

SOAH Docket No. 701-23-16824 Suffix: IDEA
TEA Docket No. 243-SE-0423

Before the State Office of Administrative Hearings

**STUDENT by next friend PARENT,
Petitioner**

v.

**Northwest Independent School District,
Respondent**

DECISION OF THE HEARING OFFICER

*** (Student), by next friend *** (Parent and, collectively, Petitioner), brings this action against the Northwest 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 impeded Parent's ability to participate in the development of Student's individualized education program (IEP). The Hearing Officer concludes the District provided Student with a

FAPE reasonably calculated to allow Student to make progress in light of Student's unique circumstances. Respondent also raised a counterclaim to prove the appropriateness of its most recent evaluation and the Hearing Officer concludes that the evaluation appropriately complies with the IDEA.

I. DUE PROCESS HEARING

The due process hearing was conducted on February 8-9, 2024 through the Zoom videoconferencing platform. Attorney Jordan McKnight represented Petitioner. Parent attended the due process hearing, as well as Student's Parent for a portion of the hearing. Attorney Cynthia Buechler represented Respondent. ***, Assistant General Counsel, and ***, Special Education Director, also attended the hearing for Respondent.

The parties offered joint and separate exhibits, all of which were admitted.¹ Petitioner offered testimony of Parent; ***, a crisis coordinator with ***; and a diagnostician who served as an admission, review, and dismissal (ARD) committee meeting facilitator. Respondent offered testimony of the campus principal, two speech language pathologists, an occupational therapist, a paraprofessional, a behavior interventionist, the Executive Director of Human Resources,² a licensed specialist in school psychology (LSSP), and a

¹ Petitioner's Exhibits 1-9 were not offered because they are duplicative of the joint exhibits.

² During the testimony of this witness, questions arose about whether Respondent failed to produce a document previously compelled in Order No. 4. During the hearing, counsel could not confirm whether the document at issue was produced. Counsel for Petitioner was advised that Petitioner may file a motion to reopen the record and recall the witness if Petitioner determined after the hearing that the document had not been timely produced. No post-hearing motions were filed.

diagnostician who participated in Student's most recent evaluation. The speech therapists, occupational therapist, behavior interventionist, LSSP, and the evaluating diagnostician were all designated experts in their respective fields. The hearing was transcribed by a certified court reporter. Both parties filed written closing briefs in a timely manner. The Decision in this case is due April 1, 2024.

II. ISSUES

A. PETITIONER'S ISSUES

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

1. Whether the District failed to provide Student with a FAPE by failing to develop an appropriate IEP for Student, including insufficient speech, occupational therapy (OT), counseling, and psychological services, resulting in inadequate progress.
2. Whether the District denied Student a FAPE by creating a hostile environment.
3. Whether the District impeded Parent's ability to participate in the IEP development process.

B. PETITIONER'S REQUESTED RELIEF

Petitioner requested the following items of relief:

1. Order the District to provide Student compensatory services in the areas of counseling, OT, speech therapy, *** therapy, and private tutoring.
2. Order the District to provide Student an independent education evaluation (IEE) in all relevant areas, including cognitive, achievement, speech, OT, assistive technology, and counseling.

3. Order the District to provide Student services from a board-certified behavior analyst (BCBA).
4. Order the District to facilitate ARD Committee meeting attendance of IEE providers to assist in development of an appropriate IEP and safety plan for Student.
5. Order the District to train staff working with Student on Student's IEP and safety plan.
6. Order the District to reimburse Parent for expenses on evaluations and educational services.
7. Any other relief the Hearing Officer deems appropriate.

C. RESPONDENT'S LEGAL POSITION

Respondent generally and specifically denied the allegations stated in the Complaint. Respondent asserted the statute of limitations affirmative defense. On January 16, 2024, Respondent also asserted a counterclaim to prove the appropriateness of its most recent full and individual evaluation (FIE) of Student.

III. FINDINGS OF FACT

1. Student is *** years old and in the *** grade. Student lives with Student's parents ***.³
2. Student is eligible for special education based on autism, ***, and speech impairment. Student has also been diagnosed with attention deficit hyperactivity disorder (ADHD). Student has attended school in the District since ***.⁴
3. Student is mostly nonverbal although Student does communicate orally in utterances up to a few words. Student's language ability is generally at a ***

³ Joint Exhibit (JE) 1 at 1; JE 7 at 11; JE 8 at 12.

⁴ JE 1 at 1; Transcript (Tr.) 23-24.

*** level. Student is identified as a ***, but Student's communication is in English.⁵

4. During the 2021-2022 school year, Student was in the *** grade. Student was served in a self-contained special education setting for most instruction and attended specials in the general education setting. Student received speech therapy for 20 minutes eight times per grading period, *** therapy for 30 minutes seven times per grading period, direct OT for 105 minutes per grading period, consult OT for 30 minutes per grading period, and ***.⁶
5. At the time of Student's annual ARD Committee meeting in December 2021, Student was able to read a ***. New goals were accepted, including a behavior goal targeting inappropriate ***, elopement, ***, physical aggression, object aggression, and verbal outbursts.⁷
6. During the 2021-2022 school year, Student had at least ***. Student also exhibited aggressive behaviors toward staff and other students and elopement.⁸

Fall 2022 Semester

7. For the 2022-2023 school year, Student began attending *** grade at a different *** school campus in the District. Parent and District agreed to the campus change because the new campus had a different

⁵ JE 4 at 7; JE 7 at 2; JE 8 at 3; Tr. 29, 88, 387-88.

⁶ JE 6 at 11-12, 14.

⁷ JE 6 at 2-4, 10.

⁸ Respondent Exhibit (RE) 4 at 2-3; RE 6 at 3-11.

behavior program to support Student's needs and offered smaller class sizes.⁹

8. Student primarily was placed in a *** (***) setting, however Student also accessed a *** (***) setting. One paraprofessional, *****, worked with Student across settings for approximately 90% of each school day. Student and Ms. ***** did not start going to the *** classroom until the end of September 2022.¹⁰
9. During the 2022-2023 school year, Student was typically absent at least one day a week to attend private applied behavior analysis (ABA) therapy. Student has attended private ABA therapy off-and-on for years. District staff have coordinated and collaborated with the private ABA providers.¹¹
10. By mid-September 2022, Student was exhibiting a frequent behavior of ***. This was also a common behavior the prior school year. A District BCBA corresponded with Parent and campus staff about the behavior. Parent reported seeing the behavior at home too and that Student complained that Student's ***.¹²
11. Parent testified that beginning in the fall of 2022, Student was exhibiting unusual behavior around ***. Student also was complaining about ***. Parent took Student to the doctor for these issues in November 2022, December 2022, and March 2023.¹³

⁹ JE 5; Petitioner Exhibit (PE) 37; Tr. 25-26, 91-92.

¹⁰ PE 36; Tr. 282, 467-68, 491-92, 499.

¹¹ RE 3 at 66; Tr. 81-82, 92-93, 513-14.

¹² RE 3 at 62-65; RE 6 at 3-11; Tr. 507, 527.

¹³ PE 10; PE 11; PE 12; PE 13; Tr. 29-41.

12. Parent reached out to *** seeking resources around November 2022 due to concerns with Student's behavior at home.¹⁴
13. On October ***, 2022, a counselor ***. The counselor was concerned about what she heard, created some recordings on her phone, and reported it to the campus principal.¹⁵
14. The next day, the principal began an investigation and interviewed the counselor, the *** teacher, and the *** paraprofessionals. The interviews revealed that, on the previous day, ***. The *** teacher ***.¹⁶
15. The record does not establish whether Student was in the classroom when this incident occurred.¹⁷
16. During the staff interviews, the principal asked about any other concerns. Ms. ***** brought up several other issues. She reported that the ***. She reported that the *** teacher told the paraprofessionals that ***. Whether this comment was also made on October ***, or a few days before, is disputed in the record.¹⁸

¹⁴ Tr. 67, 173.

¹⁵ PE 19; Tr. 283-84, 315-16.

¹⁶ PE 16; PE 17; PE 18; PE 19; PE 20; PE 35; RE 7; Tr. 285-86, 318.

¹⁷ Tr. 368-69.

¹⁸ PE 17; PE 35; Tr. 287-88, 353-54, 374-75, 471.

17. Ms. ***** testified that her statements about the *** teacher having a pattern of ***, and not Student.¹⁹
18. The principal and Ms. *** testified that the allegation about *** did not pertain to Student, that they were about ***, and that Student was always ***. Student's *** at school did not change in the 2022-2023 school year.²⁰
19. Ms. *** also reported a comment that the *** teacher made on October *** concerning Student. Student ***, ***” Ms. *** understood this comment to be in reference to Student. The other paraprofessional giggled. The *** teacher continued the conversation, ***. Student was in the same room as the teacher, who was facing away from Student. The giggling paraprofessional may have been standing outside of an open doorway during this conversation with the teacher. Ms. *** testified that she did not believe Student could hear the comments, but she did not know for sure.²¹
20. District staff, including designated experts, testified consistently that they do not believe Student has the cognitive or language abilities to understand the comment made by the *** teacher about Student, even if Student heard it, and that it therefore would not have any impact on Student. However, all of these witnesses, with the exception of Ms. ***, were not present when the comment was made and generally testified to not knowing the full extent of the *** teacher's statements.²²

¹⁹ Tr. 480-83, 486.

²⁰ Tr. 288, 352, 469, 471-72, 474.

²¹ PE 17; PE 35; Tr. 287-88, 343, 472, 478-80, 484-85.

²² Tr. 213, 215-16, 227-28, 289-90, 298, 362-63, 398-99, 405-06, 421, 451, 473, 515-16, 562, 572, 587, 589.

21. After the principal began to interview the *** teacher on October ***, the teacher ***. She never returned to the classroom after October ***.²³
22. For the first grading period of the year, ending October ***, 2022, Student was showing progress on some IEP goals but not others. Student had been resistant to writing activities in OT, but had been making slow progress on a goal to ***. Student made progress but had not yet mastered a goal on ***. Student met success criteria on a math goal to ***, although Student needed more prompting than the goal mastery criteria required. Student made progress on *** goals. Student showed regression on behavior goals when compared to the spring 2022 semester.²⁴
23. An annual ARD Committee meeting for Student was held on December ***, 2022. At that time, Student's present levels included ***.²⁵
24. Concerning behaviors at that time were inappropriate behavior ***.²⁶
25. New goals were proposed in reading (***), math (***), ***,

²³ PE 20; RE 7; Tr. 285, 290-91, 539.

²⁴ PE 23.

²⁵ JE 4 at 2-4.

²⁶ JE 4 at 5.

functional (***), fine motor (***), and *** (***). Behavior goals targeted ***, physical aggression, object aggression, verbal outbursts, elopement, inappropriate behavior ***.²⁷

26. Extensive accommodations were agreed to adapt classroom instruction, adapt materials, alter assignments, and manage behavior. Assistive technology of access to speech to text was included as an accommodation.²⁸
27. The schedule of services contained: continued placement in a special education setting for all content areas, collaborative *** in the general education setting, speech therapy in a group for 15 minutes 10 times per nine weeks, *** therapy for 135 minutes per nine weeks, direct OT for 80 minutes per grading period, consult OT for 15 minutes per grading period, and *** twice a day.²⁹
28. The IEP included a behavior intervention plan (BIP) targeting following directions, task completion, and using appropriate ways to request items/help/attention.³⁰
29. Parent attended the meeting and requested more frequent communication from staff and functional math goals, which were added. Parent did not raise any concerns about Student's ***. The meeting ended in agreement.³¹
30. At the time of the December ***, 2022 ARD Committee meeting, the diagnostician facilitating the meeting was aware of an ongoing investigation regarding the *** teacher, but was not aware that it had

²⁷ JE 4 at 9-20.

²⁸ JE 4 at 22-23.

²⁹ JE 4 at 32-33.

³⁰ JE 4 at 47-53.

³¹ JE 4 at 37, 44; Tr. 236.

anything to do with Student. The record does not reflect whether any attendees of the ARD Committee meeting knew about the *** teacher's ***.³²

Spring 2023 Semester

31. The investigation regarding the *** teacher did not conclude until January 2023. The principal's investigation ultimately substantiated that the *** teacher had failed to use appropriate de-escalation techniques with the ***. Although the principal's report refers to "students" in the plural regarding the *** allegation, it is unclear from the record whether the investigation uncovered that the *** was placed on any other students besides ***.³³
32. The January ***, 2023 memorandum to the teacher recommending her termination stated that ***. Although the campus principal was an author of this document, the principal testified that this impact on Student is inaccurate. This description was repeated in the notification that the District sent to TEA on the same date regarding the teacher's conduct. The TEA notification identified *** victims of the teacher's conduct: Student and ***. This implies that only the ***.³⁴
33. Parent was not notified of the investigation regarding the *** teacher's conduct until late January 2023, when Parent received a letter dated January ***, 2023 from the District's Executive Director of Human Resources. The letter stated that the District had conducted an

³² Tr. 203-04.

³³ PE 20; RE 7; Tr. 293-94.

³⁴ PE 14 at 3-5; RE 7 at 4; RE 8 at 3-5; Tr. 362.

investigation and sustained allegations that the *** teacher “***.” The letter further stated that the teacher had *** and that a report regarding this conduct had been submitted to TEA.³⁵

34. The Executive Director of Human Resources was responsible for reporting the conduct to the TEA on behalf of the superintendent and sending the letter to Parent but did not have any involvement in the actual investigation or any personal knowledge about Student. He relied on an educator evaluation report completed by the campus principal and the director of *** staffing in drafting his correspondence to Parent and TEA. The educator evaluation report he relied upon was not offered into evidence.³⁶
35. On January ***, 2023, Parent emailed the Executive Director of Human Resources requesting more information about the allegations in the letter. He responded stating he would call Parent, but they kept missing each other’s phone calls. Parent sent a similar email to a special education coordinator a few days later, who called Parent back but did not fully address Parent’s concerns.³⁷
36. School was closed for a week during this time frame due to an ice storm.³⁸
37. On February ***, 2023, the campus principal exchanged emails with District level staff seeking guidance about what could be disclosed to Parent about the investigation.³⁹

³⁵ PE 15; RE 8 at 6; Tr. 46.

³⁶ Tr. 538, 542, 544-45.

³⁷ PE 33; PE 34; Tr. 53-54.

³⁸ Tr. 101.

³⁹ PE 32.

38. Parent eventually had a phone conversation with the campus principal in which the principal apologized for not informing Parent sooner about the allegations. The principal testified that she told Parent that the part in the letter about the *** was an error and that had not happened to Student. During Parent's testimony, Parent did not recall the principal telling Parent that.⁴⁰
39. The principal also informed human resources staff by phone that the *** allegation did not apply to Student and the letter sent to Parent contained that error. The Executive Director of Human Resources testified that the principal informed him of his error. No written correction was ever sent to Parent.⁴¹
40. The principal attempted to schedule a meeting with Parent in late February 2023 to discuss Parent's concerns. After going back and forth about scheduling times, Parent ultimately cancelled the meeting.⁴²
41. On February ***, 2023, Parent emailed the campus diagnostician requesting an ARD Committee meeting to discuss the allegations involving Student. The diagnostician contacted the campus principal before responding because she did not know what allegations Parent was referencing. The diagnostician then responded to Parent that someone would be reaching out to Parent soon to address Parent's concerns but that this was not an appropriate topic for an ARD Committee meeting.⁴³
42. On February ***, 2023, Parent had a phone call with the Executive Director of Human Resources. Parent sent a follow up email on February *** seeking more details about the incidents and asking about the denial of Parent's request for an ARD Committee meeting.⁴⁴

⁴⁰ Tr. 49, 106, 295-97.

⁴¹ Tr. 360-61, 372, 539.

⁴² Tr. 297-98, 377.

⁴³ PE 29; PE 30; Tr. 207-08.

⁴⁴ PE 27.

43. On February ***, 2023, Parent sent another email to the diagnostician again requesting an ARD Committee meeting be scheduled to discuss how to help Student following the incident. The diagnostician responded the same day offering possible meeting dates.⁴⁵
44. The District scheduled an ARD Committee meeting for March 2023, but Parent did not respond to the meeting notice. Another meeting was scheduled for April ***, 2023. Parent attended with advocate Debra Liva. Parent and the advocate left the meeting almost immediately after the advocate requested confidential human resources records regarding the *** teacher and was denied.⁴⁶
45. In March 2023, Student began receiving *** therapy services from **. The record does not establish the qualifications of the individual providing these services, methodology, substance, or effectiveness. The *** staff member who testified was not the service provider and could not provide information on the services.⁴⁷
46. An ARD Committee meeting was held on May ***, 2023. Parent declined to attend. A review of existing evaluation data (REED) was completed and the District recommended that a new FIE be completed in all areas by the three-year due date of November ***, 2023. District staff also agreed that Student was eligible for extended school year (ESY) services for the upcoming summer. The committee discussed that Student had exhibited a decrease in **. Student's BIP was revised to more clearly define Student's behaviors.⁴⁸
47. At the end of the 2022-2023 school year, Student was generally making progress on Student's IEP goals.⁴⁹

⁴⁵ PE 26; Tr. 236-37.

⁴⁶ Tr. 108-12, 217-18, 237-38, 433-34, 517.

⁴⁷ Tr. 68-69, 80, 176, 186-88.

⁴⁸ JE 2 at 2; JE 9.

⁴⁹ PE 21.

2023-2024 School Year

48. In the fall 2023 semester, Student began attending *** school and Parent was in very regular email communication with Student's teacher about Student's daily activities and behavior.⁵⁰
49. Another REED was completed October ***, 2023 that added a counseling evaluation to the areas of evaluation recommended for the new FIE. The record does not reflect the impetus for this.⁵¹
50. An FIE was completed, report dated November ***, 2023.⁵²
51. The speech portion of the evaluation used a standardized teacher rating instrument to identify pragmatic language disorders. Student's ratings were poor or very poor in all areas. Continued eligibility based on speech impairment in expressive, receptive, and pragmatic language was recommended.⁵³
52. The OT evaluation included observations, as well as formal and informal assessment measures. Student has adequate gross motor skills and demonstrates appropriate fine motor skills to access school materials; however, Student requires adult supervision for safety. Student demonstrates some sensory sensitivities at home and school, including ***, planning, and social participation. Ongoing OT was recommended.⁵⁴
53. The Childhood Autism Rating Scale (CARS) was completed and yielded a score in the range for severe symptoms of autism spectrum

⁵⁰ RE 3 at 3-48.

⁵¹ JE 10.

⁵² JE 7.

⁵³ JE 7 at 3, 26; Tr. 392.

⁵⁴ JE 7 at 4-11, 25-26; Tr. 345-36.

disorder. The LSSP used additional standardized measures and recommended continued eligibility based on autism.⁵⁵

54. Formal testing of intelligence and adaptive behavior were not completed. The FIE reviewed formal intelligence measures completed in 2017 and 2020 consistently placing Student's cognitive abilities in the lower extreme range. Student's mental processing index was *** in 2017 and *** in 2020. Informal data showed that Student's current cognitive level remains consistent with these tests. Likewise, Student's adaptive behavior was formally assessed as low in 2017 and 2020. The new FIE concluded that Student's intellectual functioning continued to be consistent with Student's adaptive behavior. Continued eligibility based on *** was recommended.⁵⁶
55. An evaluator attempted on multiple occasions to complete formal academic achievement testing. However, Student was noncompliant and formal testing could not be completed. Teacher information and 2020 academic achievement testing was reviewed. Student's teacher reported that Student can ***. Student has not been able to ***.⁵⁷
56. A counseling assessment was completed by an LSSP. The LSSP determined that Student did not have sufficient cognitive and communication abilities to participate in counseling and services were not recommended. Instead, continued work on behavior and social skills in the special education classroom was recommended.⁵⁸

⁵⁵ JE 7 at 15-18, 26; Tr. 559-60.

⁵⁶ JE 7 at 18-19, 25.

⁵⁷ JE 7 at 21-23.

⁵⁸ JE 7 at 30-32; Tr. 560-61.

57. A functional behavior assessment was completed as part of the FIE. The LSSP concluded that Student engaged in non-compliance and off-task behaviors to self-sooth and escape task demands.⁵⁹
58. The diagnostician who worked on the evaluation had a phone call with Parent to review the results in advance of the ARD Committee meeting.⁶⁰
59. An annual ARD Committee meeting for *** grade was held on December **, 2023. Parent attended with advocate Debra Liva. District staff presented the results of the FIE. The advocate then stated that Parent would be requesting an IEE. The advocate left the meeting and encouraged Parent to leave the meeting. District staff encouraged Parent to stay for the rest of the meeting to review Student's IEP. Parent left the meeting.⁶¹
60. The meeting continued and staff discussed Student's present levels, needs, BIP, proposed goals, accommodations, assistive technology, schedule of services, and recommendation of ESY. District staff were in agreement.⁶²
61. The present levels in the IEP documented that Student was able to **. Student had not exhibited ** behaviors in the 2023-2024 school year. Student still exhibited **, physical aggression, object aggression, **, and noncompliance.⁶³
62. New goals were proposed in **), math

⁵⁹ JE 7 at 33-34.

⁶⁰ Tr. 115, 600.

⁶¹ JE 1 at 32-33; Tr. 393, 438.

⁶² JE 1 at 33-34.

⁶³ JE 1 at 2-4.

(***), behavior (***, physical aggression, object aggression, and misuse of materials), functional (***), and speech (increasing length of utterances and participating in conversation).⁶⁴

63. Accommodations were proposed to adapt instruction, alter assignments, and manage behavior. Accommodations related to assistive technology were also proposed, including access to speech to text, manipulatives, visual aids, and iPad access.⁶⁵
64. The proposed schedule of services included: all core content instruction in a special education setting, *** in general education with support, group speech therapy for 150 minutes per nine weeks, *** therapy for 135 minutes per nine weeks, direct OT for 80 minutes per grading period, consult OT for 15 minutes per grading period, and *** twice a day. The primary special education setting is in the *** program on the *** school campus.⁶⁶
65. The same occupational therapist who completed the evaluation also worked with Student in the 2022-2023 school year and continues to work with Student in the current school year. She testified that 80 minutes per grading period of direct OT is appropriate for Student to make progress and Student's OT needs are supported in other ways in the classroom throughout the school day.⁶⁷
66. The IEP included a BIP targeting compliance with directives and using appropriate ways to request items/help/attention.⁶⁸

⁶⁴ JE 1 at 8-15.

⁶⁵ JE 1 at 17-18.

⁶⁶ JE 1 at 28-30.

⁶⁷ Tr. 431, 439-40, 443, 461.

⁶⁸ JE 1 at 40-45.

67. Parent was considered in disagreement with the IEP and did not respond to requests to schedule a reconvene meeting. Parent also did not respond to instructions to submit Parent's request for an IEE in writing. The new IEP was implemented beginning on January **, 2024.⁶⁹
68. On January **, 2024, Respondent filed a counterclaim to defend the appropriateness of the FIE, effecting prior written notice of an intent to deny the IEE request.
69. In the fall 2023 semester, Student made progress on some IEP goals, but not others. Student made progress in speech therapy on **. Student mastered **. Student mastered Student's ** goals. Student exhibited increased behaviors of **, physical aggression, object aggression, inappropriate materials use, and verbal outbursts. Student showed progress on reducing elopement and **. ⁷⁰
70. A District BCBA testified to analyzing Student's behavior over the past three school years. She found that Student's negative behaviors tend to escalate following school breaks.⁷¹

IV. DISCUSSION

Petitioner alleges that the District denied Student a FAPE by failing to develop an appropriate IEP for Student and creating a hostile environment, and that the District impeded Parent's ability to participate in the development of Student's IEP. Petitioner seeks an order that District provide compensatory services and an IEE, as

⁶⁹ JE 1 at 39; RE 3 at 85-88; Tr. 607.

⁷⁰ RE 2 at 24-42.

⁷¹ Tr. 511-12, 516, 525, 528.

well as staff training. Respondent alleges that its FIE was appropriate and requests an order that it may deny Parent's request for an IEE at public expense.

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 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).

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 April 13, 2023. Respondent asserted the two-year statute of limitations. 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 April 13, 2021. *See, e.g., Hooker v. Dallas Indep. Sch. Dist.*, 2010 WL 4025776, *10-

*11 (N.D. Tex. 2010). Petitioner’s evidence and arguments all focus on the 2022-2023 school year. The analysis below is therefore similarly focused on the 2022-2023 school year.

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 3-21 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." *Endrew 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 *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).

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 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). 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).

In this case, the record includes a December 2021 IEP implemented in *** and *** grades, the December 2022 IEP implemented in *** and *** grades, and the December 2023 IEP developed and implemented in *** grade currently. Each of these IEPs includes the statutorily required elements, including annual goals, schedules of services, descriptions of related services, accommodations, and BIPs including positive behavioral interventions and supports. They were each developed

based on Student's present levels at the time and took into consideration Parent's feedback, for example, adding functional math goals to the December 2022 IEP at Parent's request. The 2023 IEP also benefitted from the new FIE information.

Petitioner specifically complains that the IEPs contain inadequate speech therapy, OT, counseling, and psychological services. In the December 2021 IEP, Student received 160 minutes of speech therapy per grading period. This was reduced to 150 minutes per grading period in the 2022 and 2023 IEPs. These amounts were recommended by the speech therapists working with Student. Petitioner did not bring forth any evidence that Student needs more speech therapy than Student has received.

Likewise with OT, Student received 105 minutes of direct and 30 minutes of consult OT per grading period under the December 2021 IEP. This was reduced to 80 minutes of direct and 15 minutes of consult per grading period under the 2022 and 2023 IEPs. The occupational therapist who has worked with Student for the past two school years testified to the appropriateness of this amount of OT to meet Student's needs. Petitioner argues that Student has not made sufficient progress in OT, but Petitioner did not bring forth any evidence that Student needs more OT than Student has received.

Student has not received counseling or psychological services at school. When the District completed a counseling evaluation in 2023, the LSSP found that Student was not eligible for and would not benefit from these services. Petitioner challenges the conclusions of this evaluation but did not bring forth any evidence that Student

qualifies for or would benefit from school counseling services. The District's decision to not offer them to Student was appropriately based on evaluation results.

Overall, the evidence showed that Student's IEPs during the relevant time frame were appropriately individualized on the basis of assessment data and Student's 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." 34 C.F.R. § 300.114(a)(2)(i)-(ii).

To determine whether a school district is educating a student with a disability in the 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 has consistently included a program primarily in a self-

contained special education setting, as well as related services. Petitioner has not challenged the restrictiveness of this type of placement. The record supports that Student's needs call for removal from the general education setting for instruction, interventions, and related services. Student's program was 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 evidence reveals some noteworthy communication and collaboration failures related to the investigation of the *** teacher's conduct. The record reflects that District staff are all confident that Student did not hear the comment that the *** teacher made about Student and/or that even if Student did hear it, Student did not

understand it and it had no impact on Student. This puts into context why Parent was

not notified until much later, when the District was reporting the teacher to the TEA. However, the record does not reflect that this shared opinion of the school professionals was ever explained to Parent until the testimony at the due process hearing in this case. The letter Parent received in January 2023 contained false information that the *** was applied to Student, which was never corrected through any written record. Further, the letter only explains that the *** teacher “***.” This does not include any context on when this happened, what was said, that it was said to another adult not to Student, and, crucially, that the District does not believe Student heard or understood the comment. The record is not clear on whether Parent ever received this type of information until hearing the testimony at the due process hearing. The District’s letter to the TEA also inaccurately described the *** teacher’s conduct and its impact on Student, creating a further paper trail of confusion. It seems clear to the Hearing Officer that the District inappropriately exaggerated its documentation for the purposes of an employment investigation and did not intend to accurately opine on Student’s experience and needs in these employment records. While this communication was not directed to Parent, it has added to the misunderstandings between the parties.

Petitioner alleges that the District impeded Parent’s ability to participate in the IEP development process. Petitioner specifically complains that the *** teacher’s conduct was not discussed at the December 2022 ARD Committee meeting and that the District denied Parent’s initial request for an ARD Committee meeting in February 2023 once Parent found out about the *** teacher’s conduct. The record does not reflect that any members of the

December 2022 ARD Committee meeting (including Parent) knew about it at that time, or that any other District staff thought that it was something the ARD Committee needed to discuss because no one thought Student heard or understood it. Once Parent became aware of the conduct and requested that an ARD Committee meeting be held, the District's initial response was to deny Parent's request. This was an uncollaborative and inappropriate response. However, when Parent asked again eight days later, the diagnostician responded the same day offering dates the ARD Committee could meet. While the first response was wrong, it was promptly reversed and Petitioner has not shown harm from this eight day delay.

More generally, the record reflects coordination and collaboration among key stakeholders. The evidenced showed that Student's teachers and service providers collaborated to meet Student's needs, including coordinating on incorporating OT work throughout Student's school day and coordinating with Student's private ABA providers. Parent was a participant in the ARD meetings that Parent attended, during the times Parent attended, accompanied by an advocate when desired. Although District staff have not always agreed with the advocate's requests in ARD Committee meetings, a failure to agree does not indicate an unwillingness to collaborate. Parent and the advocate also engaged in uncollaborative behaviour by refusing to attend meetings and leaving meetings in progress, even when encouraged to stay. Petitioner's Closing Brief argues that the District was unwilling to discuss Parent's concerns at ARD Committee meetings, but the record reflects that Parent left the meetings, or refused to attend, without giving District staff an opportunity to discuss Student's program with Parent.

Overall, the evidence showed that services were provided in a coordinated, collaborative manner by key stakeholders at times, but not always. However, the

blame for an absence of collaboration is shared between the parties. Petitioner failed to show that the District excluded Parent in bad faith or refused to listen to Parent.

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.

Here, the evidence reflects that Student has made slow and sometimes minimal progress during the relevant time frame on academic and functional goals. For example, Student's December 2021 *** grade IEP reflected that Student could ***, however Student is still in the present school year in *** grade working on expanding this to ***. The evidence also shows cyclical patterns in Student's progress on behavioral goals, reflecting regression following school breaks. Student's progress reports reflect that Student has mastered some IEP goals and not others in the relevant time frame.

Petitioner alleges that Student has made insufficient progress but did not offer any evidence, expert or otherwise, that Student should be making more progress. Petitioner relies on the letter to TEA describing a negative impact on Student from the *** teacher's conduct. However, as previously discussed, the TEA letter's characterization of the impact on Student is not consistent with the weight of the evidence in this case. The evaluation data and other evidence support that this slow rate of progress is expected and commensurate with Student's cognitive disability and overall needs. Overall, although Student's progress has been limited, the record reflects that Student has received appropriate academic and non-academic benefits

from Student's IEPs at issue.

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. *Andrew F.*, 458 U.S. at 399. Based on the four factors of *Michael F.*, the evidence establishes that the District provided Student a FAPE during the relevant time frame.

6. Hostile Environment

Petitioner also alleges that the District denied Student a FAPE by creating a hostile environment. Petitioner asserts that the *** teacher created a hostile environment through her conduct toward Student and other students in the class. The record reflects that Student spent a limited time in the *** classroom before the teacher was ***.

Petitioner relies on the statements in the letters to Parent and the TEA, however the weight of the evidence indicates that these particular documents were inaccurate when stating an impact on Student from the *** teacher's conduct. Petitioner has also merely raised questions about whether or not Student was in the classroom at the same time as any incidents between the *** teacher and other students, and whether or not Student heard, understood, or was impacted by the

inappropriate comment the *** teacher made about Student on October ***, 2022. Petitioner's Closing Brief challenges the credibility of Ms. ***'s testimony about the events of October ***, 2022. The Hearing Officer found Ms. *** to be credible, including her testimony that she does not know whether Student heard the comment and her belief Student would not understand it if Student did.

Petitioner also raises questions about whether Student would have understood that someone was laughing at Student, even if Student did not understand the comment. Petitioner relies on Parent's testimony about Student's changed behavior and complaints of *** in the fall of 2022 to support that Student must have been impacted by the events of October ***, 2022. However, the evidence showed that Student was making similar complaints of *** in mid-September before Student had even visited the *** classroom, and had shown the same *** behavior in the previous school year. Merely raising questions about what Student heard or understood does not meet Petitioner's burden of proof. Petitioner has neither shown that Student was in a hostile environment nor that Student was denied a FAPE.

D. COUNTERCLAIM

Petitioner seeks an IEE. Respondent filed a counterclaim asserting the appropriateness of its FIE. A parent of a student with a disability has the right to obtain an IEE at school district expense if the parent disagrees with the school district's evaluation. 34 C.F.R. § 300.502(b)(1). However, a school district may challenge the parental right to the IEE at school district expense by filing a request for a due process hearing to show its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2)(ii). This may also be effectuated by filing a counterclaim in an already pending parent-initiated due process proceeding. If the school district meets its burden on that issue, although parents are still entitled to secure an IEE, they do so

at their own expense. 34 C.F.R. § 300.502(b)(3).

In conducting an evaluation under the IDEA, a school district must (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b). Additionally, the evaluation materials used must be: (1) selected and administered so as not to be discriminatory on racial or cultural bias; (2) provided and administered in the child's native language; (3) used for the purposes for which the assessments or measures are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with instructions. 34 C.F.R. § 300.304(c)(1).

Petitioner's Closing Brief does not argue that the FIE was inappropriate. However, the District bears the burden of proof to show that its November 2023 FIE was appropriate. The evaluation used a variety of assessment tools, including standardized measures, observations, and teacher information. No single measure was used to determine Student's eligibility criteria or programming. The record supports that the formal evaluation materials were selected without racial or cultural bias, appropriately administered by trained staff, and administered according to their instructions. Student's ***; however, Student's communication is in English and the

evaluation was appropriately completed in English to yield the most accurate information about Student's abilities.

The 2023 FIE did not include updated formal cognitive or adaptive behavior testing. The evaluators considered formal testing from 2017 and 2020 and present levels information, then determined that new testing was not necessary. Updated formal cognitive measures were not required for an adequate FIE. Similarly, the evaluator was unable to complete formal testing in academic achievement due to Student's noncompliance. However, adequate information was gathered from a variety of sources.

Overall, the evidence showed that the District's November 2023 FIE met the requirements of the IDEA. Therefore, the District is not required to provide an IEE at public expense.

V. CONCLUSIONS OF LAW

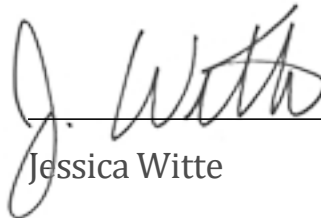
1. The burden of proof is on Petitioner as the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. The District provided Student a FAPE during the relevant time period, and Student's IEP was reasonably calculated to address Student's needs in light of Student's 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. The evaluation provided by the District complied with all requirements under the IDEA. 34 C.F.R. § 300.304.
4. Respondent is not required to grant Petitioner an IEE at public expense. 34 C.F.R. § 300.502(b)(1).

VI. ORDER

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED** and Respondent's request for relief is **GRANTED** to the extent that Respondent is not required to grant Petitioner an IEE at public expense. Any other relief not specifically granted is **DENIED**.

Signed MARCH 22, 2024.

ALJ Signature:

A handwritten signature in cursive script, appearing to read "J. Witte", is written over a horizontal line.

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).