

SOAH Docket No. 701-23-13018.IDEA
TEA Docket No. 190-SE-0223

Before the State Office of Administrative Hearings

STUDENT, BY NEXT FRIEND PARENT, PETITIONER
v.
LAGO VISTA INDEPENDENT SCHOOL DISTRICT
RESPONDENT

DECISION OF THE HEARING OFFICER

*** (Student), by next friend *** (Parent or, collectively, Petitioner) brings this action against the Lago Vista 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. Petitioner alleges that the District is attempting to deny Student a free, appropriate public education (FAPE) by moving Student to a more restrictive environment and not providing appropriate modifications and accommodations, including accommodations for Student's ***, among other violations. The Hearing Officer concludes that the District's proposed placement represents

Student's least restrictive environment (LRE) and provides Student with a FAPE reasonably calculated to allow Student to make progress appropriate in light of Student's unique circumstances.

I. DUE PROCESS HEARING

The due process hearing was conducted November 1-3, 2023, with the record left open for one additional witness to testify on November 10, 2023. The hearing was conducted through the Zoom videoconferencing platform and recorded and transcribed by a certified court reporter. Petitioner was represented by Yvonnilda Muniz with the Law Office of Yvonnilda Muniz, P.C. Attorney Sonja Kerr entered a special appearance in this matter to cross-examine a witness on behalf of Petitioner. *** and ***, Student's parents (Parents), also attended the due process hearing. Kelly Janes and Denise Hays with Walsh Gallegos Treviño Kyle & Robinson, P.C., represented Respondent. ***, Director of Special Education for the District, attended the hearing as the party representative for Respondent.

Respondent prepared 32 joint exhibits for the parties, all of which were admitted. Petitioner offered 83 exhibits, 68 of which were admitted over any objections by Respondent. Petitioner offered the testimony of ***, Student's Parent; ***, a Teacher of Students with *** (***) for *** ISD who was referred to Student's Parent through ***; ***, the Director of Outreach Programs for the *****, ***, a former

***** diagnostician who testified regarding proper testing of *** students; ***, Assistant Principal for ***; ***, a teacher with *** ISD and Student's former *** tutor; ***, Student's *** Teacher; ***, Student's *** Teacher; ***, an educational diagnostician and former Lago Vista employee who had worked with Student; ***, Student's Parent; ***, Student's ***; ***, a former District paraprofessional who testified about her concerns with Student's proposed placement; ***, the *****; Dr. ***, a licensed psychologist with *** who examined Student; Dr. Kaci Sheridan, Petitioner's educational advocate; Dr. ***, an *** specialist who works with patients who have *** and who examined Student; and Dr. ***, an expert on *** (*****) and Director of the *** who examined Student.

Respondent offered 87 exhibits, 75 of which were admitted over any objections from Petitioner. Respondent offered the testimony of ***, Student's *** grade *** teacher; Dr. ***, a licensed specialist in school psychology who examined Student; ***, a *** and ***** teacher with the District; ***, Student's *** teacher; and ***, Student's *** teacher.

Both parties timely filed written closing briefs. The Decision in this case is due on January 29, 2024.

II. ISSUES

A. Petitioner's Issues

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

1. Whether the District's proposed placement is appropriate and in Student's least restrictive environment.
2. Whether the District failed to identify Student's eligibility in all categories of suspected disability.
3. Whether the District failed to develop an individualized education program (IEP) with appropriate modifications; accommodations, including accommodations for Student's ***; and supplementary aides and services designed to provide Student a FAPE.
4. Whether the District failed to provide appropriate inclusion support to allow Student to be placed in a less restrictive environment.
5. Whether the District failed to train staff who worked with Student on Student's unique needs.
6. Whether the District predetermined aspects of Student's IEP without including input from Parent.
7. Whether the District committed procedural violations of the IDEA, including failing to have appropriate members of the Admission, Review, and Dismissal (ARD) Committee present at meetings and failing to provide prior written notice at all appropriate times.

8. Whether the District failed to update Student's IEP at all appropriate times.

B. Petitioner's Requested Relief

Petitioner requested the following items of relief:

1. Order the District to maintain Student's current placement.
2. Order the District to ensure all staff who work with Student and/or make decisions concerning Student are trained on Student's unique needs and on important definitions under the IDEA.
3. Order the District to find Student meets eligibility for special education as a student with a *** and multiple disabilities.
4. Order the District to accept and implement the accommodations listed in Dr. ***'s and Dr. ***'s reports.
5. Order the District to re-evaluate Student with the modifications to the assessment materials to account for Student's ***.
6. Order the District to consult with personnel from the ***** to determine appropriate instructional services, accommodations, and modifications for Student.
7. Order the District to implement the assistive technology services and accommodations with fidelity, including, but not limited to, ***.
8. Order the District to provide Student evidence-based instruction in reading and math.
9. Order the District to provide such other and further relief the Hearing Officer deems just and proper.

III. FINDINGS OF FACT

1. Student is *** years old and in *** grade. Student enjoys ***. Student is eligible for special education services under the IDEA as a student with other health impairment (OHI) and speech impairment (SI). Student has a ***.¹
2. Student has been enrolled in the District since ***. On May ***, 2022, the District recommended eligibility under the category of ***, which Petitioner continues to dispute. On February ***, 2023, the District recommended eligibility under the *** (***) category, which Petitioner agreed with. On October ***, 2023, the District recommended eligibility under the *** (***) category, which Petitioner had been seeking since at least February ***, 2023.²
3. The relevant time period in this matter begins on December ***, 2022, after the signing of a settlement agreement disposing of a prior due process complaint. Information regarding events before the relevant time period is provided for historical context.³
4. Student has received special education services from the District throughout the course of Student's enrollment. Student initially qualified for special education services when Student was *** years old and enrolled in another district's ***.⁴

¹ Transcript (Tr.) 41. It was noted that, while Student is ***; Joint Exhibit (JE) 14 at 1; JE 1 at 1.

² Tr. 41; JE 18 at 36; JE 16 at 41-42; JE 19 at 14.

³ Respondent's Exhibit (RE) 83 at 2-5.

⁴ Petitioner's Exhibit (PE) 24-25, JE 3.

5. Student was re-evaluated during Student's ***-grade year in 2019. As part of this evaluation, the District's licensed specialist in school psychology (LSSP) met with Student's Parents to request additional testing to consider whether Student was demonstrating characteristics of *** and attention deficit hyperactivity disorder (ADHD). Parents declined to consent to additional testing in either area of suspected disability. Student's cognitive testing in this evaluation indicated a likely IQ score between***. However, without the ability to complete adaptive behavior testing, the educational classification of *** could not be established. It was noted as part of this evaluation that Student would require a slower pace of instruction with a modified curriculum, that Student's skill development was significantly below grade-level expectations, and that Student would benefit from targeted instruction in foundational skills for reading, writing, and math in a setting with low student-to-staff ratios.⁵
6. Student's annual ARD Committee meeting for *** grade was held on April ***, 2021. Student was placed in *** math, reading, and writing in a special education setting, *** in a general education classroom with inclusion support, *** in a general education classroom, speech services, occupational therapy, and physical therapy.⁶
7. The IEP included accommodations and goals that had been developed at the ARD Committee meeting and agreed to by all participants. Relevant accommodations included breaks from *** work; flexible seating; use of a ***; minimizing ***, and where possible, ***; extra time for completing assignments; opportunity to respond orally in lieu of written responses;

⁵ PE 25 at 1, 11, 16-17.

⁶ JE 14 at 17-18.

opportunity to type in lieu of writing; oral exams; reduced length of assignments; ***; and the use of an iPad with a keyboard.⁷

8. On December ***, 2021, Student was diagnosed with ***. Dr. *** indicated at that time that Student had no apparent ***, and that the diagnosis did not result in a serious ***.⁸

2021-2022 School Year: * Grade**

9. A revision ARD Committee meeting was held on February ***, 2022. During this meeting, Parents expressed concern that Student had experienced significant regression. Student's teachers explained that Student was not showing independence and that there were working memory issues. The District requested, and Parents agreed, to move forward with a complete FIE, including evaluations for cognitive and intellectual functioning.⁹
10. As part of the FIE, multiple assessments were conducted, including a *** on April ***, 2022, by ***, a ***, which determined that Student did not meet the eligibility criteria for a student with ***.¹⁰
11. A neuropsychological evaluation was also completed on April ***, 2022, by Dr. ***, an LSSP. The evaluation found that Student fell in the extremely low range of ability when compared to same-aged peers, was slow to acquire skills and struggled to recall and generalize learned skills to novel applications, had a full-scale IQ of ***, and that Student's profile was consistent with the presence of ***.¹¹

⁷ JE 14 at 5-8, 9-10.

⁸ JE 2 at 1; RE 22 at 4-5.

⁹ JE 15 at 2-3.

¹⁰ JE 2 at 1.

¹¹ JE 3 at 22, 11.

12. Student's annual ARD Committee meeting in *** grade was held on April ***, 2022, but the committee agreed that this meeting would serve as a place holder while additional evaluations were conducted. The ARD Committee was reconvened on May ***, 2022. Petitioner asked to delay this meeting to allow for more time to review the evaluations, but the District refused and moved forward with reviewing the reports. The District informed Petitioner that Student met the definition of a student with **. After reviewing the reports, the Committee agreed to continue the meeting to a new date to allow time to review and consider additional information.¹²

13. The ARD Committee reconvened again on June ***, 2022. Parents disagreed with the proposed ** classification. While the parties generally agreed with the proposed goals, Parents objected to the use of modified curriculum in ** and **. The District proposed, and Parents disagreed with, Student being placed in the ***** classroom for math and ** (**). The District offered a nine-week trial of the ***** but Parents declined. The District also proposed social skills instruction in a special education setting.¹³

14. The ***** is a program which focuses on academic and developmentally appropriate functional skills. The program addresses skills through intensive, hands-on learning and the use of research-based strategies to meet the needs of individual students. Instruction is delivered in a low staff-to-student ratio. Opportunities for teaching generalization of skills into other settings and environments are available.¹⁴

15. The ARD Committee also discussed Student's performance on the ** grade State of Texas Assessment of Academic Readiness (STAAR). Student received scores of **, the ** areas tested in ** grade. Student

¹² JE 18 at 34-36.

¹³ JE 18 at 30, 38.

¹⁴ JE 18 at 30.

did not take the STAAR in *** grade due to COVID-19 closures and did not take the STAAR in *** grade.¹⁵

16. The ARD Committee decided that Student was eligible for the *** for *** grade. The *** is a statewide assessment for students ***.¹⁶
17. Looking at Student's present levels of academic achievement and functional performance (present levels), District noted that Student was reading *** at a *** grade level independently and at a *** grade instructional level. Student could read short passages at a *** grade level, and long passages at a *** grade level. Student struggled with questions that included inferencing and characterization skills. Student had strengths in decoding and recall. Student exhibited fatigue in reading passages and answering questions, and frequent breaks were needed for Student's success. Student's writing fell in the extremely low range of ability. For math, Student had difficulty identifying the correct operation necessary to solve a word problem when not directly instructed. Overall, Student's math abilities were in the *** to *** grade-level range.¹⁷
18. The ARD Committee meeting ended in disagreement over the modified curriculum in *** and ***, placement in the ***** for *** and math, and Student's eligibility under the category of ***.¹⁸

¹⁵ JE 18 at 7, 21.

¹⁶ JE 18 at 22-23.

¹⁷ JE 18 at 2-6.

¹⁸ JE 18 at 38.

19. On June ***, 2022, Petitioner sent a letter of disagreement to the District regarding the June ***, 2022 ARD Committee meeting. Petitioner expressed concern that the District had predetermined certain aspects of the IEP. Petitioner noted that modified curriculum for *** and *** was not contained in the April 2021 IEP and that it appeared the District had begun implementing modifications to the curriculum without Petitioner's consent. Additionally, Petitioner complained that the District predetermined Student's eligibility as a student with ***.¹⁹

2022- 2023 School Year: * Grade**

20. On August ***, 2022, the ARD Committee convened again. This ARD Committee meeting ended in disagreement over *** eligibility, *** placement, and modified curriculum for *** and ***. Petitioner informed the District they would be filing a due process hearing request for a "stay put" determination.²⁰

21. On August ***, 2022, Petitioner filed a due process complaint.²¹

22. On October ***, 2022, a *** report was prepared by Dr. ***. Dr. *** determined that Student was *** due to a ***** and recommended that Student 1) ***, 2) ***, 3) have extra time for ***, 4) have preferred seating in the front of the class, and 5) have ***. The report states that Student will need double the time to process *** information.²²

¹⁹ PE 23.

²⁰ JE 18 at 39-40.

²¹ TEA Docket No. 322-SE-822; SOAH Docket No. 701-22-09275.

²² JE 8 at 2.

23. ***** is a *** where the ***.²³

24. On December ***, 2022, the parties entered into a settlement agreement regarding the due process complaint. Petitioner released all claims, known or unknown, under the IDEA or any other cause of action, that existed as of that date. The settlement contains agreements on teacher training, compensation to Petitioner, convening a new ARD Committee meeting to review and revise the IEP, and accommodations for ***. Petitioner specifically waived any and all claims related to *** eligibility. The due process complaint was dismissed with prejudice.²⁴

25. Student's annual ARD Committee meeting in *** grade was held on February ***, 2023. Student's present levels were reviewed and updated, and new goals were proposed in the areas of speech, math, ***, ***, ***, social skills, and occupational therapy. The committee agreed that student qualified under the category of ***. Petitioner proposed eligibility under the category of ***. The District stated that they did not have the report but would revisit that issue later. The committee agreed to the proposed goals and accommodations and that Student needs a modified curriculum for *** and ***. The committee also agreed that Student would take the ***.²⁵

26. The District's proposed schedule of services included general education with inclusion support for *** and ***, as well as *** for *** and math. They also proposed speech and occupational therapy services, social skills, and inclusion support for ***. Parents continued to disagree with *** for *** and math. The ARD Committee agreed to reconvene within 10 school days.²⁶

²³ Tr. at 91.

²⁴ RE 83 at 2-5.

²⁵ JE 16 at 41-43.

²⁶ JE 16 at 43.

27. No teacher who was certified in the education of students with *** attended the ARD Committee meetings held on February ***, 2023.²⁷
28. The ARD Committee reconvened on February ***, 2023. The District had reviewed Dr. ***'s *** report but stated that the *** the District had performed previously did not support a finding of *** eligibility. The District reviewed the accommodations proposed by Dr. *** but did not make any changes to the District's proposed accommodations. Parents agreed with the District's proposed accommodations. Parents continued to disagree with the *** placement. The ARD Committee meeting ended in disagreement.²⁸
29. No teacher who was certified in the education of students with *** attended the ARD Committee meeting held on February ***, 2023.²⁹
30. The current due process complaint was filed on February 24, 2023, prior to the proposed IEP taking effect.
31. On March ***, 2023, a report was completed by Dr. ***, an LSSP, who evaluated Student due to concerns that Student had fallen behind at school. Dr. *** reviewed Student's records, reports from teachers and parents, conducted observations, and performed a variety of testing, including testing of Student's *** functioning, learning and memory, intellectual abilities and adaptive behavior, academic skills, and emotional and behavioral functioning. Dr. *** found that Student's overall cognitive abilities fall within the low range (***) percentile) when compared with others of Student's age and that Student meets the criteria for ***.³⁰

²⁷ JE 16 at 41.

²⁸ JE 16 at 44.

²⁹ JE 16 at 43.

³⁰ JE 11 at 12-13.

32. Dr. ***'s report recommends that, for core content, Student should be educated in a highly structured special education environment with a low student/teacher ratio and high academic expectations and that Student should receive individualized instruction, shortened assignments, ample response time, minimized distractions, and individualized learning packages.³¹
33. On April ***, 2023, a revision to the annual ARD Committee meeting was held to review the results of Dr. ***'s evaluation. Dr. *** concluded that Student meets the eligibility criteria for the area of ***. She also indicated that Student is eligible for special education as a student with multiple disabilities (MD). The District agreed with the *** classification, but disagreed with the MD eligibility, explaining that MD eligibility is generally limited to students with multiple low incidence disabilities. Parents asked why *** was not added as an area of eligibility, and the District explained that the District's evaluation did not support the finding of *** eligibility. Parents continued to disagree with the classification of ***.³²
34. Mr. ***, one of Student's teachers, shared that, while Student enjoys the social aspects of Student's class, Student struggles academically and requires multiple opportunities for the reteaching of materials as well as opportunities to retake significantly modified test to achieve passing grades.³³
35. There were no recommendations to changes goals or objectives from the previously proposed IEP by either Parents or the District and Parents indicated that they did not have additional questions or request for changes to accommodations. The District continued to seek placement in the *** for math and ***, but was now seeking to have Student split Student's time in *** and ***, 50% in a general education setting with inclusion support and 50% in the ***. The District explained that Student's current

³¹ JE 11 at 19.

³² JE 17 at 10.

³³ JE 17 at 10-11.

levels of progress and reading needs indicated a level of modification that is beyond what is appropriate in the *** setting. Extended school year (ESY) services were discussed, and Parents agreed to consider them.³⁴

36. Petitioner requested an independent educational evaluation (IEE) and asked the District to consult with the ***** for a new ***. The District agreed to respond to the IEE request outside of the ARD Committee meeting but did not believe that a ***** consult was necessary. Parents continued to disagree with *** placement, and the committee agreed to reconvene the ARD later to discuss the areas of disagreement.³⁵

37. The ARD Committee meeting was reconvened on May ***, 2023. The Committee agreed that a new *** would be performed with a due date of October ***, 2023, to allow Student time to adjust to Student's classes before conducting observations and testing. The committee further agreed that the evaluation would involve consultation with Dr. ***, who had performed the earlier *** report and found a diagnosis of *****. Petitioner again requested that *** be involved but the District disagreed, stating that the District's *** teacher was qualified to conduct the ***. However, the District agreed to consult with *** if the *** teacher felt it was appropriate during her testing. Petitioner continued to disagree with not incorporating *** into the evaluation immediately. The ARD Committee meeting ended in disagreement.³⁶

38. Student's second semester 2022-2023 report card reflects that Student was passing all of Student's classes, primarily receiving As and Bs, with Cs in math and ***.³⁷

³⁴ JE 17 at 11-12.

³⁵ JE 17 at 12.

³⁶ JE 17 at 12-13.

³⁷ JE 24.

39. On July ***, 2023, Student was evaluated by Dr. *** to complete a ***. A *** is a *** used to determine the degree of impact of ***** on a ***. Student scored a *** and was found to have challenges when ***.³⁸

40. Dr. *** is a leading expert on *** and creator of the *** scale assessment tool.³⁹

2023- 2024 School Year: *** Grade

41. On October ***, 2023, an *** report was prepared by ***, a Certified Teacher of the ***. The report found that Student had a *** in the ***, which means that Student ***. According to the report, Student's *** does not appear to impede Student's ability to access information in Student's environment, and additional *** modifications are not necessary. The report recommended, however, that Student be registered annually with TEA as a student with ***, that Student's educational team be educated on *** and the supports Student will require, preferred seating ***, and extra time for ***.⁴⁰

42. On October ***, 2023, a revision to the annual ARD Committee meeting was held to discuss the results of the *** assessment and the outside evaluation provided by Parents. The District proposed adding *** as an area of eligibility and adding *** consultation services to the IEP. The District also proposed adding an accommodation to prompt Student to ***

³⁸ JE 13.

³⁹ PE 7; Tr. at 904.

⁴⁰ JE 10 at 4-8.

***, but Parents did not agree, so it was removed. The District proposed altering the preferential seating accommodation based upon the District's ***. The proposed accommodation for *** was added based on the ***. The committee agreed to *** and to co-treat OT and Speech so that Student has additional advisory class days to do work. The committee ended in disagreement over the *** classification and educational placement.⁴¹

43. At the ARD Committee meeting, Student's Parent expressed concern that Student was already three to four years behind and stressed that something needed to be done immediately regarding the acquisition of pre-requisite skills. Parent wanted pre-teaching provided to Student. However, Parent did not want *** placement because Parent had heard from other parents that it did not provide educational benefit. Parents also expressed a concern that the District was providing Student with electronic copies of notes, not hard copies as required by the "stay put" IEP. Parents also argued that the District should have known about the *** diagnosis as early as *** grade due to medical records that Parents provided to District.⁴²

44. Student's first semester 2023-2024 report card reflects that Student is passing all of Student's classes, with As in *** and Cs in ***.⁴³

45. Due to the ongoing disagreements and due process complaints, changes to Student's goals and objectives have not been implemented since Student's April ***, 2021 IEP. According to Student's October ***, 2023 IEP Progress Report, Student has mastered Student's goal in being able to ***; Student can correctly ***; Student can ***

⁴¹ JE 19 at 14-16.

⁴² PE 74 at minute 43-35, 55-57, and hour 1:05.

⁴³ JE 25.

***; Student is able to ***; Student is able to ***. Generally, Student has shown some progress over time in meeting Student's goals.⁴⁴

46. At the hearing, Student's teachers testified that Student's grades do not accurately reflect Student's mastery of classroom content. Student is graded instead on effort, attitude, and participation. Student performs below grade level and is working towards mastering pre-requisite skills.⁴⁵

47. Student's teachers also expressed concerns that Student requires substantial help from peers and teachers, as well as regular prompting, in order to complete Student's work. Teachers are forced to choose between educating Student or educating the rest of the classroom.⁴⁶

48. District's grading guidelines include a redo policy. For both daily grades and tests, students may request a redo if they receive a grade of ***% or below. For retesting, the student must do a mandatory tutorial or study project before they can retake the test.⁴⁷

⁴⁴ RE 37, JE 23, JE 20, JE 21, JE 22.

⁴⁵ Tr. at 211, 226, 549.

⁴⁶ Tr. at 213, 217, 251-52, 253, 510, 842, 856, 880.

⁴⁷ PE 10 at 12-13.

49. According to Student's teachers, Student re-does many of Student's assignments and tests. This makes Student's grades an inaccurate picture of Student's academic progress.⁴⁸

50. Dr. *** testified that there are no intelligence tests that are normed for children with ***, that the scores will not be accurate, and that the scores almost always skew low, not high.⁴⁹

51. Dr. *** also questioned the *** performed by ***, explaining that the *** provides two scores which are compared for agreement. Ms. ***'s *** only had one score, indicating it may not have been properly performed.⁵⁰

IV. DISCUSSION

Petitioner alleges that the District is attempting to deny Student a FAPE by moving Student to a more restrictive environment and not providing appropriate modifications and accommodations, including accommodations for Student's ***. Petitioner is also alleging that the District failed to identify Student's eligibility under the category of MD, or timely identify Student's eligibility under the category of ***. Finally, Petitioner makes several complaints regarding the District's provision of a FAPE during the relevant time period, complaining that the District failed to offer proper inclusion support, failed to properly train staff, predetermined aspects of Student's IEP, failed to properly update Student's IEP, and committed procedural violations.

⁴⁸ Tr. at 247-248, 549-550, 809, 823-24.

⁴⁹ Tr. at 925, 968.

⁵⁰ Tr. at 920.

A. Relevant Time Period

On December ***, 2022, the parties entered into a Settlement Agreement and Release, releasing all of Petitioner’s IDEA claims against the District that existed at that time. Therefore, the Hearing Officer will not consider claims that accrued on or before that date.

B. Duty to Provide a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The District has a duty to provide 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 school district “was reasonably calculated to enable a child to make progress appropriate in

light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁵¹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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.*, 580 U.S. at 399.

D. FAPE

The Four Factors Test

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

- 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

⁵¹ There is no distinction between the burden of proof in an administrative hearing and in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n.4 (5th Cir. 2009).

demonstrated.

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F., 118 F. 3d 245, 253 (5th Cir. 1997).⁵²

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, 300.320, 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

⁵² Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765-66 (5th Cir. 2018) (citing *Endrew F.*, 580 U.S. 386).

nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress, not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

The District’s obligation when developing Student’s IEP is to consider Student’s strengths, Student’s parent’s concerns for enhancing Student’s education, results of the most recent evaluation data, and Student’s academic, developmental, and functional needs. 34
C.F.R. § 300.324(a)(1).

Student’s present levels show weakness across multiple academic areas, including math, ***, ***, and ***, as well as social skills development. This is consistent with the results of Student’s evaluations, which show that Student is eligible under the category of *** in addition to Student’s other areas of disability. The observations of Student’s teachers regarding Student’s ability to perform Student’s work, as well as Student’s reliance on support and additional prompting, further support the need for accommodations and modifications in those areas so that Student can receive academic benefits. During the relevant time period, beginning on December ***, 2022, Student’s ARD Committee has convened *** times to discuss Student’s present levels and the results of additional testing, all of which was taken into consideration in creating the proposed IEP. Goals were proposed and accepted by all parties in the areas of speech, math, ***, ***, ***, social skills, and occupational therapies, all areas that are impacted by Student’s disabilities. The parties have also agreed on Student’s accommodations, including accommodations for Student’s *** needs. When Parents expressed

concern over *** eligibility, additional testing was performed and, based upon the results of that testing, *** eligibility was agreed to and additional refinements were made to Student's *** accommodations. While the parties continue to disagree on eligibility in the areas of MD and *** as well as *** placement, the record reflects that the parties have largely been able to agree on goals, accommodations, and modifications, even though they have not been able to agree on the proper placement for Student to receive those services. Taken as a whole, the evidence shows that the District has developed the proposed IEP in consideration of Student's strengths and evaluation data, as well as Student's academic, developmental, and functional needs.

In their closing brief, Petitioner raises several concerns with the District's evaluations of Student. They point to problems with reporting numeric IQ scores when assessing students with ***, issues with the *** elements of the evaluations performed on Student, problems with the *** performed on Student, and perceived errors in the District's ***. Petitioner argues that, due to these errors, the results of the evaluations cannot be the basis for an IEP or Student's educational placement. While Petitioner's experts have pointed to concerns with the evaluations, the record reflects that a variety of assessment tools and strategies were used to gather functional, developmental, and academic information about Student and that the evaluations were administered by trained and knowledgeable personnel who stood by the results of their evaluations. Additionally, while Petitioner argues that these issues may result in errors in the evaluations, there is nothing in the record to reflect that substantial errors did exist in the results of

Student's evaluations or in the recommendations of the District's experts, which largely match the recommendations of Petitioner's experts. The results of the evaluations are consistent with the reports of Student's academic performance, the District's observations, and Parents' concerns, which together formed the basis of the proposed IEP. Therefore, the evidence shows that the proposed IEP is sufficiently individualized on the basis of assessment and performance.

2. Least Restrictive Environment

A central dispute in this due process hearing is District's proposal to place Student in the ***. Petitioner strongly opposes such a placement, arguing that it not Student's LRE.

The IDEA requires that a student with a disability shall be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment requirement." 34 C.F.R. § 300.114(a)(2)(i)-(ii). State regulations require a school district's continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, *** room/services, self-contained – regular campus (mild,

moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.1005(c).

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

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

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

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. *Id.* This determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- the educational benefit a student is receiving while placed in the general education setting; and
- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

Id.

Currently, Student is being educated in a general education setting for *** and *** with accommodations, modified curriculum, and supports. Student is being educated in a special education *** setting for math and ***. The record reflects that the District is providing Student with multiple accommodations and modifications to the curriculum in Student's general education classes. Student has not been successful in Student's special education *** classroom or in Student's general education classrooms with these accommodations and modifications.

Teachers in both settings testified that Student requires near continuous one-on-one support, with teachers forced to choose between educating Student or educating the rest of the classroom. Despite this level of attention, Student is unable to grasp the concepts in class. Student does not receive much educational benefit from either setting because Student cannot keep up with the curriculum. While Student is passing Student's classes, Student is not being graded on academic performance but rather on effort. Student requires repetition of concepts and, even with repetition, is unable to apply information without additional prompting. Student is also performing significantly below grade level in Student's classes and is missing many pre-requisite skills needed for academic progression. Keeping Student full-time in a classroom trying to complete grade level work would not be appropriate in light of Student's unique circumstances. *Andrew F.*, 580 U.S. at 399 (2017); *Daniel R.R.*, 874 F. 2d 1036.

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. 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). With Student's teachers providing nearly one-on-one attention to Student, this is what Petitioner is requesting. However, the *** placement will allow Student to be with peers working on Student's level and allow Student to receive a FAPE.

Student's proposed IEP recommends placement in the *** classroom for math, ***, and 50% of Student's time in *** and ***. The *** classroom is currently the best placement for Student to provide one-on-one instruction at Student's academic level. Student will be able to repeat concepts as needed and the curriculum will be designed to help Student develop necessary pre-requisite skills and meet Student's unique educational needs.

While the record demonstrates that Student has friendships with classmates and is very well-liked by Student's teachers, when balancing the overall benefits of continuing Student's current educational placement against allowing Student to attend the ***, the potential academic benefits of the proposed placement in the *** outweigh the social benefits of Student's current placement. The record also demonstrates that Student needs greater accommodations and modifications than can be reasonably provided in the *** classroom setting. Therefore, the *** classroom placement proposed by District represents Student's least restrictive environment and the best placement in

which Student can make academic progress and in which the District can meet Student's unique needs.

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 shows that the District worked in a sufficiently collaborative manner with Petitioner on developing the IEP. While issues of disagreement existed, these disagreements were subject to extensive discussion and attempts at resolution. While Parents disagree with the District's proposed *** classification and strongly opposes any placement in the ***, the record also shows that the District has worked to show Petitioner why they believe such decisions are

appropriate for Student and to address Petitioner's concerns, including offering a temporary trial in the ***. While these efforts ultimately ended in disagreement, a failure to agree with Parents does not, in itself, show a failure to collaborate with Parents. Additionally, the record shows that, despite passionate disagreement on some issues by both parties, they have continued to work together in Student's best interest to agree on other issues, like goals and accommodations.

Petitioner argues that the District refused to consider Parents' input, including rejecting Parents' insistence that Student was eligible under the category of *** until after this due process complaint was filed and continuing to push for *** eligibility despite Parents' concerns with the testing. However, the record reflects that the District's positions on these issues were driven by assessment data and observation and that they were made part of the larger discussion with Parents over Student's unique needs. Petitioner also complains of the District's refusal to involve *** in the *** assessment from the beginning. The record reflects that the District kept the option of working with *** open if the *** teacher felt it was necessary. While *** is a valuable resource for school districts, Petitioner has pointed to no legal obligation by the District to involve *** in *** assessments.

Petitioner also raised concerns that the District predetermined certain aspects of Student's IEP, specifically *** eligibility and use of modified curriculum in *** and ***. Both issues were raised before the December ***, 2022 settlement agreement. In the agreement, Petitioner specifically

waived any and all claims related to *** eligibility and the parties agreed to convene a new ARD Committee meeting and revise the IEP. Therefore, the Hearing Officer finds that predetermination was made a part of the settlement agreement, and any predetermination that took place before December ***, 2022 will not be considered in this decision. The record does not reflect predetermination since the settlement was entered into, with all issues of disagreement being subject to vigorous debate and discussion during the ARD Committee meetings. Overall, the evidence shows that services were provided in a coordinated, collaborative manner by key stakeholders. Petitioner failed to show that the District excluded Parents in bad faith or refused to listen to them during the relevant time period.

4. Academic and Non-Academic Benefits

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

Student's IEP goals and objectives have remained the same since April 2021. Despite working on these goals for more than two years, the record reflects that Student has mastered only two of these goals. Student's present levels reflect that Student needs to work on pre-requisite skills and that Student needs a substantial level of one- on-one support that is not available in the general education environment. While Student's report cards indicate that Student is passing all of Student's classes, the testimony of

Student's teachers shows that Student is not being graded on Student's academic performance, but rather on Student's effort. Taken together, the record reflects that Student's current placement is not able to provide Student with the level of support Student needs to obtain meaningful educational benefit.

The District's proposed IEP is designed to meet Student's individual needs. In order to gain academic benefit from Student's education, Student needs to develop pre-requisite skills and to receive substantial supports. The District's proposed placement in the *** is specifically designed to develop those pre-requisite skills and provide Student with the one-on-one support that Student needs. Additionally, the proposed IEP keeps Student in a general education environment for half of Student's time in *** and *** as well as in Student's ***. This will allow Student to continue to receive the non-academic benefits of remaining with Student's peers without disabilities to the extent possible while providing Student with meaningful academic benefit.

5. FAPE Conclusion

When looking at the totality of the *Michael F.* factors as applied to the IEP at issue here, the evidence shows that the proposed IEP is individualized based on Student's assessment and performance, will be provided in Student's least restrictive environment, will be provided in a coordinated and collaborative manner by the key stakeholders, and will provide Student academic and non-academic benefits. The evidence shows that Student's proposed program is reasonably calculated to provide meaningful educational benefit and is appropriately ambitious

in light of Student's unique circumstances. *Andrew F.*, 580 U.S. at 399, 403. Based on the four factors of *Michael F.*, the evidence establishes that the District's proposed IEP will provide Student a FAPE.

E. Categories of Eligibility

Petitioner contends that the District failed to appropriately identify Student in all categories of suspected disability when they failed to identify Student as eligible under the category of *** until the October ***, 2023 ARD Committee meeting despite receiving the initial *** diagnosis on October ***, 2022. However, the record shows that *** eligibility was considered and rejected by the District because the available data did not support a finding that Student met the qualifications as a student with *** at that time. It was not until the District conducted a new *** on October ***, 2023, that the District concluded that Student did qualify as a student with ***. Additionally, it should be noted that much of the delay in conducting the new *** was by agreement to give Student time to adapt to Student's new classes before testing.⁵³ While the District did ultimately agree to *** eligibility based upon new information, nothing in the record reflects that the District was wrong to deny *** eligibility based upon the known information that existed at the time.

Additionally, as stated in the IDEA, "nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special

⁵³ JE 17 at 12-13.

education and related services is regarded as a child with a disability under this subchapter.” 20 U.S.C. 1412(a)(3)(B). During the relevant time period, Student was already being served under the IDEA and was already receiving accommodations tailored to Student’s *** needs. Even if the District’s failure to identify Student as eligible under the category of *** was improper, Petitioner has failed to show how such a violation impeded Student’s right to a FAPE or significantly impeded Parents’ opportunity to participate in the decision-making process regarding the provision of FAPE or caused a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(E)(ii). Therefore, any failure of District to recognize Student as eligible under the category of *** is, at worst, a procedural violation that did not result in harm to Student.

Petitioner also complains that the District failed to recognize Student as eligible under the category of MD. At the April ***, 2023 revision to the annual ARD Committee meeting, the District explained that MD eligibility is generally limited to students with multiple low incidence disabilities, and therefore was not appropriate for Student. Additionally, as discussed above, Student had already been identified and was being served under the IDEA, with specific supports, accommodations, and modifications designed to meet Student’s individual needs. Even if MD eligibility was appropriate, the District was not required to include eligibility in that particular category under the circumstances and the failure to do so would be a procedural violation that did not result in harm to Student.

F. Current Placement

Petitioner raised two concerns with Student's current placement. First, whether the District failed to provide appropriate inclusion support to allow Student to be placed in a less restrictive environment and second, whether the District failed to update Student's IEP at all appropriate times. Turning to the first issue, the District is currently operating under the "stay put" IEP developed in 2021. This IEP was agreed to by the parties and, while the parties have been working to amend the IEP, they have not been able to reach an agreement. During the relevant time period, the District has been required to abide by the "stay put" IEP. In its closing brief, Petitioner argues that the District failed to implement Student's IEP with fidelity by giving Student Student's information in ***.

The exact language of the accommodations in question are "***, and where possible, substitute ***." ⁵⁴ There is no functional difference in this matter between providing Student with assignments in *** or providing Student with the ability to ***. Additionally, none of the accommodations require physical copies of assignments. Therefore, Petitioner did not meet Petitioner's burden of proving that the District failed to implement Student's IEP with fidelity. Nor does the record reflect

⁵⁴ JE 14 at 9.

other ways in which the District failed to provide appropriate inclusion support during the relevant time period that would allow Student to be placed in a less restrictive environment.

Turning to the second issue, Petitioner complains that the District failed to update Student's IEP at all appropriate times. However, Petitioner has not specified any time during the relevant time period when the IEP was not appropriately updated, and the Hearing Officer has not found any examples in the record. Instead, the record reflects substantial efforts by the parties to update Student's IEP, but unfortunately, the parties have been unable to come to an agreement.

G. Training

The December ***, 2022 settlement agreement addressed Petitioner's concerns regarding training, and nothing in the record reflects that training was not conducted as agreed or that the agreed training was not appropriate. Therefore, the record does not support the conclusion that the District failed to provide the appropriate training for staff who worked with Student during the relevant time period.

H. Procedural Violations

Petitioner complains that the District committed procedural violations of the IDEA by failing to have appropriate members of the ARD Committee present at ARD Committee meetings and failing to provide prior written notice at all

appropriate times. Specifically, Petitioner points to the fact that no teacher who was certified in the education of students with *** attended the ARD Committee meetings held on February ***, 2023, or February ***, 2023, as required by 19 T.A.C. § 89.1050(c)(3)(A). However, Petitioner has not shown how the absence of the *** teacher at these two ARD Committee meetings impeded Student's rights to FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student, or caused a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2). Therefore, while absence of a *** teacher at these two ARD Committee meetings was a procedural violation, Petitioner has not proven that it resulted in harm to Student.

Turning to the second issue, Petitioner has not pointed to any time that District failed to provide prior written notice during the relevant time period, and the Hearing Officer has not found any in the record.

I. Conclusion

The record reflects that Student needs to develop prerequisite skills because Student struggles with multiple disabilities- OHI, ***, speech impairment, ***- and Student has been evaluated and determined to meet eligibility criteria for ***. Moreover, the deficits resulting from these disabilities have impeded Student's ability to make progress towards mastery of content offered in the general education and *** settings. Therefore, after reviewing the facts in this case, the

Hearing Officer finds that the District's proposed IEP offers Student a FAPE in Student's least restrictive environment.

V. CONCLUSIONS OF LAW

1. The burden of proof in this due process hearing is on Petitioner as the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. The District's proposed placement offers Student a FAPE in the least restrictive environment. *Daniel R.R. v. State Bd. of Educ.*, 874 F. 2d 1036, 1048 (5th Cir. 1989); 34 C.F.R. § 300.114(a)(2)(i)-(ii).
3. Petitioner did not meet its burden of showing that the District failed to identify Student in all areas of suspected disability. *Schaffer*, 546 U.S. at 62.; *R.C. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718, 730-32 (N.D. Tex. 2013.); 20 U.S.C. § 1412(a)(3)(B).
4. The District developed an IEP reasonable calculated to enable Student to make progress appropriate in light of Student's unique needs. *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).
5. Petitioner did not meet its burden of showing that the District failed to train staff who work with Student appropriately. *Schaffer*, 546 U.S. at 62.; 34 C.F.R. § 300.156(a).
6. Petitioner did not meet its burden of showing that the District predetermined aspects of Student's IEP. *Schaffer*, 546 U.S. at 62.; *E. R. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 769 (5th Cir. 2018).
7. The District committed a procedural violation of the IDEA by failing to have a teacher who was certified in the education of students with *** attended the ARD Committee meetings held on February **, 2023, and February **, 2023. 19 T.A.C. § 89.1050(c)(3)(A); 34 C.F.R. 300.321. However, this was a procedural error only and did not impede

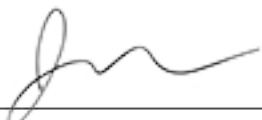
Student's rights to FAPE, significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student, or cause a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2).

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

VI. ORDERS

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

SIGNED January 29, 2024.



Jacob Wallace
Special Education Hearing Officer
For the State of Texas

VII. 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).