

SOAH DOCKET NO. 701-21-2259.IDEA
TEA DOCKET NO. 176-SE-0521

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

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Student, by next friends Parent and Parent (Student or, collectively, Petitioner) brings this action against the Highland Park Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations.

The main issues in this case are whether the District failed to provide Student a Free Appropriate Public Education (FAPE) and whether the District improperly failed to find Student eligible for Dyslexia services and serve Student accordingly. The Hearing Officer concludes that, although the District was correct not to identify Student as a student with Dyslexia, the District has failed to confer a FAPE on Student.

II. PROCEDURAL HISTORY

A. Legal Representation

Petitioner was represented throughout this litigation by their legal counsel, George Shake with Duffee and Eitzen, LLP. Respondent was represented throughout this litigation by its legal

counsel, Nona Matthews and Jennifer Carroll with Walsh, Gallegos, Treviño, Russo and Kyle, P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted September 29-30, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by their legal counsel, George Shake. In addition, Student's parents attended the due process hearing as Student's next friends.

Respondent continued to be represented by its legal counsel, Nona Matthews and Jennifer Carroll. In addition, ***, the Director of Special Programs for the District, attended the hearing as the party representative. Both parties filed timely written closing briefs. The Decision in this case is due on November 30, 2021.

IV. ISSUES

A. Petitioner's Issues

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

1. Whether Student—currently eligible for special education as a student with an emotional disturbance, speech impairment, and Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD)—should also be found eligible for special education and related services as a student with a specific learning disability in the areas of Dyslexia, basic reading, written expression, and math calculations as recommended in a privately-obtained evaluation.
2. Whether the District failed to provide Student an evidence-based Dyslexia program with the eight required components and six areas of delivery methodology when

such a program was necessary to provide Student a Free Appropriate Public Education (FAPE).

3. Whether the District failed to provide Student specialized reading instruction from a Certified Academic Language Therapist (CALT) in a setting with a teacher to student ratio of no more than 1:3 when such instruction was necessary to provide Student a FAPE.
4. Whether the District failed to allow Student's parents to participate fully in planning Student's educational services, including Student's Present Levels of Academic Achievement and Functional Performance (PLAAFPs).
5. Whether the District has created Individualized Education Plan (IEP) goals designed to address Student's known deficits.
6. Whether the District has implemented Student's IEP; in particular, providing Student math instruction in Student's least restrictive environment as agreed to in the IEP.

B. Respondent's Legal Position and Additional Issues

The District generally and specifically denies Petitioner's issues and denies responsibility for providing any of Petitioner's requested relief.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requested the following items of relief:

1. Order the District to find Student eligible for special education and related services in the category of specific learning disability in the areas of Dyslexia, basic reading, written expression, and math calculations.
2. Order the District to provide Student an evidence-based Dyslexia program with the eight required components and six areas of delivery methodology.

3. Order the District to provide Student specialized reading instruction from a CALT in a setting with a teacher to student ratio of no more than 1:3.
4. Order the District to allow Student's parents to participate fully in planning Student's educational services, including Student's PLAAFPs.
5. Order the District to correct Student's IEP to indicate Student's parents did not waive the five-day waiting period after the IEP was developed before implementing it.
6. Order the District to create IEP goals designed to address Student's known deficits without reducing Student's instruction time in a general education setting.
7. Order the District to implement Student's educational program in Student's least restrictive environment as agreed to in the IEP.
8. Order the District to provide compensatory education services.
9. Order the District to reimburse Student's parents for tutoring services and private evaluations they obtained as a result of the District's failure to follow the IDEA.

VI. FINDINGS OF FACT

1. Student is *** years old and attends *** grade at *** in the District. Student was born in *** before moving to ***, in early 2014 when Student was *** years old. Student moved into the District from ***, during the summer prior to the 2019-20 school year. In ***, Student attended private school, public school, and home school at various times. Student attended public school during the 2018-19 school year. Student is a kind and nurturing *** who enjoys ***, playing on Student's iPad, and spending time with Student's ***. Student is eligible for special education and related services as a student with an Emotional Disturbance (ED), Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD), and a speech impairment.¹

Evaluation History Before 2020

2. Student was found eligible for special education and related services under the eligibility category of Developmental Delay prior to the 2015-16 school year. However, Student did

¹ J9, at 5, 8-9; J33, at 1, 36; TR 413.

not attend public school during the 2015-16 school year. Student instead attended a private school in *** supportive of Student's disabilities.²

3. In January 2016, after Student had already been identified as eligible for special education, a private evaluator conducted a comprehensive neuropsychological evaluation. The evaluator noted Student had several strengths, including intellectual skills, memory, and social skills. However, Student had a number of weaknesses in all areas of academic skills. Student's full scale Intelligence Quotient (FSIQ) should not be relied on in assessing Student's abilities. Student's academic skills were below age-level expectations. Student also exhibited social and motor skill *** and struggled with time-based requirements. The evaluator concluded Student had a significant developmental delay. Student met DSM-V criteria for a *** delay and qualified for special education as a student with a developmental delay. Student would need additional support for Student's ***, a lack of time-based demands, and significant flexibility from Student's teachers. The evaluation also recommended future evaluators look for potential learning disabilities, though no learning disabilities were apparent at the time of the evaluation.³
4. In November 2017 when Student was in *** grade at the same private school Student had attended since the 2015-16 school year, an outside evaluator in *** conducted a comprehensive psychological evaluation at the request of Student's family. The evaluator did not observe Student in-person in any of Student's classes. Student showed tremendous *** during testing and needed to be tested over multiple short sessions due to Student's lack of endurance for physical and mental tasks. Most of Student's academic abilities fell into the range expected of a student in ***, well below Student's *** grade peers. In particular, Student's reading level was indicative of a student who had just begun ***, well behind that of Student's peers.⁴
5. The evaluator found Student met criteria for a specific learning disability in reading and writing. The evaluator also found Student had ADHD. The evaluator found evidence of a developmental delay but not enough evidence to formally diagnose it. The evaluator noted that, while Student was performing at a *** grade level in math despite being in *** grade, math was an area of relative strength and therefore not an area in which Student had a specific learning disability. The evaluator made a number of recommendations, including specialized instruction in reading and writing in a small setting, methods to help Student's *** such as additional time for responses and ***, conducting OT and AT evaluations, and

² J1.

³ J1.

⁴ J2.

- a number of others. The evaluator did not mention a possibility Student had Dyslexia and did not recommend any Dyslexia-specific interventions.⁵
6. When Student arrived in the District from *** in 2019, the District conducted a Full and Individual Evaluation (FIE). Student was served primarily in a self-contained special education classroom in a public school in *** during the 2018-19 school year when Student was in *** grade. Student was receiving special education services in *** under the eligibility categories of a specific learning disability, ED, and OHI for ADHD.⁶
 7. The District performed ten standardized assessments in its FIE, including the Behavior Rating Scales for Children, Third Edition; the Kaufman Assessment Battery for Children, Second Edition, Normative Update; and the Comprehensive Test of Phonological Processing, Second Edition. The District conducted interviews with Student's parents and teachers. District evaluators reviewed both the 2016 neuropsychological evaluation and the 2017 psychoeducational evaluation described above. The District evaluators also observed Student in-person in class several different times.⁷
 8. As in the 2017 evaluation, Student exhibited weaknesses in every area of cognitive processing ability, including crystalized knowledge, fluid reasoning, long-term retrieval, and several others. Student did not exhibit a pattern of strengths and weaknesses, instead demonstrating weaknesses in every category. This is consistent with the finding of the 2017 evaluator, who found relative strengths in certain areas such as mathematics, but still found Student performing well-below grade level in all areas. An identification of a specific learning disability requires strengths and weaknesses, which Student did not exhibit. The District found Student's ***, as opposed to a specific learning disability, was the primary cause of many of Student's learning difficulties. Therefore, Student did not qualify as a student with a specific learning disability. Student did qualify for special education as a student with ED and OHI for ADHD due to Student's pervasive *** and Student's inability to maintain attention on tasks.⁸
 9. The FIE made a number of recommendations, including maintaining the current IEP goals as they were developed at Student's previous school in *** and updating them as needed, providing oral administration of directions and assignments, and limiting the amount of information Student must learn during a given instructional session. The FIE then made recommendations for instructional interventions in specific areas of weakness. The FIE

⁵ J2.

⁶ J9.

⁷ J9, at 2-3.

⁸ *Id.*, at 55; TR 499.

made six recommendations in the area of long-term storage and retrieval, one in short-term memory, eight in fluid reasoning, six in auditory processing, five in processing speed, four in visual processing, six in reading, four in math, and five in writing. Each of those was an area in which Student was behind Student's grade-level peers. The reading interventions included teaching comprehension monitoring, providing instruction with an emphasis on *** reading, and providing explicit vocabulary instruction.⁹

ARD Committee meetings in the District

10. On October ***, 2019, after Student had been a student in the District for a little more than a month, the District held an annual Admission, Review, and Dismissal (ARD) Committee meeting to consider the 2019 FIE and Student's IEP. Student's parents attended the meeting. The IEP contained three math goals, a *** goal, two reading goals, two adaptive behavior goals, a writing goal, and a social skills goal. Each goal was measurable, challenging, and based on Student's PLAAFPs. The IEP contained more than a dozen accommodations and they were based on the accommodations found in Student's FIE. Student was assigned to a special education *** classroom for Student's core classes—math, ***—and a general education setting with support from special education staff through the Positive Behavior Support (PBS) program for *** classes and lunch. The meeting ended in agreement.¹⁰
11. The District held three additional ARD Committee meetings during the 2019-20 school year, each of which Student's parents attended. The District conducted a speech evaluation in October 2019. Based on that evaluation, the ARD Committee met again in November 2019 to add speech therapy services to Student's IEP. The ARD committee added 60 minutes per week of speech therapy services and added speech impairment as an eligibility category. The ARD Committee met again in December 2019 to add a new reading goal and to discuss Student's placement. The District held another revision ARD Committee meeting to discuss Student's *** in May 2020. Each meeting ended in agreement.¹¹

December 2020 Private Evaluation

12. In December 2020, Student's parents obtained a private psychoeducational evaluation due to their concerns with Student's progress in reading, writing, and math. The evaluator reviewed the 2016, 2017, and 2019 evaluations described above as part of the evaluation. The evaluator found that Student had Dyslexia, a specific learning disability in written expression and math, ADHD, and a *** disability. While the 2017 evaluation had found

⁹ J9.

¹⁰ J10.

¹¹ J13, 14, 16.

Student had a specific learning disability in reading and writing, this was the first evaluation to find Student had Dyslexia.¹²

13. The December 2020 evaluation contained a number of shortcomings. First, the evaluator based her evaluation on no in-person observations of Student at school and no interviews with Student's teachers. Further, the evaluation used the Woodcock-Johnson IV to find Student had a score of *** in general intellectual ability. This was higher than a previous finding in 2017 of a score of *** in general intellectual ability. The evaluator stated this fell in the average range and she used this score as evidence all of Student's scores were in the average range. However, according to the Woodcock-Johnson IV, the average range is 90-110, placing Student's general intellectual ability score in the below-average range. This may have changed the evaluator's assessment, by her own admission through testimony, that Student had a specific learning disability if she had placed Student's score in the correct range.¹³

14. In addition to finding erroneously that Student's fluid reasoning fell in the average range, the evaluator also had scores in all areas of cognitive ability that were significantly higher than in any of the previous three evaluations. All previous evaluation had consistently found Student's cognitive ability to be in the low range in all areas. This evaluation differed drastically from the three previous ones. For instance, the 2020 evaluation found a fluid reasoning score of *** compared to a score of *** on the 2017 evaluation. The scores in the 2017 evaluation were consistent with both the 2016 evaluation and the 2019 FIE. A Student's scores should never deviate more than 8-10 points over time. In this case, the evaluator obtained a deviation of 23 points from the prior evaluation. In visual processing, the 2020 evaluation found a score of *** compared to *** in 2017. The 2020 evaluation was greatly out-of-step with all previous evaluations. The evaluator relied on a false definition of "average," a lack of in-person observations or discussions with Student's teachers who work with Student daily, and scores that greatly deviated with previous testing to draw the conclusion that Student was in the average range in most areas and thus had specific learning disabilities and had Dyslexia in the areas in which Student showed a relative weakness. She did not recommend Student receive reading instruction in a 1:1 setting. She recommended Student needed to receive reading instruction around other peers so they could model reading skills for Student.¹⁴

ARD Committee Meetings Following December 2020 Evaluation

¹² P29, at 18-20.

¹³ P29.

¹⁴ TR 59-60; 69-70.

15. On February ***, 2021, the District held an ARD Committee meeting to review the December 2020 outside evaluation which posited that Student had Dyslexia. The District continued to believe Student did not have Dyslexia. No prior evaluation had found Student had Dyslexia and Student’s teachers’ experiences with Student did not indicate Student had Dyslexia. The District attempted to obtain consent from Student’s parents to conduct an additional evaluation. Student’s parents refused to give consent for a new evaluation. To date, Student’s parents have not allowed the District to conduct an additional evaluation.¹⁵
16. At the February *** ARD Committee meeting, the District moved Student into general education classes for *** at Student’s parents’ request. The District wanted an opportunity to review the December 2020 in more detail with the evaluator present. The ARD Committee recessed so that could be arranged. On April ***, 2021, the ARD Committee reconvened. The District did not think Student had Dyslexia and noticed several questionable findings outlined above from the December 2020 evaluation. The District again requested consent from Student’s parents for the District to conduct its own evaluation. Student’s parents declined.¹⁶
17. In March 2021, Student’s parents, through their attorney, emailed a number of proposed PLAAFPs for the District to include in Student’s IEP. The District developed Student’s PLAAFPs in Student’s IEP based on Student’s functioning at the time. The PLAAFPs included some—but not all—of the statements Student’s parents asked to be included. PLAAFPs are designed to include strengths and needs as opposed to recommendations for future programming. However, each of Student’s parents’ requests, even ones that were not necessarily appropriate as PLAAFPs, was noted in the IEP itself.¹⁷
18. The District, despite not believing Student had Dyslexia, agreed to provide Dyslexia programming to Student. Rather than providing Student’s parents’ requested program—a research-based program the District was already providing in a general education setting to other students called “***”—the District instead offered a program called “***.” *** is a general education Dyslexia program developed by the Region 4 Education Services Center designed to serve students with Dyslexia. The program cannot be modified in any way for the unique circumstances of special education students. Instead, it must be implemented with fidelity without modifications for a student’s unique needs. Student did not need the program, because Student did not have Dyslexia. Student also did not need

¹⁵ J33.

¹⁶ *Id.*

¹⁷ *Id.*; TR 239.

services from a CALT, because Student did not have Dyslexia and Student was able to make progress on Student's IEP goals without a CALT.¹⁸

19. The District had no evaluation data supporting the use of ***. Even the evaluation finding Student had Dyslexia did not recommend that program. The District's reasoning for providing the program was that they "strongly feel it would be a good fit for Student," but that decision was not based on evaluation data or any other reasoning beyond the subjective feelings of District staff. ***. Student is pulled from Student's *** class four times per week for 45 minutes each time to receive instruction in a setting in which Student is the only student. Student is further behind Student's peers in Student's *** class, because Student is pulled during Student's *** class and thus misses the majority of class time in order to participate in ***. 45 minutes constitutes the majority of Student's *** class time. Student's *** class in the special education *** setting is one hour each day. The District pulls Student from the class for 45 out of 60 minutes to offer Student a different curriculum—one which cannot be modified—than what Student learns in the *** class. Student's *** class has written composition and reading comprehension aspects, neither of which is addressed in ***. Student misses those when Student is pulled from ***, where Student was making progress prior to being placed in ***. Student does not need *** and it is not individualized in any way to support what Student learns during Student's regularly scheduled *** class.¹⁹
20. During the meeting, the District agreed to provide a portion of Student's math education in a general education setting. The District had previously begun putting Student in the general education setting and then moving Student back to the special education for more specialized instruction prior to the ARD Committee meeting. The parties disagreed on the IEP but did agree on continuing to provide a portion of Student's math class in the general education setting. Respondent—through its attorney—attempted to gain Student's parents' agreement—through their attorney—to begin implementing this portion of the IEP, but Student's parents were unresponsive. On April ***, 2021, the District began providing math education partially in a general education setting and partially in a special education setting as it had done prior to the ARD Committee meeting.²⁰

Student's performance and services

21. Since April 2020, Student has worked three or four days per week for 45 minutes per session prior to school in the morning with a private tutor. The current private tutor is a ***. Student also occasionally receives weekend tutoring as well from her. She tutors

¹⁸ TR 270-72, 275, 281-82.

¹⁹ J33, at 33; TR 173-75, 325-26.

²⁰ J33.

Student primarily in reading. She also did some math work with Student at one point, but she primarily focuses on reading. It is not possible to tell the extent to which Student's private tutoring impacts the progress Student is making toward Student's IEP goals.²¹

22. From the time Student entered the District, Student has made progress toward each of Student's IEP goals. From October 2019-October 2020, Student mastered the majority of Student's IEP goals and made progress on each one. From October 2020-April 2021, Student demonstrated progress on each of Student's goals again. Student mastered Student's reading comprehension and reading fluency goals and was on track to master all of Student's goals. In addition, Student's MAP scores from spring 2021 and fall 2021 indicate Student has made improvement in both math and reading. ***.²²

VII. DISCUSSION

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.²³ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

B. Duty to Provide a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C.

²¹ TR 328, 342-44.

²² J21; J32; J40; TR 222-25, 255.

²³ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

§ 1400(d). The district has a duty to provide 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, 188-189, 200-201, 203-204 (1982).

In order for a child to receive a FAPE, a school district must provide a student an educational program reasonably calculated to enable a student to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 983, 1001 (2017). That progress must be something more than mere *de minimis* progress. *Id.*, at 1000.

C. FAPE

Petitioner's allegations

Petitioner alleges the District should have found Student eligible as a student with a specific learning disability for Dyslexia and then served Student appropriately as a student with Dyslexia. Petitioner wanted the District to provide a CALT to serve Student and to provide Student an evidence-based Dyslexia program, because Petitioner asserts the District should find Student has Dyslexia.

The District refused to change Student's eligibility without the opportunity to do its own evaluation. Student's parents refused to consent to the District's desired evaluation. The District, in the absence of additional data, served Student in a Dyslexia program. Student's parents requested the District serve Student in the *** Dyslexia program. Instead, the District served

Student in ***. The main question in the case is whether the District's chosen program provided Student a FAPE.

The Four-Factor Test

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

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

Cypress-Fairbanks Ind. 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).

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

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide 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, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009).

The District's obligation when developing Student's IEP and BIP is to consider Student's strengths, 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. Section 300.320(a)(1)(i). For Student, whose behavior impedes Student's learning and that of others, the District must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir.2012).

The evidence showed the District based the IEP on observation and assessment prior to April 2021. The District conducted its FIE in September 2019 when Student moved into the District. The District found Student did not have a specific learning disability. The previous evaluator who had found Student had a specific learning disability in 2017 had conducted no in-person observations of Student to observe how Student's *** contributed to Student's difficulties with learning and engaging in class work. *See* 34 C.F.R. Section 300.310(b) (requiring that an FIE contain an in-person observation).

The District implemented an IEP similar to the one Student's prior school in *** had implemented. The IEP had numerous accommodations and goals based on Student's PLAAFPs. Although the District's IEP did not specifically state Student had a specific learning disability, it continued to provide services and interventions in all areas of weakness. As long as a school district

evaluates a student to target specific issues a student is experiencing, it need not identify and diagnose every possible disability a child has. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3rd Cir. 2012). In this case, the District was targeting Student’s weaknesses in reading, writing, and math without specifically finding Student had a specific learning disability. The District also had a BIP to address Student’s behavioral issues related to Student’s ***. The District was addressing Student’s areas of need despite not specifically labeling Student a student with specific learning disabilities.

Then, in December 2020, a private evaluation determined Student had Dyslexia. In April 2021, the District placed Student in ***. No evaluator had recommended ***. No District staff member could give an evidence- or observation-based reason for recommending ***. *** is a Dyslexia program and the District’s evaluation and observations did not hint that Student might have Dyslexia. The District refused to provide Student a CALT, because Student did not have Dyslexia in the District’s opinion. *** cannot be modified to meet the needs of a student who, like Student in this case, is receiving special education, because it must be implemented with fidelity. Yet the District pulled Student from Student’s *** class for 45 out of 60 minutes each day to be the only Student receiving ***. The District continues to serve Student in this program. This decision is not based on assessment and performance. Therefore, the District is not basing Student’s IEP on the basis of Student’s current performance and the District’s assessments.

2. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “LRE requirement.” 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require a school district’s continuum of instructional

arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including mainstream, homebound, hospital class, *** room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

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

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

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

In this case, Student has not been educated in Student's LRE. Student is being pulled out of Student's *** class four days a week for 45 minutes at a time to be educated without access to any peers in ***. The evaluator who found Student had Dyslexia recommended Student not be educated in such a restrictive, one-on-one environment. The District does not feel Student has Dyslexia. Yet it still pulls Student out of Student's class to place Student in a Dyslexia program in a more restrictive setting without access to peers who do not have disabilities. Student's reading needs can be met in a special education *** class instead of the more restrictive, one-on-one setting.

Petitioner also raised the issue as to whether math should be provided in a general education setting. The parties have agreed to provide math instruction in a combination of a special education and general education setting. The District did implement this portion of the IEP with fidelity. Petitioner did not present evidence that Student should be educated entirely in the general education setting as opposed to the hybrid approach on which the parties have agreed previously.

However, due to the restrictive setting away from Student's peers in which the District delivers reading instruction, the district is not educating Student in Student's LRE.

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

The evidence showed the District collaborated appropriately with Student's parents. Student's parents attended each ARD Committee meeting. Their input was considered each time and often the District implemented the suggestions of Student's parents, including the suggestion to place Student in general education *** class. Petitioner argues Respondent did not incorporate all of Student's parents' requested PLAAFPs into the IEP. PLAAFPs are a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for children without disabilities). 34 C.F.R. Section 300.320(a)(1)(i). They are the starting point in forming an IEP for a student. *Andrew F.*, 137 S.Ct. at 1000. The District was not required to place each of Student's parents' requested statements into the PLAAFPs. *See White*, 343 F.3d at 380. The District incorporated the feedback of Student's parents and included each of

their requested statements somewhere in the IEP. The District collaborated sufficiently with Student's parents.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012). Whether a student receives passing grades and progresses from year-to-year are factors in whether a student is receiving academic benefit, but whether a student is making more than *de minimis* progress under the IEP is the key to understanding whether a student is receiving academic benefit. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 590-91 (5th Cir. 2009).

In this case, Student is making progress on Student's IEP goals. Student mastered the majority of them between October 2019 and October 2020 and made progress on all of them. Student also made progress during the 2020-21 school year on all Student's IEP goals. Student's MAP scores also demonstrated progress. However, this particular prong of the *Michael F.* factors is difficult to judge, because Student has been receiving tutoring four mornings per week from a ***. There was no method presented during the hearing to isolate the benefit Student receives from Student's academic program from the benefit Student receives from such frequent tutoring from an expert. Further, there is no evidence of Student's non-academic benefit. No one testified as to whether Student has friends at school or participates in extracurricular activities there.

5. Conclusion

From the evidence presented in this case, it does not appear that Student has Dyslexia. There is no evidence the Dyslexia program the District is providing Student in a restrictive one-on-one setting is providing Student academic benefit. What is clear is that the District has not

based the implementation of that program on observation and assessment. And it is not providing the program in Student's LRE, instead pulling Student out of Student's *** class for 45 minutes each day to provide a program not based on performance and assessment.

The District is appropriately collaborating with Student's parents. And while Student has received academic benefit from Student's program, the Hearing Officer does not weigh this heavily in the analysis. It is not possible to determine how much academic benefit is due to the District's program and how much is due to the daily tutoring from *** Student receives before school. *See Leah Z.*, 580 F.3d at 294 (noting that hearing officers have discretion to apply appropriate weight to the *Michael F.* factors as the hearing officer sees fit). When weighing the factors, the Hearing Officer concludes the District has not provided Student a FAPE.

D. Remedy

The District failed to confer a FAPE on Student. The District delivered Student a Dyslexia program it used with *** and provided it to Student in a restrictive, one-on-one setting. It did this despite the fact that there is a lack of evidence Student has Dyslexia.

An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite educational benefit denied by the school district's failure to comply with the IDEA. *Letter to Kohn*, 17 IDELR 522 (OSERS 1991). Compensatory education imposes liability on the school district to pay for services it was required to provide all along and failed to do so. *See Meiner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *D.A. v. Houston Indep. Sch. Dist.*, 716 F.Supp.2d 603, 612 (S.D. Tex. 2009), *aff'd* 629 F. 3d 450 (5th Cir. 2010) (upholding decision that student failed to prove amount of compensatory reimbursement student entitled for school district's failure to timely evaluate).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided prospectively in order to compensate the student for a deficient educational program provided in the past. *G. ex. Rel RG v. Fort Bragg Dependent Schs.*, 343 F. 3d 295 (4th Cir. 2003). A compensatory education award should place Student in the position in which Student would have been but for the school district's violations of the IDEA. *P.P. v. Northwest Indep. Sch. Dist.*, 839 Fed. App'x. 848, 856 (5th Cir. 2020).

Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 35, 374 (1996); *Harris v. Dist. of Columbia*, 19 IDELR 105 (D.D.C. 1992). A qualitative, rather than quantitative, standard is appropriate in fashioning compensatory and equitable relief. *Reid ex rel Reid v. District of Columbia*, 401 F. 3d 516, 523-24 (D.C. Cir. 2005).

Petitioner made several requests for relief around finding Student eligible as a student with Dyslexia and providing Student appropriate Dyslexia services. Petitioner has not offered sufficient evidence that Student has Dyslexia. The evaluation on which Petitioner relies for that contention contains a number of key errors and is out-of-step with previous evaluations. It also included no in-person observations of Student in Student's educational environment even though such observations are required under the IDEA. *See* 34 C.F.R. § 300.310(b) (requiring that an FIE contain an in-person observation). Petitioner has not consented to allow the District to conduct a new evaluation to this point. The District has requested permission to reevaluate Student since February 2021.

Petitioner also requested compensatory education for Student. Petitioner presented no expert testimony or evidence explaining the nature and scope of the compensatory services Student requires to remedy the provision of Dyslexia services in a restrictive environment. Petitioner bears the burden of demonstrating what, if any, compensatory services are due to put Student in the same position in which Student would have been but for the violations of the IDEA. *P.P.*, 839 Fed. App'x. at 856. Therefore, the Hearing Officer cannot order compensatory education services.

Further, Student's parents refused to consent to a reevaluation after the error-ridden evaluation on which they relied for Student's Dyslexia diagnosis. The District continued to offer a reevaluation in February 2021 and April 2021. Student's parents refused to provide consent to evaluate. The District should not be punished for an error compounded by Student's parents' refusal to provide consent to evaluate. *See D.A.*, 716 F.Supp.2d at 612.

VIII. CONCLUSIONS OF LAW

1. The District has failed to provide Student a FAPE in Student's LRE. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988.
2. All of Petitioner's claims arising under any laws other than IDEA are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503(a); 300.507, 19 Tex. Admin. Code § 89.1151(a).

IX. ORDERS

1. The District shall offer Petitioner an FIE. Petitioner may decide whether or not to consent to that evaluation.
2. If Petitioner consents to the FIE, the District must complete the FIE within 45 school days. The District must then hold an ARD Committee meeting within 15 school days following the completion of the FIE. Both timelines may be adjusted by agreement of the parties. During the ARD Committee meeting, the District shall consider adjustments to Student's IEP and potential changes to Student's eligibility.
3. The District shall hold an ARD Committee meeting within ten school days of receiving this decision. The parties may agree to an alternative date if a convenient date within ten school days cannot be found. During that ARD Committee meeting, the District shall immediately remove Student from ***. The ARD Committee shall also consider whether Student can be placed in a general education math class as opposed to splitting time between general education and special education. The District shall invite Student's outside tutor to the ARD Committee meeting so District staff and Student's tutor can provide services in concert for the benefit of Student. If the tutor cannot attend the ARD Committee

meeting, she shall be given an opportunity to submit feedback prior to the ARD Committee meeting in writing or via a phone call or Zoom meeting with District staff.

4. Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are **DISMISSED** as outside the jurisdiction of the hearing officer.
5. Petitioner's request for attorneys' fees and litigation costs are **DISMISSED** as outside the jurisdiction of the hearing officer

All other relief not specifically stated herein is **DENIED**.

SIGNED November 30, 2021.



Ian Spechler
Special Education Hearing Officer
For the State of Texas

X. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a) (b).