, Student academically performed at a \*\*\* level in reading and in math, based on benchmark testing data. Student struggled in the general education setting, even with all provided services and accommodations, because of Student's skills deficits, inability to complete assignments or tasks without full assistance. In occupational therapy, Student was making steady progress, rarely \*\*\*. Student's parent asked to table the discussion, and the meeting ended in disagreement.<sup>20</sup>
17. In March and April of 2023, the District held four ARD Committee meetings to plan for the upcoming 2023-24 school year, each of which Parent attended. On March \*\*\*, 2023, the ARD Committee reviewed Student's grades and progress. Student was failing multiple subjects, and the ARD Committee revised Student's PLAAFPs. Student's parent requested to table the meeting,

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<sup>18</sup> Respondent's Exhibit (R) 14; R24; TR 115, 149, 295, 384.

<sup>19</sup> J16, at 268-270, 274, 283-285.

<sup>20</sup> J18, at 327-328.

but the administrator wanted to continue the meeting after a break. In an escalated voice, Student's parent accused the ARD Committee of violating Parent's parental rights. Concern over Parent's health led the ARD Committee to table the meeting. On March \*\*\*, 2023, the ARD Committee met to continue reviewing Student's progress and recommended a change of placement into a self-contained \*\*\* class, based on Student's learning deficits and inconsistent academic progress. Thus, the ARD Committee recommended that Student's placement be in a more restrictive environment. Student's parent disagreed with the recommendation for placement. The ARD Committee agreed to take a 10-day recess. On April \*\*\*, 2023, the ARD Committee again recommended placement into an \*\*\* class, based on Student's PLAAFPs, IEP goals and objectives, and supports. The ARD Committee reported that Student was making progress in the resource setting, but not the general education setting, and needed additional supports. Student's parent again disagreed with the recommendation. The meeting ended in disagreement.<sup>21</sup>

18. Student's former \*\*\* grade and current \*\*\* grade teacher testified during the due process hearing to using and documenting all of Student's IEP accommodations on each assignment as appropriate for the subject and assignment. For example, on one \*\*\* assignment, Student's teacher testified to using the accommodation of orally administering the assignment by \*\*\*, verbally asking Student the question, and then having Student circle Student's response. She also testified to making accommodations for Student to complete assignments, even if such accommodations were not included in the IEP yet, such as orally providing answers in \*\*\* classes when grading did not include writing out answers; in those instances, Student would state the answer, and Student's teacher would write down Student's answer on the assignment.<sup>22</sup>
19. Student's teacher testified that Student needed one-on-one time for specialized instruction, redirection back to the assignment, reteaching concepts, and provision of accommodations. She estimated that while Student was in her general education class of approximately \*\*\* students, 60 percent of

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<sup>21</sup> J19, at 370-374.

<sup>22</sup> TR, at 42-45, 51-52, 68, 88, 93.

her classroom time was devoted to one-on-one instruction with Student. Typically, after giving the assignment to the class, Student’s teacher would work with Student alone to chunk the assignment into detailed steps, reteach concepts as needed, and reduce the length of the assignment and the number of answer choices. At that point, she would check in with the rest of the class, and then return to Student. She testified that Student usually was on the same problem on which she had left Student—in the interim, having sat there and either played with something at Student’s desk or simply taken a break. Then, they would move onto the next question together.<sup>23</sup>

20. Thus, Student’s teacher testified that Student’s setting within her classroom was like “a class within a class” in that she provided Student with a significant amount of individual support and accommodations necessary for Student to complete the assignments, while the rest of her class was able to progress without such assistance. She testified that not only did Student work at a different pace than everyone else, but Student also needed support in things the others did not, such as in the development of social and \*\*\* skills. She testified to the need for repeating lessons and stories and bringing in other resources such as \*\*\* so that Student could better understand the material. She also testified to Student’s in-class support consisting of extra support not only through one-on-one instruction, but also during small group and whole group instruction to keep Student on task.<sup>24</sup>
21. Student’s \*\*\* grade inclusion teacher testified that she has provided accommodations thought to be helpful for Student beyond what was included in the IEP. For example, to help focus Student’s attention, she would highlight portions of \*\*\*. For one math assignment, she testified to using the accommodations of \*\*\*—the last of which constituted an alteration to the grade-level expectation for \*\*\*.<sup>25</sup>

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<sup>23</sup> TR, at 91-92.

<sup>24</sup> TR, at 95-96, 99-100, 102-103.

<sup>25</sup> TR, at 114-115, 123-124, 165-167.



22. Student's PLAAFPs at the beginning of the 2022-23 school year demonstrate that Student received numerous accommodations and supports in the classroom. The PLAAFPs reported that in reading, Student could \*\*\* with supports. In math, Student required visuals, charts, and manipulatives with support to add meaning to given assignments. Student additionally needed frequent prompts to complete assignments. Student could do \*\*\*.<sup>26</sup>
23. Student's PLAAFPs as of April of 2023 further show that Student continued receiving accommodations and supports throughout Student's \*\*\*-grade year. In math, Student could \*\*\* when prompted. In \*\*\*, Student could participate in classroom and \*\*\*, and specialized support. In \*\*\*, Student could identify \*\*\*. In general, Student received various behavioral supports to improve Student's time spent on tasks: praise, token-economy, access to preferred materials, chunking assignments, visual schedule, and frequent reminders.<sup>27</sup>

## **VII. DISCUSSION**

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

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>28</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62

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<sup>26</sup> J16, at 264-265.

<sup>27</sup> J19, at 342-343.

<sup>28</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n.4 (5th Cir. 2009).



(2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The IDEA creates a presumption in favor of the education plan proposed by the school district and places the burden of proof on the party challenging it. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE in Student's LRE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

**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). School districts have a duty to provide a FAPE to all children with disabilities ages 3-21 in their jurisdictions. 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 and provide Student 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).

For a child to receive a FAPE, a school district must provide a student an educational program reasonably calculated to enable a student to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 389 U.S. 386, 403 (2017). That progress must be something more than mere *de minimis* progress. *Id.* at 402-03.

### **C. FAPE Analysis**

Petitioner alleges primarily that the \*\*\* placement for Student is inappropriate and that Student needs to remain in a combination of the resource special education setting and the mainstream general education setting. The primary basis for Petitioner's claim is that the District refused to modify Student's curriculum appropriately and/or implement all of Student's accommodations appropriately. Thus, because the District refuses to provide Student a FAPE, it cannot place Student in a more restrictive environment.

### **D. The Four-Factor Test**

A hearing officer must apply a four-factor test to determine whether a Texas 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 LRE;
- 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. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

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

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

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

*V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

The District's obligation when developing Student's IEP and BIP is to consider Student's strengths; Parent's concerns for enhancing Student's education; results of the most recent evaluation data; and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.320(a)(1)(i). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and behavior intervention plan (BIP). 34 C.F.R. § 300.324(a)(2)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir.2012).

The evidence showed the District based the IEP on assessment and observation of Student's performance. The District conducted formal evaluations of Student in 2018, 2021, and 2022. It adjusted its accommodations and services based on each evaluation it received. The District also continually sought teacher input on the services it was providing.

In March 2022, based on the new FIE, the District added the eligibility of autism back after removing it in 2019. The District also added a number of new accommodations for Student based on the evaluation, including grading on mastery of skill, \*\*\*, extra time for oral response, modified curriculum, oral administration of tests, providing verbal cues and prompts, \*\*\*, and frequent structured movement breaks. In September and October 2022, over the course of four ARD Committee meetings, the District added additional special education

time into Student's schedule in an effort to help Student perform better in comparison with Student's same-age peers. And in March 2023, the District proposed placement in the \*\*\* classroom based on teachers' observations of Student's performance in class and on Student's standardized tests showing Student was performing well below grade level. In short, the District provided services based on evaluation and observation of Student's performance.

## **2. LRE**

The IDEA requires that a student with a disability shall be educated with peers without disabilities to the maximum extent appropriate. Special classes, separate schooling, and other removal from the regular education environment should 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. This provision is known as the "LRE requirement." 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require a school district's continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005.

To determine whether a school district is educating a student with a disability in the LRE, 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 Ed.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

The evidence indicates that the District's proposed placement in the \*\*\* classroom represents Student's LRE. Every witness who testified in this case, each of whom is familiar with Student and two of whom taught Student in the classroom during the 2022-23 school year, strongly recommended placement in the \*\*\* classroom so that Student can work on prerequisite skills. Student's situation does not even "fall into a gray area" as to whether Student would be best served in the \*\*\* classroom.

The witnesses also testified that Student is working on a curriculum different from the curricula Student's peers are working on. Student's goals and class work are significantly below grade level. Teachers devote a substantial amount of one-on-one time to Student. Nothing in the IDEA requires a school to devote all or most of a teacher's time to one student. *Daniel RR.*, 874 F.2d at 1048-49. That is what is happening with Student in Student's current inappropriate placement.

Petitioner argues that the reason the District is struggling to accommodate Student in Student's current environment is that the teachers are unable or unwilling to modify Student's curriculum or implement Student's accommodations. 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 Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). This approach affords school districts some flexibility in implementing IEPs while also holding them accountable for material failures and for providing each student with a disability a FAPE. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Failure to implement a material portion of an IEP violates the IDEA, but failure to execute an IEP perfectly does not amount to denial of FAPE. *See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478, 484 (4th Cir. 2011).

In this case, the evidence indicates that the District implemented the IEP appropriately. While Petitioner claims the District was unwilling to modify Student's curriculum, the evidence demonstrates Student was working almost entirely on a modified curriculum with goals significantly below grade level. Petitioner did not show evidence the District was not implementing any other accommodations. The District also had speech and occupational therapy services in place to help Student access the curriculum. In short, the District implemented the IEP, gave Student extra support, modified Student's curriculum, and provided 17 accommodations. Still, according to the testimony of all five witnesses in this case, it was not enough to help Student gain the prerequisite skills Student needs. The \*\*\* classroom appears to be the environment for Student to do that.

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

## **Stakeholders**

School districts must allow parents to play a key role in the development of the IEP. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 395 (5th Cir. 2012). 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, \*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 the District collaborated appropriately with Parent. Parent attended each ARD Committee meeting and, until the spring of 2023, agreed with the ARD Committee decisions at each ARD Committee meeting. Parent's input was considered each time, including during the multiple ARD Committee meetings in the spring of 2023. For Parent's part, the evidence indicates that Parent was a respectful and active participant in all ARD Committee decisions. The only disagreement between the parties revolved around Student's LRE. As shown above, the District had reasons for recommending the placement it did. It was not required to accede to Parent's recommendation of a less restrictive placement.



The evidence in this case indicates that the District is implementing all of Student's accommodations. Even with that implementation, Student's teachers testified they are spending up to 60% of their time working with Student and are essentially creating a "class within a class" for Student. The IDEA does not require a school district to create an alternative curriculum or offer a "classroom within a classroom" in order to comply with the IDEA's LRE requirement. *Brillon v. Klein Indep. Sch. Dist.*, 100 Fed. App'x. 309, 313 (5th Cir. 2004). Thus, the District's proposed placement of the \*\*\* classroom does represent Student's least restrictive environment.

#### **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, 812-13 (5th Cir. 2012). Whether a student receives passing grades and progresses from year-to-year are factors in whether a student is receiving academic benefit, but whether a student is making more than *de minimis* progress under the IEP is the key to understanding whether a student is receiving academic benefit. *V.P.*, 582 F.3d at 590-91.

In this case, Student made progress toward all of Student's IEP goals. However, in order to maximize Student's potential and work on the prerequisite skills Student lacks, Student needs to be placed in the \*\*\* classroom. Student's IEP goals are well below grade level and, while challenging for Student, they are not helping Student gain the prerequisite skills Student needs to become the best student

Student can.

## **5. Conclusion**

From the evidence presented in this case, the District is basing Student's educational program on its evaluations and ongoing data and observations of Student. While Student's placement in \*\*\* would be more restrictive, it is the best placement for Student to maximize Student's potential. Student needs to recover prerequisite skills, and the \*\*\* classroom is the best placement in which to do so.

The District appropriately collaborated with Parent and other key stakeholders in developing Student's IEP, including holding a total of seven ARD Committee meetings during the 2022-23 school year. Parent agreed in all ARD Committee meetings until the spring of 2023, when Parent respectfully disagreed with the District's recommended placement. Finally, Student progressed toward Student's IEP goals even though those goals were significantly below grade level. Petitioner did not present any testimony indicating Student was not receiving a FAPE or that the \*\*\* classroom did not represent Student's least restrictive environment. Petitioner bears the burden of proof under the IDEA. It did not provide evidence to meet that burden.

## **VIII. CONCLUSIONS OF LAW**

1. 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. *Rowley*, 458 U.S. 176; *Endrew F.*, 580 U.S. at 403.

2. The District educated Student in Student's LRE both before and after recommending Student attend school in the \*\*\* classroom. 34 C.F.R. § 300.114(a)(2)(i)(ii).
3. Parent and other key stakeholders participated appropriately in planning Student's IEP. *White*, 343 F.3d at 380.

### **IX. ORDERS**

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

**Signed November 6, 2023.**



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Ian Spechler  
Presiding Administrative Law Judge

### **X. 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).