

SOAH Docket No. 701-24-02419.IDEA
TEA Docket No. 036-SE-1023

**Before the
State Office of Administrative
Hearings**

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

DECISION OF THE HEARING OFFICER

*** (Student), by next friends *** and *** (Parents and, collectively, Petitioner), brings this action against the Klein 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 issues in this case are whether the District failed to provide Student a free, appropriate public education (FAPE) and whether the District failed to implement Student's individualized education program (IEP). The Hearing Officer concludes the District provided Student with a FAPE reasonably calculated

to allow Student to make appropriate progress in light of Student's unique circumstances and appropriately implemented Student's IEP.

I. DUE PROCESS HEARING

The due process hearing was conducted on February 6-7, 2024 through the Zoom videoconferencing platform. Student was represented in this litigation by Student's attorney, Mark Whitburn of Whitburn & Pevsner PLLC. Parents were present. The District was represented by its attorneys, Erik Nichols and Matthew Acosta of Spalding Nichols Lamp Langlois. In addition, Dr. ***, the Executive Director of Special Programs, and ***, Compliance Officer for Special Education, attended as party representatives for the District.

The parties offered joint and separate exhibits, which were admitted. Petitioner offered testimony of two of Student's special education teachers, Student's Parent, and Dr. ***. Dr. *** completed an independent evaluation of Student and was designated as an expert in clinical psychology. Respondent offered testimony of a District licensed specialist in school psychology (LSSP) and the District's Coordinator of Appraisal and Psychological Services, both of whom were designated as experts. The hearing was recorded and transcribed by a certified court reporter. Both parties timely filed written closing briefs. The Decision in this case is due on April 1, 2024.

II. ISSUES

A. PETITIONER'S ISSUES

Petitioner identified the relevant timeframe as the 2021-2022 school year and raised the following IDEA issues for decision in this case:

1. Whether the District failed to provide Student with a FAPE; and
2. Whether the District failed to implement Student's IEP and behavior intervention plan (BIP) appropriately.

B. PETITIONER'S REQUESTED RELIEF

Petitioner requested the following items of relief:

1. Order the District to place Student at ***;
2. Order the District to reimburse Parents for privately obtained educational services, including ***; and
3. Any other relief the Hearing Officer deems appropriate.

C. RESPONDENT'S LEGAL POSITION

Respondent generally denies the factual allegations and asserted the statute of limitations as an affirmative defense. Respondent also asserted that Petitioner did not provide notice of a unilateral placement, that equitable factors bar reimbursement, and that claims against the school Student attended during the 2022-2023 school year are intervening or superseding causes of Petitioner's claims.

III. FINDINGS OF FACT

1. Student is *** years old and in the *** grade. Student ***.¹
2. In ***, Student was found eligible for special education based on other health impairment (OHI) due to attention deficit hyperactivity disorder (ADHD).²
3. During the 2018-2019 school year, *** grade, Student attended *** in the District.³
4. During the 2019-2020 school year, *** grade, Student attended *** in the District.⁴
5. Student was homeschooled for the majority of *** grade during the 2020-2021 school year.⁵

Fall 2021 Semester

6. Student returned to *** in the District for *** grade in the 2021-2022 school year. Student was enrolled about two weeks after the school year began.⁶
7. When Student was re-enrolled, the District and Parents agreed to implement the IEP that had been implemented when Student was last enrolled at the beginning of the fall 2020 semester until an admission, review, and dismissal (ARD) committee meeting could be held. These services were:

¹ Joint Exhibit (JE) 3 at 17; JE 10 at 2.

² JE 3 at 1.

³ JE 3 at 18; Transcript (Tr.) 191-92.

⁴ Tr. 26, 129.

⁵ JE 2; JE 3 at 17.

⁶ JE 3 at 17-18.

support for 20 minutes three times a week, *** in-class support for 20 minutes three times a week, pull out behavior/social/emotional instruction 45 minutes per day, reading pull out 45 minutes per day, math pull out 45 minutes per day, in-class support for behavior/social/emotional monitoring for 120 minutes weekly, occupational therapy for 60 minutes per three weeks, and psychological services for 30 minutes per nine weeks.⁷

8. During the 2021-2022 school year, Student received instruction and behavior support from the *** (***) program. The *** program is individualized to support each student's needs and provides behavior support and direct social skills instruction. Students typically spend most of their time in the *** classroom until they meet behavior proficiency goals and are then integrated into general education and other settings for increasing amounts of time. The *** teacher collects academic work from the general education and other special education teachers to give instruction to the students receiving academic instruction in the *** classroom.⁸
9. When students are in the *** program, a daily behavior card is completed by staff assessing each student's progress on their individual behavior goals, typically broken down into 15-minute intervals for the entire school day. This card is also a daily communication tool to parents.⁹
10. When Student initially re-enrolled in school, Student received all instruction in the *** classroom, except Student attended *** with general education peers, per Student's IEP. During this time, Student received Student's in-class support and pull-out support in core content areas in the *** classroom. After two weeks of success, Student was permitted to spend more time in other settings and less time in the *** classroom.¹⁰
11. After a couple weeks of attending more class time in other settings in which Student was consistently not meeting Student's daily behavior goals, Student was returned to

⁷ JE 12.

⁸ JE 12; Respondent Exhibit (RE) 53 at 9-12; Tr. 20-23, 60-61, 164-65.

⁹ RE 53 at 18, 27, 38; Tr. 50-52, 99-100.

¹⁰ JE 13 at 4, 25; Petitioner Exhibit (PE) 4 at 6, 11-12; RE 3 at 30; RE 7; Tr. 164-65.

a schedule of primarily receiving instruction in the *** classroom in early October 2021.¹¹

12. The *** teacher communicated regularly with Parents throughout the 2021-2022 school year about Student's challenges and successes.¹²
13. The *** teacher also coordinated regularly with Student's other teachers and service providers and an LSSP providing behavior support.¹³
14. A reevaluation of Student was requested when Student re-enrolled based on Parents' concern about dyslexia and/or dysgraphia. The full individual evaluation (FIE) was completed, and the written report was dated October ***, 2021.¹⁴
15. The FIE noted that Student already had excessive absences in the 2021-2022 school year that influenced Student's learning and behavior patterns and that Student's attendance had been inconsistent in the past.¹⁵
16. Cognitive assessments in the seven areas of cognitive processing were administered and analyzed using a cross-battery approach. A full-scale IQ was not used due to variability in Student's cognitive profile. Student had relative strengths in short term working memory, long term retrieval, and comprehension-knowledge. Student had relative weaknesses in auditory processing, visual processing, fluid reasoning, and processing speed. Student's overall cognitive profile was low in most areas but assessed to be sufficient to permit consideration of specific learning disabilities.¹⁶
17. Academic achievement was assessed with standardized measures. Student's reading and math composite scores and all reading and math subtests were low.

¹¹ RE 3 at 33-48.

¹² PE 4 at 1, 3, 7-8, 11-12, 48, 55-56, 63-64; RE 8; RE 9; RE 10; RE 11; RE 14; RE 15; RE 16; RE 18; RE 19.

¹³ Tr. 109-10, 114-15, 137-41, 165-66, 170, 258-59, 267-69, 286-90.

¹⁴ JE 1; JE 2; JE 3; Tr. 261-64.

¹⁵ JE 3 at 16-17.

¹⁶ JE 3 at 23-36.

Student's writing composite score and all subtests were very low. On assessment of oral reading, Student's rate, accuracy, and fluency were all very poor.¹⁷

18. The FIE determined that Student met the Texas Education Agency (TEA) criteria for both dyslexia and dysgraphia. The report concluded that Student met criteria for specific learning disabilities in basic reading with dyslexia, math calculation, and written expression with dysgraphia.¹⁸
19. A functional behavior assessment (FBA) was completed as part of the FIE. The FBA discussed previous targeted behaviors of noncompliance with adult directives and inappropriate social interactions, defined as cussing, name-calling, arguing with adults, and aggression. These behaviors were identified in prior FBAs completed in October 2018 and May 2019. The 2021 FBA recommended focusing on two behaviors: oppositionality to directives/requests and physical aggression. The FBA recommended interventions to address these behaviors¹⁹
20. The 2021 FIE incorporated an October ***, 2020 occupational therapy evaluation that had been completed before Student was unenrolled to homeschool, and an October ***, 2019 occupational therapy sensory evaluation completed in *** grade. Observations were completed by an occupational therapist in October 2021 to determine whether these prior evaluations still reflected Student's abilities and needs, concluding that they did. Overall, the occupational therapy portion of the evaluation concluded that Student's speed at producing written and typed work was below average and that Student demonstrated handwriting difficulties and very low visual perception and motor coordination. Assistive technology, including speech-to-text, as well as low-tech writing supports, were recommended. Continued occupational therapy was also recommended.²⁰

¹⁷ JE 3 at 37-41.

¹⁸ JE 3 at 41-52.

¹⁹ JE 3 at 17-23, 57-59.

²⁰ JE 3 at 4-16, 50, 57.

21. Beginning in October 2021, the District attempted to schedule an ARD committee meeting with Parents to review the FIE and discuss Student's program. Parents requested later dates to accommodate their schedules and their advocate's schedule.²¹
22. On November ***, 2021, Parents were provided draft present levels, goals, a BIP, and accommodations to review prior to the ARD committee meeting.²²
23. On November ***, 2021, Student's Parent sent an email to the *** teacher and another campus staff member about an incident in *** class where Student was ***. Student's Parent raised concerns about Student's self-esteem on a few occasions.²³
24. During the fall 2021 semester, the District continued to implement and track progress on Student's IEP goals from Student's fall 2020 IEP. Student made progress on goals targeting ***. Student was not making clear progress on ***, complying with academic task directives, and positive social interactions with peers and adults.²⁴
25. Student typically showed regression on academic and behavior progress following absences.²⁵

²¹ PE 4 at 8-9.

²² JE 4 at 28-47.

²³ JE 4 at 26; Tr. 177-78, 182-83.

²⁴ JE 14.

²⁵ Tr. 28, 171.

Spring 2022 Semester

26. On January ***, 2022, a staffing meeting was held with campus and District-level staff to discuss concerns about Student's behavior and strategies to address it.²⁶
27. On the same date, Student received an office referral for ***. Parents and campus staff exchanged subsequent emails about strategies to address Student's behavior.²⁷
28. An ARD committee meeting was held January ***, 2022 to review the FIE and conduct Student's annual IEP review. The record does not clearly reflect why it took so long for this meeting to occur after Student reenrolled and the FIE was complete. Student's Parent attended but did not want to proceed without Student's Parent and the family's advocate present. The meeting was tabled without further discussion.²⁸
29. The ARD committee meeting continued on February ***, 2022 with both parents and advocate Louis Geigerman in attendance. After some discussion, this meeting was tabled as well. The meeting resumed and ultimately concluded on March ***, 2022.²⁹
30. The FIE was reviewed and eligibility based on specific learning disabilities in basic reading with the condition of dyslexia, math calculation, and written expression with the condition of dysgraphia were recommended, in addition to Student's existing eligibility of OHI for ADHD.³⁰
31. The IEP includes statements about Student's present levels that come from the FIE, as well as updated teacher information and progress data. Weekly data

²⁶ JE 4; Tr. 269-70.

²⁷ PE 4 at 55-61; RE 12.

²⁸ JE 13 at 29.

²⁹ JE 13 at 29-31.

³⁰ JE 13 at 1-2, 28, 45-46.

was presented on Student's noncompliance and inappropriate interactions. Student's reading level was assessed at below a ***-grade level.³¹

32. New annual goals were proposed for: behavior (***), ***, math (***), and reading (***).³²
33. Accommodations were proposed to adapt instruction, adapt materials, alter assignments and testing, manage behavior, and provide assistive technology.³³
34. The proposed schedule of services for the remainder of the 2021-2022 school year was: 20 minutes of daily dysgraphia intervention, 30 minutes of daily dyslexia intervention, 120 minutes per week of behavior support in the special education setting, 30 minutes four days a week of in-class support in general education for *** with a modified curriculum, 15 minutes twice a week of in-class support in general education for ***, 15 minutes twice a week of in-class support in general education for ***, 30 minutes four days a week of math pull-out instruction, 45 minutes daily of pull-out for social/emotional learning, integrated occupational therapy services for 60 minutes per three weeks, and psychological services for 30 minutes per nine weeks. The schedule of services also explains that behavior support through push-in and pull-out services may increase at times to meet Student's specific needs. This explanation appears intended to account for the structure of the *** program wherein students receive most instruction in the *** classroom until behavior proficiency goals are met and more time is then spent in other settings.³⁴
35. Extended school year services were recommended.³⁵

³¹ JE 13 at 2-8.

³² JE 13 at 11-15.

³³ JE 13 at 17-18.

³⁴ JE 13 at 24-25.

³⁵ JE 13 at 24, 27.

36. The IEP included a BIP following the recommendations of the FBA to address oppositionality to directives and physical aggression.³⁶
37. The ARD committee discussed Student's attendance. Student's Parent shared that Student has *** that impact attendance, as well as school avoidance. Incentives for school attendance were discussed and included as an accommodation.³⁷
38. Parents ultimately disagreed with the IEP, including the present levels statements and the goals. However, Parents also waived their right to a 10-day reconvene meeting and waived the five-day waiting period before implementation of the new IEP would begin.³⁸
39. The *** teacher subsequently exchanged emails with Parents about implementation of the new accommodations related to encouraging school attendance, including permitting Student's request to help with ***.³⁹
40. According to Student's report card from the third quarter of the school year, up to that point, Student had *** excused and *** unexcused absences and *** tardies. Student's grades at that point were generally in the ***s in core content areas with modified curriculum.⁴⁰
41. According to an IEP progress report for the third nine-week grading period, Student was absent *** out of *** days. Therefore, progress was not able to be determined on Student's IEP goals. The daily behavior cards reflect that Student was generally not meeting Student's behavior goals when in attendance.⁴¹

³⁶ JE 13 at 36-44.

³⁷ JE 13 at 29-30.

³⁸ JE 13 at 31-32, 34.

³⁹ RE 18; Tr. 96-98.

⁴⁰ JE 15; Tr. 153.

⁴¹ PE 4 at 69-74; RE 5.

42. From the daily behavior cards, it appears Student only attended *** full days and *** partial day of school during the final nine-week grading period of the school year. Student's Parent testified that Parent withdrew Student from the District at some point in the spring 2022 semester. The record does not otherwise reflect when Student was withdrawn.⁴²

Subsequent Evaluations and Post-District Enrollment

43. Parents requested an IEE during the March ***, 2022 ARD Committee meeting and subsequently communicated with District staff about their request and selecting providers.⁴³

44. A speech IEE was completed by ***, report dated September ***, 2022. The evaluator collected information from Parents and District teachers and conducted standardized assessments. The evaluation concluded that Student exhibited strengths in receptive and expressive language, pragmatic language, articulation, voice, and fluency. Student did not meet special education eligibility criteria in the area of speech impairment.⁴⁴

45. Parent also sought an IEE by Dr. ***, LSSP.⁴⁵

46. Student enrolled in the *** in the fall 2022 semester.⁴⁶

47. The request for an IEE by Dr. ***, paid for by the District, was ultimately cancelled because *** had entered into a contract with Dr. *** to complete an IEE.⁴⁷

⁴² RE 6 at 9-84; Tr. 186.

⁴³ JE 13 at 30; RE 13; RE 20.

⁴⁴ JE 9.

⁴⁵ JE 6; JE 7.

⁴⁶ RE 25.

⁴⁷ RE 21.

48. Dr. ***, a clinical psychologist, completed an IEE of Student, report dated February ***, 2023. Dr. *** reviewed records; collected information from Student's Parent, an *** teacher, and the principal; and completed standardized testing and a school observation at ***.⁴⁸
49. Dr. *** performed cognitive testing using the Stanford-Binet intelligence scales in five cognitive areas. The cognitive test yielded a full-scale IQ of ***, in the borderline intellectual functioning range.⁴⁹
50. The Stanford-Binet is considered an outdated and disfavored cognitive measure and does not test in all seven cognitive domains. Dr. *** did not conduct any supplemental cognitive testing in the remaining untested domains.⁵⁰
51. Dr. ***'s academic achievement testing found Student performing very low in all areas, in the ***-grade range, and particularly low in ***.⁵¹
52. Dr. *** completed a Childhood Autism Rating Scale (CARS), Second Edition, High Functioning, which yielded results showing severe symptoms of autism spectrum disorder (ASD). Dr. *** concluded based on the CARS that Student qualified for a diagnosis of ASD and met IDEA eligibility criteria based on autism.⁵²
53. The determination of autism eligibility did not include any formal evaluation of Student's speech, which would have been typical to determine whether Student had deficits in verbal and nonverbal communication. Dr. ***'s

⁴⁸ JE 10; Tr. 208-09.

⁴⁹ JE 10 at 11-12.

⁵⁰ Tr. 310-11, 316-18.

⁵¹ JE 10 at 12.

⁵² JE 10 at 4-5, 14.

autism determination also conflicts with the *** IEE finding that Student's communication is a strength.⁵³

54. Dr. ***'s administration of the CARS High Functioning version did not comply with the assessment manual. The high functioning version of the CARS is only standardized for students with IQs over ***. Dr. ***'s testing determined Student's IQ was ***. Additionally, the high functioning version of the CARS requires multiple observations and interviews, versus the standard version which can be completed with one observation. Dr. *** did not gather the required information to properly complete the high functioning version of the CARS. The nonstandard CARS administration calls into question the validity of the results and conclusions.⁵⁴
55. Dr. *** completed an FBA targeting verbal aggression, physical aggression, ***, and noncompliance. The FBA did not distinguish between the behaviors and makes conclusions about the antecedents, consequences, and hypothesized functions in aggregate. The hypothesized functions include items that are not functions, including antecedents and attributing Student's behavior to symptoms of ASD, ADHD, and emotional disorders.⁵⁵
56. Dr. *** concluded that Student meets special education eligibility criteria based on autism, emotional disturbance, and specific learning disabilities in written expression, basic reading, reading fluency, reading comprehension, math calculation, and math problem-solving; Student does not meet eligibility based on intellectual disability despite a *** IQ and deficits in adaptive behavior; and an ARD Committee should obtain updated medical information to determine ongoing eligibility based on OHI.⁵⁶
57. The report does not offer any analysis of whether autism or emotional disturbance should be considered a primary eligibility. Further, the emotional

⁵³ Tr. 303-05.

⁵⁴ Tr. 306-09, 314-16.

⁵⁵ JE 10 5-7; Tr. 312-13.

⁵⁶ JE 10 at 14-19.

disturbance eligibility was determined based on an assessment measure that was used without completing its emotional disturbance qualifier component.⁵⁷

58. Dr. *** recommended that Student be served in a private placement, “such as ***.” She testified that this recommendation was based on Student’s lack of success in the public school setting. The report included many additional recommendations to address Student’s needs.⁵⁸
59. After her report was completed, Dr. *** also generated a February ***, 2023 letter recommending that Student receive up to 40 hours per week of applied behavior analysis (ABA) therapy.⁵⁹
60. Dr. ***’s IEE was reviewed by an ARD committee at ***. The ARD committee did not accept Dr. ***’s autism eligibility determination.⁶⁰
61. During the 2022-2023 school year, Student struggled behaviorally at ***. After *** in early February 2023, the record is unclear on whether Student ever returned to school at ***.⁶¹
62. In March 2023, Parents filed a due process hearing request against both the District and ***, TEA Docket No. 218-SE-0323. In June 2023, the case was dismissed at Petitioner’s request. Petitioner had reached a settlement agreement with *** and the case against *** was dismissed with prejudice. Petitioner chose not to proceed against the District at that time and the case against the District was dismissed without prejudice.⁶²

⁵⁷ Tr. 309-10, 318-20.

⁵⁸ JE 10 at 19-20; Tr. 219.

⁵⁹ JE 11.

⁶⁰ RE 38; RE 43.

⁶¹ RE 28; RE 32; RE 33; RE 34; RE 35; RE 36; RE 37; RE 38; RE 40; Tr. 188.

⁶² RE 52; Tr. 193-94.

63. In mid-September 2023, Student began attending ***, a private program.⁶³

IV. DISCUSSION

Petitioner alleges that the District denied Student a FAPE and failed to implement Student's IEP, including Student's BIP, during the 2021-2022 school year. Petitioner seeks an order requiring the District to privately place Student at *** and to reimburse Parents for the out-of-pocket expenses they incurred by placing Student at *** for the current school year.

A. BURDEN OF PROOF

The burden of proof in a due process hearing is on the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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 that the District failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017); *Tatro v. State of Tex.*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom, Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), and *vacated in part*, 741 F.2d 82 (5th Cir. 1984).

⁶³ PE 5; PE 6.

B. STATUTE OF LIMITATIONS

A parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of a FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(b)(6), (f)(3)(C); 34 C.F.R. § 300.507(a)(1), (2).

Petitioner's Complaint was filed on October 2, 2023. Respondent raised the two-year statute of limitations as an affirmative defense. Petitioner did not plead any exceptions to the two-year statute of limitations. Therefore, Petitioner was required to bring claims within two years of when Petitioner knew or should have known (KOSHK) about the actions that form the basis of the complaint. Petitioner has not argued, and the evidence has not established, that the KOSHK accrual date is any later than two years backward from the date of filing. Therefore, the timeframe for the claims at issue here begins on October 2, 2021. *See, e.g., Hooker v. Dallas Indep. Sch. Dist.*, Civil Action No. 3:09-CV-0676-G-BH, 2010 WL 4025776, *10-*11 (N.D. Tex. Sep. 13, 2010).

C. 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 provide a FAPE to all children with disabilities ages 3 to 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 school district “was reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 580 U.S. at 403. A hearing officer applies a four factor test to determine whether a Texas school district’s program meets IDEA requirements. Those factors are:

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

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

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. *Michael Z.*, 580 F. 3d at 294. Even after the Supreme

Court's 2017 decision in *Andrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765-66 (5th Cir. 2018) (citing *Andrew F.*, 580 U.S. 386).

In this case, there are two IEPs at issue that were implemented in the 2021-2022 school year. The IEP that was implemented for the majority of that school year, until the conclusion of the March ***, 2022 ARD committee meeting where a new IEP was developed, was the fall 2020 IEP. Student attended only a handful of school days after the March 2022 IEP was implemented. Therefore, the fall 2020 IEP is what was implemented for the vast majority of Student's attendance during the 2021-2022 school year. The parties did not offer the fall 2020 IEP as an exhibit, and it is therefore not in the record. The record only includes an August ***, 2021 transfer agreement wherein the parties agreed to implement the fall 2020 IEP and a recounting of the schedule of services. The record reflects, by implication, that other parts of that IEP were also implemented in the 2021-2022 school year, including the BIP, IEP goals, and accommodations. However, the FAPE analysis below is hamstrung by the absence in the record of the actual IEP that was implemented for most of the time period at issue.

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). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

The District's obligation when developing Student's IEP and BIP 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). 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).

Here, the schedule of services in the transfer agreement reflects robust supports and related services in both special education and general education settings. By implication, the record also supports that a BIP targeting ongoing problem behaviors and that included positive behavior supports was a part of this program. Without the Fall 2020 IEP in the record, the Hearing Officer cannot draw conclusions about the evaluation data and performance on which it was based.

However, Petitioner bears the burden of proof, and Petitioner has not offered any evidence that this program was insufficiently data-based, including by failing to offer the Fall 2020 IEP itself.

The March 2022 IEP was developed with the benefit of the October 2021 FIE, as well as updated performance data gathered since Student returned to public school in the fall 2021 semester. This IEP increased Student's supports to target Student's newly identified specific learning disabilities. Student's BIP was also updated to address Student's most prevalent behaviors. The ARD Committee considered parent information about Student's school avoidance and developed accommodations to encourage attendance. The March 2022 IEP included all the required elements and was appropriately individualized on the basis of assessment information and Student's performance.

After Student left the District and attended at least one semester at another school, Petitioner obtained the February 2023 *** IEE which makes new diagnoses and new recommendations. This report is not persuasive evidence that any portion of the District 2021-2022 program was inappropriate. The autism eligibility recommended by Dr. *** was effectively questioned by the District's expert witnesses and was not accepted by the school Student was attending at the time. The recommendation for a private placement was based, in part, on the significant struggles that Student was having in the *** school during the 2022- 2023 school year. This does not reflect any failure of the District to obtain and consider appropriate assessment and performance information in the 2021-2022 school year in developing an appropriate placement.

Overall, the evidence showed that Student's program during the 2021-2022 school year was appropriately individualized on the basis of assessment and performance.

2. Least Restrictive Environment

The IDEA requires a student with a disability to be educated with non-disabled peers to the maximum extent appropriate 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" (LRE). 34 C.F.R. § 300.114(a)(2)(i)-(ii).

The IDEA's regulations require a school district to ensure availability of a continuum of instructional placements to meet the needs of students with disabilities. 34 C.F.R. § 300.115. 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 classes, resource room and/or services, self-contained, nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005(c).

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

1. Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
2. If not, whether the school district mainstreamed the student to the maximum extent appropriate.

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

Student's program during the relevant time frame included a mix of special education and general education settings, with behavioral support through the *** program, as well as related services. Petitioner briefly argues that the *** program was not Student's LRE, but it is not clear in the Closing Brief whether Petitioner thinks Student needed a more or less restrictive setting. Petitioner's primary complaints focus on whether the general education teachers were properly trained to implement Student's IEP and the specific ways that *** staff worked with Student, which are not elements of the LRE. The record supports that Student's needs call for removal from the general education setting for certain instruction, interventions, and related services. Student's program was therefore administered in the least restrictive environment and Student was included to the maximum extent appropriate.

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

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, Civil Action No. 4:16-CV-

0058, 2017 WL 3017282, at *27 (S.D. Tex. June 15, 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

The record contains abundant evidence of collaboration and information sharing both among District staff serving Student and between the District and Parents. Staff consulted regularly with each other on Student's needs, behaviors, and support strategies. Parents received daily information from the behavior cards, as well as frequent emails on both positive and negative events in Student's school day. Parents attended and participated in the ARD Committee meetings, along with their advocate. The record does not reflect that Parents ever made a request that was denied, let alone ignored. Overall, the evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders at times. Petitioner failed to show that the District excluded Parents in bad faith or refused to listen to them.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P.*, 703 F.3d at 813-14.

The evidence showed that Student made some progress on academic goals during the 2021-2022 school year, but progress was questionable on other goals, including Student's behavior goals. Petitioner cites to Student's worsening behavior over the course of the 2021-2022 school year. The District, on the other hand, points to Student's frequent absences and regression following absences as impediments to progress. Student's attendance record certainly impacted Student's academic and non-academic benefit in the 2021-2022 school year. Petitioner's Closing Brief argues that most of Student's absences were due to school refusal at the fault of the District. However, the evidence generally attributes Student's absences to a combination of***, and school refusal. Even assuming without deciding that the District has a role to play in encouraging Student's attendance in this circumstance, the ARD Committee discussed it when it was raised by Student's Parent and adopted accommodations. Petitioner faults Student's teacher for her testimony that she did not think this type of attendance encouragement was the District's responsibility. Regardless of the teacher's personal feelings, however, she implemented the accommodations. In any event, for reasons that are not clearly reflected in the record, Student did not attend very much school after the new IEP was implemented before being withdrawn at some point, which is also not clearly reflected in the record.

Besides attendance, from the Hearing Officer's perspective, the greatest impediment to Student making more progress in the 2021-2022 school year was the amount of time it took to get a new IEP in place. Student re-enrolled in the District in fall 2021 after a year of home schooling and an interim plan was put in place to implement an old IEP until a new evaluation was completed and a new IEP could be developed. An FIE was completed in October 2021 showing Student had new needs, including newly identified learning disabilities. However, the ARD committee did not conclude developing a new IEP until March ***, 2022, and Student barely attended school after that and then was unenrolled at some point. The record is not totally clear on the cause of this delay, however, the only evidence addressing this indicates that the delay was based on Parents' request to accommodate their and their advocate's schedules for meetings. Therefore, the Hearing Officer cannot conclude that the limitations on progress stemming from the delay are the fault of the District.

Overall, although Student's progress was limited in the 2021-2022 school year, the record reflects that it was an appropriate amount of progress in light of Student's attendance and the limitations the District faced in promptly and collaboratively developing a new IEP for Student.

5. FAPE Conclusion

When looking at the totality of the *Michael F.* factors as applied to the IEPs at issue here, the evidence showed that the IEPs at issue were individualized based on

Student's assessment and performance, provided in Student's LRE, provided in a sufficiently coordinated and collaborative manner by the key stakeholders, and provided Student academic and non-academic benefit. The evidence showed that Student's program was reasonably calculated to provide meaningful educational benefit and was appropriately ambitious in light of Student's unique circumstances for the 2021-2022 school year. *Andrew F.*, 458 U.S. at 399. Based on the four factors set forth in *Michael F.*, the evidence establishes that the District provided Student a FAPE during the relevant time frame.

D. IEP IMPLEMENTATION

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). To prevail on this claim, Petitioner must show more than a *de minimis* failure to implement all elements of Student's IEP, and instead, must demonstrate that the District failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Petitioner's Complaint alleges that Student's BIP was not appropriately implemented across settings. The only specific claim in the record pertains to the incident in *** class in November 2021 when Student was ***

***. The only evidence describing this incident is an email from Student's Parent recounting the event, seemingly based on Parent's understanding from what Student told Parent. No other exhibits or witnesses corroborated the details of this event. Even assuming that this occurred exactly as was reported in the email from the parent, this single incident *** does not rise to the level of a failure to implement substantial provisions of the IEP. The record does not include the IEP and BIP being implemented in November 2021. Therefore, it cannot be conclusively determined that private reprimands were even a part of the IEP and BIP being implemented at that time.

Overall, the absence of the fall 2020 IEP in the record is a substantial impediment to Petitioner in meeting Petitioner's burden on Petitioner's failure to implement claim. Petitioner has not alleged, and the record does not support, that the schedule of services contained in the transfer agreement was not implemented. Other details of the fall 2020 IEP are only understood in the record through implication. Petitioner has not met Petitioner's burden to show by a preponderance of the evidence that there was a failure to implement an IEP that is not in evidence. Petitioner also has not alleged any specific implementation failures regarding the March 2022 IEP. Student attended, at most, *** of days of school after this IEP was implemented. Both prongs three and four above were resolved in favor of the District. Petitioner did not meet Petitioner's burden of proof as to this issue.

E. PRIVATE PLACEMENT AND AFFIRMATIVE DEFENSES

Petitioner has requested private placement at ***. Petitioner must meet a two-part test in order to obtain private placement at District expense. First, Petitioner must prove the District's program was not appropriate under the IDEA. Second, Petitioner must prove placement at *** is appropriate. A private placement may be appropriate even if it does not meet state standards that apply to the public school. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cnty. v. Carter*, 510 U.S. 7 (1993).

Petitioner failed to meet Petitioner's burden of proving the District's program was not appropriate under the IDEA; therefore, the Hearing Officer need not address whether placement at *** is appropriate. Likewise, the Hearing Officer need not reach Respondent's affirmative defenses regarding the private placement because Petitioner did not meet Petitioner's burden to show that the District's program is inappropriate.

V. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. 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, 403 (2017).

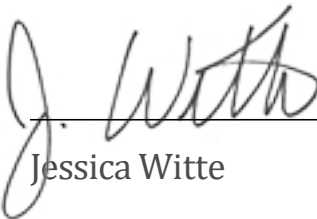
3. Petitioner did not meet Petitioner's burden of proving that the District failed to implement Student's IEPs. *Schaffer*, 546 U.S. at 62; *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

VI. ORDER

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

Signed MARCH 28, 2024.

ALJ Signature:



Jessica Witte

Presiding Administrative Law Judge

VII. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this case 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).