CONFIDENTIAL
Pursuant to FERPA – 20 U.S.C § 1232g;
34 C.F.R. Part 99

SOAH DOCKET NO. 701-21-3442.IDEA
TEA DOCKET NO. 263-SE-0821

STUDENT, B/N/F PARENT,	**§**	**BEFORE A SPECIAL EDUCATION**
Petitioner	**§**	
	§	
v.	**§**	**HEARING OFFICER FOR**
	§	
KELLER INDEPENDENT SCHOOL DISTRICT,	**§**	
Respondent	**§**	
	§	**THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

*** (Student), by next friend *** (Parent or, collectively, Petitioner), brings this action against the Keller Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., and its implementing state and federal regulations. The issue presented in this case is whether the District denied Student a free, appropriate public education (FAPE) in the least restrictive environment. The hearing officer concludes Petitioner did not meet Petitioner's burden of proving that Student requires concurrent, synchronous virtual instruction to receive a FAPE.

II. LEGAL REPRESENTATION

Petitioner was represented throughout this litigation by Petitioner's legal counsel, Mark Whitburn of Whitburn and Pevsner, PLLC. The District was represented throughout this litigation by its legal counsel, Nona Matthews, of Walsh, Gallegos, Trevino, Kyle, and Robinson, P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted via the Zoom videoconferencing platform on June 15-16, 2022. The hearing was recorded and transcribed by a certified court reporter. Petitioner requested an open hearing and observers were present.

Petitioner continued to be represented by Mark Whitburn. ***, Student's parent, attended the hearing. The District continued to be represented by Nona Matthews who was assisted by co-counsel Eileen Costello. ***, the District's Executive Director of Special Education, attended the hearing as the party representative. Amanda Bigbee, General Counsel for the District, also attended the hearing. The parties filed timely written closing arguments. The hearing officer's decision is due on August 5, 2022.

IV. ISSUES PRESENTED

A. Petitioner's Claims

The relevant time period includes the 2021-22 school year. Petitioner raised the following legal issue for decision:

- Whether the District denied Student a FAPE in the least restrictive environment by failing to provide concurrent, synchronous virtual instruction.

B. Petitioner's Requested Relief

1. An order directing the District to provide compensatory educational services as appropriate to compensate for the District's failure to address Student's educational needs appropriately.

2. An order compelling the District to provide Student concurrent, synchronous virtual instruction, as well as any other services or instructional mechanisms appropriate for Student's education in the home environment.

3. Any and all relief that the hearing officer deems appropriate or which is recommended by Petitioner's experts and evaluators.

C. The District's Legal Position

The District generally denies Petitioner's factual allegations and specifically denies that it failed to provide Student a FAPE in the least restrictive environment.

V. FINDINGS OF FACT

Background Information

1. Student is *** years-old and lives with Student's family in the District. Student was a *** grade student at *** during the 2021-22 school year. Student enjoys playing outside and reading and loves ***. Student's parents are ***, and Parent previously ***.[1]

2. Student has been diagnosed with ***. *** affects Student neurologically, causing ***. Student gets *** "much faster than other children" and may experience decreased ***, and require frequent breaks. Student experiences ***.[2]

3. While Student's *** is a permanent, chronic condition, its effects vary, and Student may at times experience an exacerbation of *** symptoms that significantly impact Student's ability to function. It is not possible to predict *** symptoms and they may appear suddenly. For Student, some days are better than others. Student has had prolonged periods (up to a year) without severe *** episodes.[3]

4. In addition to ***, Student has been diagnosed with ***, which may add to Student's ***, and ***. Student's *** and related health conditions place Student at risk of complications from illness, including COVID-19, which may trigger a *** crisis.[4]

5. Student attended *** and the first semester of *** grade in *** Independent School District (*** ISD). Student attended school in-person until the pandemic caused schools to close in March 2020 and then attended virtually. *** ISD conducted a Full Individual Initial Evaluation (FIIE) in February 2020. Based on a December 2019 Other Health

[1] Joint Exhibit (Jt. Ex.) 1 at 12; Transcript (Tr.) at 29, 303, 326, 385-86, 390, 422-23.

[2] Jt. Ex. 4 at 1; Jt. Ex. 7 at 18; Jt. Ex. 8 at 5, 12; Petitioner's Exhibit (P. Ex.) 3; Respondent's Exhibit (R. Ex.) 5; Tr. at 249-50, 256, 388.

[3] Tr. at 249-52, 255-56, 258-61, 415.

[4] Jt. Ex. 4 at 1; P. Ex. 2; P. Ex. 3; Tr. at 253-54, 388.

Impairment (OHI) report from Dr. ***, Student met criteria as a student with an OHI due to ***.[5]

6. The February 2020 FIIE found Student had developmentally functional receptive and expressive language and articulation skills. Student's cognitive profile was within the average range. Student's academic skills fell within the average range of ability, with only yet to be introduced math calculation skills falling in the low average range.[6]

7. The February 2020 FIIE included an occupational therapy (OT) assessment. Student demonstrated slightly decreased fine motor skills and a slight delay in prewriting skills. On the Sensory Profile 2, Student demonstrated significantly atypical sensory processing patterns. Student may become distressed during large gatherings (i.e., lunch time), had difficulty participating in group activities where there was a lot of talking, and did not participate in groups well. Student's sensory processing patterns significantly impacted Student's ability to participate in academic tasks and Student had an educational need for OT services.[7]

8. Student attended *** Independent School District (*** ISD) from December 2020 to May 2021. Student participated in *** ISD's virtual learning program and received concurrent, synchronous virtual instruction, a method of instruction where a teacher provides simultaneous instruction to students in the classroom and a student or students in a remote location. After some initial periods of ***, Student could generally sustain a full day of virtual learning but Student's ***, at times, interfered with instruction.[8]

9. *** ISD conducted a Review of Existing Evaluations and Data (REED) in March 2021. Updated assessments in the areas of communication and intellectual and academic functioning were reviewed at an ARD Committee meeting on May ***, 2021.[9]

10. Student did not demonstrate deficits in language skills or articulation. The occupational therapist noted that Student's writing at times appeared to show Student was experiencing *** which decreased Student's ability to ***. Previously noted sensory issues did not impact Student's participation in virtual classes. Student continued to demonstrate a need for OT services.[10]

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[5] Jt. Ex. 1 at 1, 20-21, 23; Jt. Ex. 2 at 6; Tr. at 402.

[6] Jt. Ex. 1 at 2-7, 13-20.

[7] Jt. Ex. 1 at 8-11, 20, 25.

[8] Jt. Ex. 2 at 6; Tr. at 36-37, 119, 388-91.

[9] Jt. Ex. 2 at 1.

[10] Jt. Ex. 2 at 3-5.

11. To evaluate orthographic processing skills, Student was given two subtests from the Woodcock-Johnson Tests of Cognitive Abilities (WJ-IV COG), with scores falling in the average range. On the Comprehensive Test of Phonological Processing, Second Edition (C-TOPP 2), all scores were within normal limits in relation to same-age peers.[11]

12. Student's teacher reported Student's reading, math, and writing skills were on grade level, with a relative weakness in ***. On the writing subtests from the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), scores fell in the average range in written expression, spelling, and writing fluency. On the Spelling of Sounds subtest from the Woodcock Johnson Tests of Achievement (WJ-IV ACH), Student's standard score of *** fell in the average range.[12]

13. Overall, the re-evaluation found that Student did not have a speech impairment, Specific Learning Disability, or dysgraphia. Student continued to be eligible as a student with an OHI. Parent requested an Independent Educational Evaluation (IEE) for dysgraphia, but it was not completed before Student moved to the District.[13]

14. The May 2021 *** ISD ARD Committee considered Student's present levels of academic achievement and functional performance (PLAAFPs). Student continued to attend school virtually and actively participated in virtual instruction, participated during class, and always completed Student's work. No areas of need were identified in reading, math, or behavior. Student's May 2021 IEP included an annual goal targeting fine motor skills and handwriting. Accommodations included allowing breaks and rest periods, chunking of assignments, and opportunities for movement as needed; extra time to complete assignments (up to one day); access to technology for assignments; minimal auditory distractions; oral administration of assessments; and opportunities to take assessments earlier in the day.[14]

15. Student could achieve Student's fine motor skills goal in the general education classroom with supports and services and Student's May 2021 IEP called for all instruction in the general education setting. Student's schedule of services for May ***, 2021 – May ***, 2022 called for *** minutes per week of in-class support for *** if attending in-person and *** minutes per week if attending virtually. Whether attending in-person or virtually, Student's May 2021 IEP called for ***-minute OT session in the first nine weeks of the 2021-22 school year, ***-minute sessions in the second nine weeks, and ***-minute session in the third and fourth nine weeks.[15]

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[11] Jt. Ex. 2 at 8-9.

[12] Jt. Ex. 2 at 9-12.

[13] Jt. Ex. 2 at 1, 15; Tr. at 427.

[14] Jt. Ex. 3 at 2-4, 7-8.

[15] Jt. Ex. 3 at 10-13.

2021-22 School Year

16. Student's family moved to the District in early July 2021 and Parent contacted the District's Executive Director of Special Education in late July to make her aware Student was transferring to the District. In initial communications, Parent made clear she was not requesting, nor would she accept, homebound services, and was instead requesting virtual instruction and services at home with a ***. The Executive Director of Special Education indicated the District was awaiting guidance from the Texas Education Agency (TEA) on allowable remote learning options for the 2021-22 school year, but the ARD Committee could consider this option if required to provide Student a FAPE.[16]

17. The *** is technology that allows a student to attend classes via interactive videoconferencing and is a mechanism of providing concurrent, synchronous virtual instruction. The *** is *** (a device similar to an iPad) ***. The *** is operated *** by the student remotely at home using an iPad or similar device. The student using it can participate in class ***. Parent wanted concurrent, synchronous virtual instruction with the ***, rather than an iPad, because the *** would give Student more of a presence in the classroom.[17]

18. The Executive Director of Special Education was familiar with the *** technology requested by Parent and had prior experience with it in another school district. She also met with the Region 11 Educational Service Center's Director of Technology and Special Education Director to gather information about a program where member school districts are loaned a *** at no cost.[18]

19. On August ***, 2021, the District convened an ARD Committee meeting to review Student's IEP from *** ISD and discuss Parent's concerns with Student attending school in-person. Student was not too unwell to participate in instruction at the time. Instead, Parent sought continued virtual learning to reduce Student's risk of exposure to COVID-19 until Student was vaccinated because of the risk of complications with Student's medical condition if Student were infected. She requested virtual learning via the ***, wanting Student to make friends and be social and fully participate in the general education classroom. At the same time, Parent reported there was "a good chunk of time" where Student could not participate in Zoom lessons due to *** during remote learning last school year. The ARD Committee considered information from Parent concerning

[16] P. Ex. 8; Tr. at 30-31, 103-05, 386-87, 453-455.

[17] P. Ex. 7 at 1; Tr. at 56-57, 387, 404-05.

[18] P. Ex. 7; Tr. at 55-57, 105.

Student's medical needs, two recent letters from treating providers provided by Parent, and a homebound needs assessment.[19]

20. An August ***, 2021 letter from Dr. ***, Student's pediatrician, described Student's medical condition and its functional implications, including ***. Dr. *** recommended Student learn from home due to current concerns with the spread of COVID-19 because Student's medical history could make it "very difficult" for Student to overcome a COVID-19 infection and Student was at risk of "major medical challenges" that could lead to a long hospitalization and setbacks in Student's physical health if exposed. Dr. *** asked the District to consider technology where Student "could attend school remotely giving Student somewhat of a physical presence on campus and could allow Student to socialize with Student's peers." The District interpreted this statement as supportive of Parent's request for the ***.[20]

21. On August ***, 2021, Dr. *** also completed a Homebound Needs Evaluation-Referral. He prescribed homebound services for the upcoming school year to reduce Student's risk of exposure to COVID-19 given its increased presence in the community and the risk of exacerbation of Student's medical conditions that may result if Student were infected.[21]

22. An August ***, 2021 letter from Dr. ***, Student's pediatric neurologist, recommended virtual schooling at home to reduce Student's risk of exposure to COVID-19 because Student was not old enough to be vaccinated and "at very high risk" of serious and potentially life-threatening illness and complications if infected. She recommended "full remote access to Student's classroom for academics and socialization with Student's peers and teachers" and further opined homebound education was not appropriate for Student.[22]

23. Without obtaining additional information from either medical provider, the District agreed with Dr. ***'s recommendation for homebound services and offered *** hours a week of remote homebound instruction and OT services. The ARD Committee discussed Parent's concern that remote homebound services would not provide opportunities for socialization and exposure to peers. District members of the ARD Committee recognized the potentially harmful effects of remote homebound instruction included lack of exposure to peers and lack of social opportunities with same-age peers, but concluded the benefits outweighed these possible harmful effects due to Student's documented

[19] Jt. Ex. 4; Jt. Ex. 5 at 1-2; P. Ex. 2; P. Ex. 3; Tr. at 108, 111, 114, 388, 402.

[20] P. Ex. 3; Tr. at 154-55.

[21] Jt. Ex. 4 at 1-3; Tr. at 45.

[22] P. Ex. 2; Tr. at 242, 253-54.

health concerns. The District was also prepared to provide Student in-person services in the general education classroom, but Parent declined.[23]

24. The August ***, 2021 ARD Committee did not reach consensus, with Parent disagreeing with the District's offer of remote homebound instruction. The ARD Committee agreed to a recess to gather more data and to reconvene at a later date. In the interim, the District and Parent executed a Transfer Student—Agreement to Implement form adopting comparable services to the May 2021 *** ISD IEP, including *** minutes per week of inclusion support in the general education setting for *** and OT.[24]

25. At a reconvene ARD Committee meeting on August ***, 2021, Parent again raised concerns the District's remote homebound proposal would not allow Student to be educated with Student's peers and receive the same curriculum. The District again proposed *** hours a week of remote homebound instruction and concurrent opportunities for socialization such as a *** (where Student would remotely connect with peers ***) or virtual participation in an existing or new social skills group with the general education counselor. The *** was specific to Student and not something that was already in place. The District was open to other ideas and solutions to meet Student's socialization needs, but Parent "wasn't having any of it." The ARD Committee also discussed the District's virtual learning option (parent led, asynchronous virtual instruction) available to all *** through *** grade students in the fall of the 2021-22 school year.[25]

26. Special education leadership explained why the District opposed the *** technology based on Student's "present levels" as specified in the homebound needs assessment and the doctors' memos describing Student's medical condition and related symptoms. According to the District, it did not appear that Student *** to participate in a full day of instruction at the time due to Student's medical condition and ***, and the District had concerns with the general education teacher's ability to monitor Student's ***.[26]

27. Parent disagreed with the District's proposal due to the restrictive nature of homebound services and lack of interaction with peers and the classroom, and because it was not sufficient instructional time. The District made efforts to reach agreement with Parent and "come to a middle ground." Parent was not open to other ways for Student to receive instruction and socialization opportunities other than the ***.[27]

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[23] Jt. Ex. 5 at 1-2; Tr. at 35, 40-42, 156-59, 208-09, 214, 225-27.

[24] Jt. Ex. 5 at 2; Jt. Ex. 6.

[25] Jt. Ex. 5 at 2; Tr. at 50-55, 104, 110-11, 463.

[26] Jt. Ex. 5 at 2; Tr. 58-59, 74.

[27] Jt. Ex. 5 at 3, 5; Tr. at 120, 401, 407, 455.

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28. Student did not enroll in the District during the fall semester of the 2021-22 school year. Parent arranged for a structured homeschool program aligned with the Texas Essential Knowledge and Skills (TEKS). Student remained in good health that semester.[28]

29. After Parent notified the District that Student was vaccinated and ready to come to school in-person, the District convened an ARD Committee meeting on December ***, 2021 to develop a plan for in-person learning. The ARD Committee reviewed Student's PLAAFPS from *** ISD and continued the services and fine motor skills goal specified in Student's May 2021 IEP. Student's accommodations were modified to include access to personal protective equipment and reminders to wear Student's mask.[29]

30. Student's December 2021 IEP called for all instruction in the general education classroom, with *** minutes per week of in-class support in *** and OT. The District agreed to provide mitigation and recovery services to address potential learning loss during the time Student did not attend school that fall, including an additional *** minutes of inclusion support per week in *** and *** additional minutes of OT. Student began in-person instruction on December ***, 2021.[30]

31. In January 2022, Student was on grade level in ***, but had difficulty *** and with written communication. Student followed classroom expectations. Student was excited to be at school, enjoyed socializing with peers, and made friends in class.[31]

32. Student attended school in-person until the end of January 2022 when Student contracted COVID-19. Student was absent for 10 days in early February to quarantine and returned to school only briefly. COVID-19 caused a severe exacerbation of Student's ***. Student became very ill, with "***. This was Student's *** and Student's experience after having COVID-19 was not typical of Student's condition. Student did not return to in-person learning during the spring semester.[32]

33. Parent provided a March ***, 2022 letter from Dr. *** describing Student's current medical circumstances stemming from the recent severe exacerbation of Student's ***. Achieving control of Student's *** required a substantial escalation in ***. Until successfully weaned from Student's elevated ***, Student required more breaks during the school day and may miss school due to ***.[33]

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[28] Tr. at 120, 407-08.

[29] Jt. Ex. 7 at 1-5, 7, 9, 17; Tr. at 121-23.

[30] Jt. Ex. 7 at 13-15, 17-18; Tr. at 124-25.

[31] Tr. at 188-89, 441-44, 450.

[32] R. Ex. 5; Tr. at 125-26, 252-53, 408-11, 413, 416.

[33] R. Ex. 5.

34. The District convened an ARD Committee meeting on March ***, 2022 to consider whether remote homebound instruction may be appropriate. Student was absent for *** days during the third nine weeks of school due to illness. Parent reported Student was having difficulty regulating Student's emotions and Student was ***. At the time, Student could not sustain an hour of instruction a day and the ARD Committee proposed a gradual introduction of remote homebound services, beginning with *** minutes per week for two weeks, *** minutes per week for two weeks, and increasing to *** minutes per week. Due to the severity of Student's medical circumstances at the time, the March 2022 IEP focused on the essential components of the TEKS and suspended the mitigation and recovery services and did not include socialization opportunities.[34]

35. The March 2022 ARD Committee reached consensus, with Parent agreeing to remote homebound services but continuing to pursue the due process hearing seeking concurrent, synchronous virtual instruction when it was not medically appropriate for Student to be at school. However, Parent agreed that remote homebound instruction was an appropriate instructional arrangement at the time.[35]

36. Student received remote homebound instruction via Zoom by a certified general education teacher from March ***, 2022 to the end of the school year. The homebound teacher and Student's general education teacher on campus collaborated to develop an appropriate curriculum and provide Student exposure to the same curriculum as in the classroom. Parent also sought out additional teaching resources and created a Google Classroom where the general education teacher uploaded resources to go through independently.[36]

37. After the gradual introduction of services, Student could generally tolerate *** hours a week of instruction (***) depending on the day and how Student was feeling. On days when Student did not feel well physically, Student was unable to access the instruction in the way planned. *** significantly interfered with Student accessing the curriculum at approximately 20% of sessions when Student could not continue with instruction because Student *** or had to end the session because Student did not feel well enough to continue. Parent's presence during instruction was "imperative" to helping keep Student focused and engaged. The homebound teacher worked collaboratively with Parent to determine the appropriate level of instruction and make adjustments as needed based on Student's needs on a particular day.[37]

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[34] R. Ex. 6 at 1, 5-8; Tr. at 89-90, 130-35, 173.

[35] R. Ex. 6 at 5-6, 9; Tr. at 87, 296-97, 412-13.

[36] Tr. at 303-05, 324-25, 354-55, 444-45.

[37] Tr. at 305-08, 310-11, 328-39, 360-61.

38. Student was able to practice and gain academic skills. Student is an "excellent reader," with good fluency and decoding skills and comprehension skills comparable to same age peers. Student needed re-exposure to certain math concepts, with developing skills in this area. Student demonstrated strong skills in ***.[38]

39. As Student's health began to improve, the homebound teacher and Student's teacher on campus discussed potential avenues for Student to connect with peers, including a ***, but no socialization opportunities materialized before the end of the school year. Socialization is important for all students and Student would benefit from opportunities to work with Student's peers.[39]

40. Student successfully completed the reduced amount of work provided while receiving remote homebound instruction and Student's grades for the fourth quarter of the 2021-22 school year (***) reflect mastery of the material Student was exposed to from the *** grade classroom. Student was promoted to *** grade.[40]

41. Data on Student's fine motor skills goal was not collected for the reporting period ending on December ***, 2021 (Student's first week of in-person attendance) and absences prevented data collection for the reporting period ending on March ***, 2021. For the period ending on May ***, 2022, Student was making progress towards meeting Student's fine motor skills goal, ***.[41]

42. Student's inclusion support teacher during in-person learning, who was in a classroom where concurrent, synchronous virtual instruction was provided during the pandemic, did not believe this form of instruction would be less isolating "because Student would be in the background." In her experience, children on the screen had limited interaction with children in the classroom and the screen was a barrier to meaningful interaction.[42]

43. Student required significant support from Parent and the homebound teacher to attend and focus on instruction. This aspect of providing instruction was highly individualized. The homebound teacher expressed concern that, because concurrent, synchronous virtual instruction would not be as tailored to Student's needs on a particular day, Student would not be able to "maintain the focus and attention needed in order for that learning opportunity to be successful for Student."[43]

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[38] Tr. at 308-09, 326-28.

[39] Tr. at 228-29, 258, 314-22, 446-49.

[40] R. Ex. 9; Tr. at 143, 341-42, 446.

[41] R. Ex. 8; Tr. at 340-41.

[42] Tr. at 195-98.

[43] Tr. at 355-57.

44. In January 2022, the Executive Director of Special Education contacted TEA to inquire whether a waiver was available to allow for concurrent, synchronous instruction for a special education student either through remote conferencing or remote homebound instruction, and was advised that instruction cannot be concurrent. Formal TEA guidance confirms that concurrent instruction is not available through remote conferencing or recently enacted legislation creating the Local Remote Learning Program (Senate Bill 15).[44]

45. Delivery of concurrent instruction to a special education student on homebound services is also prohibited by the Student Attendance Accounting Handbook (SAAH), which provides that "[v]irtual instruction provided to students in special education homebound programs cannot be provided by a teacher concurrently," including by "a *** that allows for virtual interaction between student and teacher." However, according to informal guidance from TEA to the District, the SAAH "provides that synchronous, concurrent instruction is generally not allowable for attendance accounting purposes. However, if the student's ARD Committee has determined that remote instruction, including concurrent, synchronous instruction is necessary in order for the student to receive a FAPE, the district must provide the service."[45]

VI. DISCUSSION

As an initial matter, the hearing officer addresses the District's argument that, because the concurrent, synchronous virtual instruction sought by Parent is prohibited by state law and the SAAH, the District's decision to comply with state law cannot serve as the basis for an alleged failure to provide Student a FAPE in the least restrictive environment. The District is correct that the hearing officer lacks jurisdiction to resolve whether any such prohibition under state law and policy may conflict with the IDEA, but resolution of this question is not necessary to answer the legal issue presented. Here, the District received specific guidance from TEA that, if a student's ARD Committee determines that remote instruction, including synchronous, concurrent instruction is necessary for the student to receive a FAPE, a school district must provide it.

[44] R. Ex. 1 at 2; R. Ex. 2 at 3; R. Ex. 3 at 19; R. Ex. 4 at 3-5; Tr. at 147-48.

[45] R. Ex. 4 at 1; R. Ex. 10 at 64, 101, 259-60; R. Ex. 11 at 7-8, 19; Tr. at 135-41.

A. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and 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 a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Accordingly, Petitioner bears the burden of proving that the District failed to provide Student a FAPE in the least restrictive environment.

B. A School District's Duty to Provide FAPE

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. Once a student is determined to be eligible for special education, an IEP must be developed. The District's mandate to design and deliver an IEP falls under its broader statutory obligation to furnish a FAPE that emphasizes special education and related services designed to meet Student's unique needs and prepare Student for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209 (5th Cir. 2019). The District is responsible for providing, at public expense, the specially designed instruction and support services necessary to meet Student's unique needs and confer an educational benefit. 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).

To meet the obligation to provide a student with a disability a FAPE under the IDEA, his or her 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. While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district

must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP proposed by the school district was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

1. The Four-Factor Test

While Petitioner specifically challenges the District's failure to educate Student in the least restrictive environment by failing to provide concurrent, synchronous virtual instruction, the test of whether Student's program offered Student a FAPE turns on several factors. The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program meets IDEA's requirements. These factors are:

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

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

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. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (*citing Endrew F.*, 137 S. Ct. at 1000-01). 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.

a. Individualized on the Basis of Assessment and Performance

The District's obligation when developing Student's IEP is to consider Student's strengths; Parent's concerns for enhancing Student's education; results of the most recent evaluation data; and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(1). Student was new to the District in August 2021 and the District adopted the services specified in the May 2021 IEP from *** ISD, which included a fine motor skills goal to address *** deficits, OT services, and accommodations to address Student's disability. While these aspects of the proposed August 2021 IEP were appropriate, the same cannot be said about the limited amount of remote homebound instructional time offered.

Student has a chronic medical condition that presents itself differently at different times. Student experiences ongoing *** symptoms, including ***, even when Student's condition is not exacerbated. Regardless of educational setting, Student requires accommodations, such as breaks and rest periods, to benefit from instruction. When Student experiences an infrequent exacerbation of *** symptoms, as happened after Student contracted COVID-19, Student may have significant functional limitations that impede Student's ability to benefit from more than a limited amount of instruction, as was the case in March 2022.

However, the information available to the District in August 2021 regarding Student's medical circumstances does not support the District's conclusion that Student could not benefit from more than *** hours a week of remote homebound instruction. Though Parent reported *** interfered with Student's ability to participate in virtual learning in *** ISD, Parent credibly testified that she sought a continuation of virtual learning in August 2021 to decrease Student's risk of contracting COVID-19 until Student was vaccinated and could attend in-person, not due to the acuity of Student's medical circumstances at the time. Parent's position was supported by the information considered by the ARD Committee from Dr. *** and Dr. ***, who agreed that Student's medical condition necessitated instruction in the home during the fall of 2021 to reduce Student's risk of contracting COVID-19 ***.

While neither medical provider gave specific guidance on the frequency and duration of services Student could sustain at the time, neither provider recommended reduced instructional time. Dr. *** appeared to support Parent's request for the *** and Dr. *** recommended "full remote access to Student's classroom for academics and socialization," and it was reasonable to conclude both providers made these recommendations because Student could engage in more than a small amount of instruction. These recommendations cast doubt on the District's contention that Student lacked the stamina to benefit from anything more than a limited amount of instruction due to Student's medical condition in August 2021, and support Petitioner's contention the District misunderstood Student's health circumstances at the time. In addition, Student's May 2021 *** ISD IEP was available to the ARD Committee and did not call for reduced instructional time in the virtual environment and indicated Student actively participated in virtual instruction and class.

Here, the District focused too narrowly on Dr. ***'s homebound prescription. To the extent the August 2021 ARD Committee could not reconcile Dr. ***'s recommendation for homebound services with Dr. ***'s recommendation that homebound services were not appropriate, further exploration by the District was warranted because Student was new to the District and ARD Committee members were not familiar with Student's medical needs, which are integral to developing an appropriate program. While, as discussed below, remote homebound instruction as prescribed by Dr. *** was an appropriate instructional arrangement in August 2021, the District minimally should have obtained clarification on current instructional stamina before proposing only *** hours a week of instruction.

Student's needs and medical circumstances changed over the course of the 2021-22 school year and the evidence showed Student's March 2022 IEP was individualized on the basis of assessment and performance. The information available to the ARD Committee at the time from Dr. *** and Parent confirmed a *** after contracting COVID-19. The March 2022 ARD Committee appropriately proposed a gradual transition to remote homebound instruction

consistent with the acuity of Student's medical condition and Student's stamina to engage in instruction. Even as Student's medical circumstances began to improve, Student was still unable to engage in planned instruction approximately 20% of the time due to ***. While Petitioner faults the March 2022 IEP for not including socialization opportunities, Student's medical circumstances at the time it was developed warranted focusing on the essential components of the *** grade curriculum.

Despite an appropriately individualized IEP in March 2022, the hearing officer concludes Student's August 2021 IEP was not individualized on the basis of assessment and performance.

b. Least Restrictive Environment

The IDEA expresses a strong preference for inclusion of students with disabilities and requires them to be educated with students without disabilities to the maximum extent appropriate and in the least restrictive environment appropriate to meet their needs. Special classes, separate schooling, or other removal from the regular educational environment may occur only when the nature or severity of a student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)-(ii).

Consideration of a student's least restrictive environment includes an examination of the degree of benefit the student will obtain from an inclusive education. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989). A presumption in favor of the educational placement established by an IEP exists, and the party challenging it bears the burden of showing why the educational setting is not appropriate. *Christopher M.*, 933 F.2d at 1291.

The IDEA's regulations require a school district to ensure availability of a continuum of instructional placements to meet the needs of students with disabilities, including instruction in regular classes, special classes, special schools, homes, hospitals, and institutions. 34 C.F.R.

§ 300.115. State regulations require that school districts make available a continuum of instructional arrangements to meet the individualized needs of students with disabilities, including mainstream classes, homebound services, hospital classes, resource room and/or services, self-contained-regular campus, nonpublic day school, and residential treatment facility. 19 Tex. Admin. Code § 89.1005(c).

A two-part test with a presumption in favor of inclusion of students with disabilities determines whether removal from the general education setting is appropriate. First, whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. Second, if this is not possible, whether the school district included the student to the maximum extent appropriate. *Daniel R.R.*, 874 F.2d at 1048. The issue of whether an IEP was implemented in the least restrictive environment is a relevant factor in making the overall determination whether the school district's program provided the student FAPE. *Daniel R.R.*, 874 F.2d at 1049; *Michael F.*, 118 F.3d at 253; *R.H. v. Plano Indep. Sch. Dist*., 607 F.3d 1003, 1012-13 (5th Cir. 2010).

Student exclusively received virtual instruction beginning in March 2020, and Student's May 2021 IEP from *** ISD called for a general education placement with supports and services whether instruction was in-person or remote. When Student moved to the District, Parent sought a continuation of the concurrent virtual services Student received in *** ISD but via the ***, which Petitioner maintains is necessary to ensure Student receives a FAPE in the least restrictive educational environment.

The parties do not dispute that Student required educational services in the home at the beginning of the 2021-22 school year. The information available to the August 2021 ARD Committee, including information from Parent and the recommendations of Dr. *** and Dr. ***, showed that *** and risk of significant complications if Student was exposed to COVID-19 warranted a continuation of remote instruction in the home, rather than in-person services. Removal from the general education setting was necessary to ensure Student's safety and the

hearing officer concludes the District appropriately offered remote homebound services. It is the method of delivering instruction in the home at issue in this case.

Because removal from the general education classroom was appropriate, the District had an obligation to include Student to the maximum extent appropriate. Numerous witnesses addressed the importance of socialization for children, and Student should have meaningful opportunities for socialization in Student's educational program. Parent raised significant concerns with the District's remote homebound offer in August 2021 in large part due to concerns about isolation and lack of exposure to peers. The August 2021 ARD Committee recognized and discussed these concerns and proposed opportunities targeted at meeting Student's non-academic needs, including a *** and social skills group led by the general education counselor. While Petitioner characterizes these methods of access to peers as "empty" because the District needed to further develop them, the evidence showed the District committed to providing these or other opportunities for socialization in Student's IEP and would have welcomed Parent's input in designing these measures. However, these conversations did not go any further because Parent would not entertain options other than the ***.

In addition, a preponderance of the evidence did not establish that the *** technology sought by Parent was required to provide Student a FAPE. The evidence concerning the *** consisted largely of testimony from the parties describing the functions of the technology, but a clear picture did not emerge showing how or if Student would receive non-academic benefit in particular.

The inclusion support teacher, who worked directly with Student in the classroom during in-person learning and delivered concurrent, synchronous virtual instruction during the pandemic, raised concerns that Student "would be in the background." She also expressed reservation with the appropriateness of concurrent virtual instruction for Student and the meaningfulness of the interactions between the remote student and students in the classroom. Though she did not have experience with the ***, her testimony illustrates the tension between the availability of technology and lessons learned by educators during the pandemic regarding

its efficacy as a method of delivering instruction to remote learners. The homebound teacher, Student's most recent instructor, also did not recommend concurrent, synchronous virtual instruction for Student due to concerns with the lack of individualization it would offer because Student required significant support from both Parent and the instructor to attend and focus on instruction at home. While Parent ***, the recent experiences of District personnel who are familiar with Student and Student's needs carry significant weight when considering the appropriateness of this technology for Student. Without professional or expert testimony showing that the *** could meet Student's individualized needs, Petitioner did not meet Petitioner's burden of proving that the narrow remedy sought is required in order for Student to benefit from Student's educational program.

The weight of the credible evidence showed that the District offered a program in which Student would be educated with students without disabilities to the fullest extent possible given Student's need to be educated at home in August 2021. Student's placement was Student's least restrictive environment. 34 C.F.R. § 300.114(a)(2)(i)-(ii); *Daniel R.R.*, 874 F.2d at 1048.

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

The IDEA contemplates a collaborative process between a school district and the parents of a student with a disability. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd*, 909 F.3d 754 (5th Cir. 2018). As key stakeholders, parents, school administrators, and teachers familiar with the student's needs should all be involved in the "highly coordinated and collaborat[ive] effort" of developing a student's IEP. *Michael F.*, 118 F.3d at 253. The IDEA, however, does not require a school district, in collaborating with a parent, to accede to all of the parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657 (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 the 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.*

Despite reaching an impasse early in Student's tenure in the District regarding Student's program in the home in the fall of 2021, the record overall reflected a good working relationship between Parent and the District and numerous instances of collaboration between key stakeholders during the 2021-22 school year. Parent participated in all ARD Committee meetings and was given an opportunity to share concerns. The evidence also showed the District did not simply dismiss Parent's request for the *** and considered this request, with the Executive Director of Special Education conducting independent research and visiting the Region 11 Educational Service Center to gather information about its program and the *** technology.

The District was responsive to information Parent provided as Student's needs and circumstances changed during the school year, convening ARD Committee meetings in December 2021 to develop an IEP once Student was ready to come to school in-person and in March 2022 when the recent exacerbation of Student's medical condition after Student contracted COVID-19 necessitated instruction at home. The March 2022 ARD Committee incorporated Parent's concerns and feedback when developing a plan to gradually transition Student into remote homebound services consistent with Student's significant *** at the time.

The record also showed collaboration outside the ARD process. In the spring of 2022, the homebound teacher and Student's teacher on campus worked together to develop the appropriate curriculum and the *** grade teacher provided additional resources at Parent's request. The implementation of Student's remote homebound services evidenced a strong collaboration between the homebound teacher and Parent. The homebound teacher described Parent as an "excellent collaborator" and her presence during instruction and work with Student to employ coping strategies and signal when Student needed a break was "imperative" to ensuring Student could participate in and benefit from the instruction provided.

Parent remained steadfast in her request for concurrent, synchronous virtual instruction via the ***. However, the evidence showed she was not open to other suggestions from the District to meet Student's needs and her singular focus on a particular method of delivering instruction perhaps hindered a more collaborative and creative approach to developing Student's educational program.

A preponderance of the evidence demonstrates that services were provided in a coordinated, collaborative manner by key stakeholders. Petitioner failed to show that the District excluded Parent in bad faith or refused to listen to her.

d. 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. *V.P.*, 582 F.3d at 588; *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813-14 (5th Cir. 2012).

The evidence showed Petitioner made academic progress during the 2021-22 school year. Even though Student did not attend school in the District in the fall of 2021, Parent remediated any instructional loss by providing a structured homeschool program aligned with the *** grade curriculum and Student was on grade level academically in January 2022 except in ***. Student made progress on Student's fine motor skills/*** goal during remote homebound instruction and mastered the skills needed to be promoted to *** grade.

Apart from the few weeks Student attended in-person instruction, Student did not have any contact with peers or opportunities for socialization during the 2021-22 school year and Student received limited non-academic benefit. However, as discussed, in August 2021 the District proposed an IEP that included opportunities for exposure to peers and Parent rejected the District's offer of FAPE in favor of homeschooling. Because the non-academic measures the

District proposed were not implemented, the hearing officer is unable to analyze whether these measures conferred non-academic benefit. However, as discussed, these measures were reasonably calculated to meet Student's non-academic needs during remote homebound instruction in the fall of 2021.

Finally, while Student's March 2022 IEP did not provide for non-academic or socialization opportunities, the severity of Student's medical circumstances and Student's inability to consistently engage in instruction at the time supports the conclusion that the March 2021 IEP appropriately focused on the essential components of the *** grade curriculum.

2. Conclusion as to the Four Factors

In this case, Student's August 2021 IEP was not individualized on the basis of assessment and performance with regard to the amount of instructional time offered and this factor favors Petitioner despite the finding that the March 2022 IEP met this test. The remaining factors favor the District. Here, despite the insubstantial offer of instructional time proposed in August 2021, Petitioner made academic progress during the 2021-22 school year. Because educational benefit is "one of the most critical factors" in the analysis, when an educational benefit has been achieved, notwithstanding a negative finding that the IEP failed the first factor because it was not sufficiently individualized, the program can still support a finding the Student received a FAPE. *R.P.*, 703 F.3d at 813-15.

When Student's program is considered as a whole, Student was offered or provided a FAPE by the District during the 2021-22 school year. *Klein Indep. Sch. Dist. v. Per Hovem*, 690 F.3d 390, 397 (5th Cir. 2012). A preponderance of the evidence showed that Student's IEPs during the relevant time period were reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. at 188-89, 203-04; *Endrew F.*, 137 S. Ct. at 999.

VII. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proving the District denied Student a FAPE in the least restrictive environment by failing to provide concurrent, synchronous virtual instruction. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)-(ii); *Schaffer*, 546 U.S. at 62.

2. Student was provided a FAPE during the relevant time period and Student's IEPs were reasonably calculated to confer educational benefit in light of Student's circumstances. *Rowley*, 458 U.S. at 188-89, 203-04; *Endrew F.*, 137 S. Ct. at 999.

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requested relief is **DENIED**.

SIGNED August 5, 2022.

Kathryn Lewis
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO PARTIES

The Decision of the Hearing Officer 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. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).