

DOCKET NO. 271-SE-0520

**STUDENT, B/N/F PARENT AND
PARENT,
Petitioner**

v.

**KATY INDEPENDENT SCHOOL
DISTRICT,
Respondent**

§
§
§
§
§
§
§
§
§

BEFORE A SPECIAL EDUCATION

HEARING OFFICER FOR

THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Student, b/n/f Parent and Parent (Student or, collectively, Petitioner) brought this action against the Katy Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482, and its implementing state and federal regulations. The main issue in this case is whether the District has offered Student a free appropriate public education (FAPE) in the least restrictive environment (LRE).

The Hearing Officer concludes that the District provided Student with a FAPE during the 2019-20 school year and offered Student a FAPE in the LRE for the 2020-21 school year. The Hearing Officer also finds that the District did not fail to properly identify an additional category of eligibility, nor did it fail to evaluate Student in all suspected areas of need with regard to communication and in-home and parent training needs. The Hearing Officer similarly concludes that the District did not violate procedural requirements related to prior written notice. The Hearing Officer finds, however, that the District committed a procedural violation of the IDEA by failing to perform an occupational therapy sensory evaluation of Student.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Dorene Philpot, and on October 7, 2020, Yvonnilda Muñiz filed a notice of appearance, joining Ms. Philpot as co-counsel. The District was represented throughout the litigation by its legal counsel, Alaina Smith and Kevin Christiansen with the District's Office of General Counsel.

III. DUE PROCESS HEARING

The due process hearing was convened on October 14-16, 2020. The hearing was conducted using the Zoom platform and was recorded and transcribed by a certified court reporter. Petitioner was represented by Ms. Philpot and Ms. Muñiz. *** and ***, Student's parents, attended the due process hearing.

Respondent continued to be represented by its legal counsel Alaina Smith, who was assisted by co-counsel, Kevin Christianson. In addition, ***, the Executive Director of Special Education for the District, attended the hearing as the party representative. Both parties timely filed written closing briefs. The Decision in this case is due December 23, 2020.

IV. ISSUES

A. Petitioner's Issues

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

- Whether the School District denied Student a FAPE by failing to propose and implement an Individualized Education Program (IEP) reasonably calculated to provide a FAPE in the LRE.
- Whether the School District failed to timely and comprehensively evaluate Student for special education and related services.

- Whether the School District violated student and parental procedural rights.

B. Respondent's Legal Position and Additional Issues

Respondent generally denied the allegations and contends it provided Student with FAPE during the relevant time period.

The District raised the following additional issue:

- Whether claims accruing outside the one-year statute of limitations should be dismissed.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

- An order directing the District to provide Student an appropriate IEP in the LRE that complies with the procedural and substantive requirements of state and federal special education laws, compensatory education, or other appropriate relief.
- If the District is, or has been, unwilling or unable to provide appropriate services, an order directing the District to reimburse Student's parent(s) for a parentally chosen placement or services, to include reimbursement for past and future private services.
- Any other relief the hearing officer finds appropriate or is recommended by an expert or evaluator.

B. Respondent's Requested Relief

- An order dismissing all claims arising outside the one-year statute of limitations.

VI. FINDINGS OF FACT

Student Needs and Eligibility

1. Student is ***-year-old *** grader in the District. Student lives with Student's mother, father, ***. Student was first diagnosed with autism in June 2011 at the age of *** when—after noticing a regression of milestones, decreased speech, loss of words, social withdrawal, and loss of focus—Parents sought an evaluation from the ***.¹
2. In 2016, Parents requested a full individual and initial evaluation (FIE) from the District. The District conducted the FIE and completed its written report on November ***, 2016 (2016 FIE). Student was *** years-old and was not enrolled in a public or private academic school setting at the time of the FIE.²
3. Student exhibited deficits in developing and maintaining social relationships; social-emotional reciprocity; and nonverbal communicative behaviors. In addition, Student demonstrated an excessive adherence to routines; highly restricted, fixated interests; repetitive behaviors; and reactivity to sensory input. Student met the criteria for a diagnosis of autism with “a very likely probability” of requiring substantial support.³
4. Student demonstrated significantly delayed academic skills in the areas of reading and math as well as deficits in executive functioning. Student's global intellectual functioning was in the moderately impaired or delayed range of intelligence, and Student exhibited deficits in adaptive behavior. Student also struggled with articulation and demonstrated deficits and inconsistent skills with respect to pragmatic communication.⁴
5. The FIE indicated that Student had a disability in the areas of autism, a speech impairment, and an intellectual disability. Although the FIE was completed in November 2016, Student did not enroll in the District until August 2017.⁵
6. Parents filed a request for a due process hearing in September 2018. The parties reached a mediated settlement agreement on or about October 18, 2018. Under the terms of the mediated settlement agreement, the District agreed to provide a psychological/psychoeducational evaluation by Dr. *** and an independent Functional Behavior Assessment (FBA) and related Behavior Intervention Plan (BIP) from ***, a board certified behavior analyst (BCBA). The District also agreed to provide professional development to campus teachers and paraprofessionals related to best practices for serving

¹ Joint Exhibit (JE) 1 at 2, 3, 33.

² JE 1 at 18, 33.

³ JE 1 at 3-5, 7.

⁴ JE 1 at 5-7, 21, 26-28.

⁵ JE 1 at 7, 16, 28; JE 6 at 2.

students with autism and further agreed to contract with an outside BCBAD⁶ to make recommendations based on in-class observations of Student.⁷

7. Student's ARD committee met on October *** and ***, 2018. The committee agreed that Student would be placed in a *** class setting for *** classes. The rest of Student's school day would be spent in the general education setting, including ***. An inclusion specialist attended the October 2018 ARD committee meetings and worked with campus staff afterwards to provide inclusion support related to Student's needs.⁸

Dr. *'s Report**

8. In accordance with the October 2018 settlement agreement, the District contracted with ***, Ph.D. and BCBAD, to observe Student in Student's *** grade class and make recommendations related to teaching strategies and supports for campus staff (***) Report). This report, dated December ***, 2018, was based on Dr. ***'s observations; a review of then-existing behavior goals and BIP; and consideration of behavioral data collected by the District. Parents did not receive a copy of this report prior to discovery in this matter.⁹
9. The *** Report provided a *** in response to staff requests. Although the District did not adopt this specific form, Respondent provided a daily *** to Parents from the beginning of the 2019-20 school year through early March 2020.¹⁰

Dr. *'s Independent Educational Evaluation (***) Evaluation)**

10. Dr. *** completed the psychological/psychoeducational evaluation of Student identified in the parties' October 2018 settlement agreement on January ***, 2019. The evaluation found that Student's overall ability related to cognitive functioning fell in the *** range, while overall adaptive skills and functional communication and study skills were rated in the clinically *** range for adaptive behavior deficits. With regard to academic performance, Student's reading, writing, and math scores fell in the *** range as did Student's oral expression and listening comprehension.¹¹
11. Dr. ***'s evaluation results were consistent with the 2016 FIE and revealed intellectual ability in the *** range. Student displayed relative strengths in basic reading skills and listening comprehension and relative weaknesses in mathematics skills and oral

⁶ A BCBAD is a board certified behavior analyst with a doctorate in the field.

⁷ JE 21 at 1-3; JE 5 at 1.

⁸ JE 4 at 33-34; JE 36 at 1; Transcript (TR) 132:5-12.

⁹ JE 5 at 1; Tr. 47:19 - 48:6, 48:15-20, 50:23-51:12, 152:8-19.

¹⁰ JE 5 at 5; JE 28; JE 32; Tr. 560:5-17.

¹¹ JE 6 at 1, 6-8; Tr. at 314:20-22.

expression. Dr. *** concluded that the Student qualified for a diagnosis of autism and an intellectual disability with a classification of that disability in the *** range.¹²

12. Dr. *** identified significant deficits across attentional domains, including the Student's ability to sustain and control Student's attention under various sets of circumstances. The evaluation, however, was silent as to a possible diagnosis of an attention-deficit/hyperactivity disorder (ADHD). Dr. *** acknowledged that it can be difficult to parse out the difference between attention issues tied to ADHD and those tied to autism. Whether an individual is diagnosed with both autism and ADHD is a matter presently left up to a clinician's professional judgment under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). Prior to the current version of the DSM-5, a diagnosis of autism would "rule out" the additional diagnosis of ADHD.¹³
13. Dr. *** observed that Student's deficits in self-regulation were problematic for learning as well as interacting with others and that the deficits were potentially disruptive to others. He also observed that Student's social skill deficits and atypical social behavior were problematic for social and independent functioning. He recommended that a systematic social skills training program be implemented and include direct instruction, modeling, one-to-one interaction, one-to-two or small group social groups, and applied practice.¹⁴

May 2019 ARD Committee Meeting

14. Ms. ***, BCBA, conducted an independent FBA and provided a written report to the District on May ***, 2019—the same day the District convened an annual ARD committee meeting for Student. During this meeting, the ARD committee reviewed Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) as well as the *** Evaluation. In determining Student's PLAAFP, the District relied on evaluations, teacher observations, Student performance, and a Brigance assessment—a standardized assessment of Student's basic skills in the areas of reading, writing, math, ***, and science. Parents disagreed with the results of the Brigance assessment and the PLAAFPs.¹⁵
15. The committee determined that Student needed a modified curriculum with an emphasis on key concepts and reduced expectations of grade-level standards as well as accommodations, assistive technology, and behavior and functional supports. The ARD committee reviewed Student's proposed goals. Parents actively participated in the discussion and revision of these IEP goals and benchmarks.¹⁶

¹² JE 6 at 11.

¹³ JE 6 at 11; Tr. at 391:13-24.

¹⁴ JE 6 at 14.

¹⁵ JE 8 at 1, 3-6, 34; JE 9.

¹⁶ JE 8 at 24, 34-36.

16. Because the District did not receive the *** FBA until the day of the meeting, the parties agreed to review it at a later date. As a result, Student's BIP remained unchanged from the previous year.¹⁷
17. The District recommended during the meeting that Student receive special education services for *** in a *** setting. The District also recommended that Student spend the remainder of Student's school day in the general education setting with in-class support. Parents requested that Student continue to receive special education services in the *** setting for *** with one-on-one support throughout the school day. The ARD committee agreed to Parent's request. In addition to the support of a one-on-one aide throughout the instructional day, Student received inclusion support in ***.¹⁸

2019-20 REED and Proposed May 2020 IEP

18. The first instructional day of the 2019-20 school year was August ***, 2020. The District convened a meeting for the Review of Existing Evaluation Data (REED) on September ***, 2019, that included Student's ARD committee members. The committee identified the available evaluations of Student which included the District's 2016 FIE, previous evaluations for assistive technology and music and occupational therapy, the *** Evaluation, and the *** FBA. The committee agreed that only a speech reevaluation was necessary. As a result, the REED became the new FIE upon completion of the speech reevaluation on November ***, 2019.¹⁹
19. The District sent an ARD Meeting Invitation to parents on January ***, 2020; February ***, 2020; and February ***, 2020. The ARD was scheduled for February ***, 2020, at 8:00 a.m. The District provided two to three weeks' notice of ARD meetings at Parents' request. Campus staff entered information related to Student into the school's Frontline special education software program on February ***, 2020. Parents were unable to attend the February *** meeting. The District continued to attempt to schedule an ARD committee meeting with Petitioner, offering dates throughout February, March, and April 2020.²⁰
20. Spring Break took place the week of March 9 through March 13, 2020. Students did not return to campus after Spring Break due to COVID-19, but began receiving instruction remotely approximately two weeks later.²¹
21. On March ***, 2020, Student's special education teacher emailed an *** program *** specialist (who holds certifications in special and general education as well as autism) to

¹⁷ JE 8 at 34.

¹⁸ JE 8 at 31, 35; Tr. at 533:24 – 534:7, 597:10-22.

¹⁹ JE 10 at 1, 7-8; JE 31 at 1; Tr. at 632:17-633:4.

²⁰ Respondent's Exhibit (RE) 5 at KISD 009875, 009877-009885; Petitioner's Exhibit (PE) 10E; Tr. 483:21-23.

²¹ JE 31 at 1; RE 7A-7F; Tr. at 414:7-24.

determine whether Student might benefit from some of the same online instructional programs *** was using during school closures.²²

22. Parents and the District agreed to amend the May 2019 IEP in accordance with a Special Education Emergency Contingency Plan (Plan) on or about May ***, 2020. The Plan agreed upon by Parents and the District offered direct speech therapy services for 30 minutes once a week or indirect services three times per grading period. Parents requested indirect speech services.²³
23. The Plan indicated that Student would receive modified work weekly and participate in learning through online tools and lessons, including ***. The Plan identified the following accommodations: supervision, visual aids (pictures, flashcards, etc.), manipulatives, frequent breaks, ***, positive reinforcement, chunking assignments, ***, and modified curriculum. It also identified additional resources that could be accessed through learning maps and District choice boards for ***.²⁴
24. The ARD committee meeting originally noticed for February ***, 2020, was held on May ***, 2020. The committee reviewed Student's PLAAFPs. Student made passing grades in a modified curriculum. As of March ***, 2020, Student was demonstrating mastery of Student's speech therapy goals. Student also met the third benchmark towards two of Student's annual reading goals and was making progress towards a third. Student made some progress from May 2019 to March ***, 2020, with respect to behavior and self-help goals. Although Student did not meet the benchmarks in Student's two *** goals, Student showed progress over the course of the school year. Student showed regression in one of Student's reading goals, all three of Student's math goals, and Student's science and *** goals. Student's lack of progress was a result of Student's prompt dependence and a lack of accuracy in certain skill sets.²⁵
25. Student was reading at an independent level *** and was able to answer *** comprehension questions correctly. Parents disagreed with the data and indicated that Student was reading higher level books at home and was able to answer questions about them. Parents expressed similar concerns regarding Student's reported present levels of performance in *** and math.²⁶
26. Parents provided videos of Student working one-on-one with Student's mother. In these videos, with visual and verbal prompting from the parent and limited or no visual or

²² PE 9 at 20; Tr. at 277:18-21.

²³ JE 14 at 2.

²⁴ JE 14 at 2-3.

²⁵ JE 15 at 46-48; JE 16 at 49; JE 24 at 1-17; Tr. at 594:6-13, 730:21-734:12.

²⁶ JE 15 at 4, 46, 47.

auditory distractions, Student was able to read a higher level book and write simple sentences on a dry erase board.²⁷

27. Student did not engage with peers or adults, attend to classroom instruction, or participate in small group activities in the general education setting. Student continued to struggle with ***. Parents offered input and suggestions related to the latter behaviors, including providing support for seating during instruction, ***, and reminders to slow down. The District identified seating and visual supports it used to meet Student's needs, noted Student's need for frequent movement, and agreed that *** were helpful.²⁸
28. The May 2020 IEP proposed to continue Student's modified curriculum, accommodations, and supports. The ARD committee reviewed proposed goals. Parents agreed with the speech goals, but expressed concerns and requested revisions to the reading, math, ***, science and *** goals. Student's goals were revised to take into account Parents' concerns.²⁹
29. District members of the ARD committee made the following recommendations for Student's placement during the 2020-21 school year: Because Student showed progress in reading and because reading was a preferred activity, Student would receive reading instruction in the *** setting. Due to Student's struggles with functional routines, lack of independence, and lack of progress in math, ***, science, and ***, Student would receive instruction in those subjects in a *** classroom. Student would attend *** in general education. Parents disagreed with the District's placement recommendations. They wanted Student to continue with Student's current placement in the *** and general education settings.³⁰
30. The District's *** program offers a full curriculum modified to meet the individual needs of students with cognitive and adaptive behavior deficits. The classroom is configured to minimize distractions and support whole group instruction, one-to-one and one-to-two instruction, and individual work. It is highly structured and incorporates organizational systems designed to develop the student's ability to function independently. The program uses ABA principles throughout the day and focuses on academic needs as well as ***, functional needs, communication, vocational needs, transition planning, and social skills. The District has procedures in place to ensure that the *** classroom aligns with behavior analysis principles and contracts with outside consultants, including at least one BCBAD, to provide student-specific support for teachers and paraprofessionals based on ABA principles when needed.³¹

²⁷ PE 11; Tr. at 361:10-19, 362: 4-10, 363:16-18, 363:23-364:1, 553:1-8.

²⁸ JE 15 at 6, 47; Tr. at 525:10-528:20.

²⁹ JE 15 at 3-7, 32, 47-49, 57-59; Tr. at 602:7-603:2.

³⁰ JE 15 at 49-50.

³¹ Tr. at 687:3-688:14, 689:6-691:18, 693:10-695:20, 698:7-700:12.

31. ABA strategies help students learn to manage their behavior and include, among other things, first/then practices, visual schedules and supports, structured teaching and learning, social skills training, and shaping, modeling, and task analysis. ABA strategies also recognize a prompting hierarchy in which prompts are given at the lowest level possible to secure learning engagement.³²
32. The District provided training on autism and general ABA principles to Student's teachers. In addition, campus education, support, and administrative staff collaborated at the beginning of each year to discuss Student's needs, curriculum modifications, and accommodations.³³
33. The District's special education *** setting provides small-group interventions in reading, math, and *** to students who may need reinforcement related to concepts taught in the general education setting, instruction provided at a slower pace, information presented in different ways, and/or access to supplemental materials, such as manipulatives. Students receiving support in a *** environment need to have the functional skills required to navigate the school building, use the bathroom independently, and sit and attend to instruction with other students working at the same level or on the same skills. Students in the *** setting are also expected to follow teacher instructions and work independently.³⁴
34. The ARD committee reconvened on May ***, 2020, discussed the Student's FBA and BIP, and revisited the issue of Student's placement for the 2020-21 school year. The District previously conducted an FBA in August 2018 (2018 FBA). The 2018 FBA identified three target behaviors: ***. The 2018 FBA determined that the primary function of Student's targeted behaviors was escape and avoidance of non-preferred tasks and that the behaviors served a secondary sensory response. A BIP was developed in 2018 to address the targeted behaviors identified in the FBA. It incorporated prevention techniques and teaching strategies, including first/then requests, frequent reinforcement, frequent breaks, a hierarchy of prompts, and prompt-fading. Although the 2018 FBA was included in the proposed May 2020 IEP, Student's BIP was revised based on multiple sources of information, including classroom observations, collected data, and the *** FBA.³⁵

***** FBA and Recommendations**

35. The *** FBA identified problematic behaviors, including ***. Student's revised May 2020 BIP targeted two of the behaviors identified in the *** FBA: ***. Consistent with Student's 2018 FBA, Ms. *** determined that the primary function of Student's behaviors

³² JE 5 at 1; Tr. at 214:24-215:1, 254:12-255:8, 689:6-21, 728:20-24.

³³ TR. at 102:5-10, 544:2-15.

³⁴ Tr. at 568:11-22, 569:1-15, 587:16-24, 705:13-18.

³⁵ JE 2 at 34-39; JE 16 at 1, 46; TR. at 633:5-13, 639:5-12.

was escape/avoidance and concluded that there were secondary concerns related to attention and sensory needs.³⁶

36. Ms. *** recommended frequent but short breaks, a ***, and prompt and proximity fading. A *** is a system by which a student receives frequent reinforcements. The May 2020 IEP and BIP proposed the use of a frequent reinforcement system with Student, frequent breaks, a first-then strategy to gain compliance, and teaching strategies that included a prompting hierarchy and prompt fading.³⁷
37. Ms. *** recommended that staff preview lessons with Student; incorporate errorless teaching strategies; and provide a dynamic learning environment in which Student would be able to stand for some instruction and have the chance to walk, jump, or run briefly and frequently when appropriate and under instructional control. Student's case manager previewed lessons with Student, embedded content lesson concepts across the curriculum, integrated errorless teaching strategies, and provided Student with a learning environment that incorporated the opportunity for movement by jumping, walking, and accessing the campus ***.³⁸

***** and *** Recommendations**

38. Dr. *** recommended that teachers use an orienting statement to help gain Student's attention and reminders to Student to remember what incentive Student was working for when redirection was necessary. Staff used the orienting statement, "Student, it's time to work," and the reinforcement reminder: "what are you working for?"³⁹
39. Dr. *** recommended that Student's program emphasize an ABA approach; use transition routines; ensure that the learning environment was not overly auditorily stimulating; and minimize visual distractions by blocking the line of sight through the use of cubicles or temporary furniture. Dr. *** also suggested using the ABA prompt hierarchy and providing alternate seating arrangements to maximize Student engagement.⁴⁰
40. Student's May 2019 IEP and the District's implementation of it included ABA principles and strategies, such as first/then practices, visual schedules and supports, frequent reinforcement, prompt-fading, and use of a prompt hierarchy. Student's accommodations included minimization of visual and auditory distractions, supervision during transitions, and proximity control. Student received instruction in *** in the *** setting which involved fewer students and provided flexible seating options, including an independent study carrel that helped to minimize visual distractions. The May 2020 IEP also included

³⁶ JE 9 at 9, 16, 26-27; JE 16 at 60-62; Tr. at 633:14-22, 642:2-11.

³⁷ JE 9 at 23, 24, 26; JE 16 at 60- 62; Tr. at 569:19-22, 603:6-11, 634:16-20, 635:2-15, 638:7-640:23.

³⁸ JE 9 at 24, 27; Tr. 558:14-559:15, 594:16-20, 639:24-640:10, 640:5-10.

³⁹ JE 5 at 1; Tr. at 554:18-555:6, 556:9-17.

⁴⁰ JE 5 at 2; JE 6 at 12.

ABA principles and strategies as well as accommodations for minimizing distractions, providing supervision during transitions, and proximity control.⁴¹

41. Dr. *** recommended that Student's program address Student's prompt-dependence and that it should include a balance of intensive support to develop Student's abilities to manage ***self with more independence along with opportunities to practice with typical children. Dr. *** recommended that goals should be drafted to designate the type and number of prompts that constitute a correct response and that prompts should be systematically faded as Student moved through the four levels of learning, including skill acquisition, fluency, maintenance and generalization.⁴²
42. Both the May 2019 IEP goals and benchmarks and those proposed in the May 2020 IEP measured Student's mastery of academic skills on a prerequisite level, behaviors, communication, and social and functional skills as well as the level of independence achieved with respect to relevant benchmarks over each grading period. This was accomplished by specifying the number and/or type of prompts that could be counted in a successful trial towards mastery and reducing the number of prompts while maintaining the target number of successful trials across grading periods.⁴³
43. Dr. *** recommended that Student's curriculum focus on functional academic skills, communication, self-help, self-regulation, and independent living skills and that Student's programming include social skills training and address time on task, staying in Student's assigned area, and minimizing escape behavior.⁴⁴
44. The May 2019 IEP included reading and *** goals for navigating text that is not in book form, reading and following directions, and ***. The May 2019 IEP also included speech goals for whole body listening, reciprocal turn-taking, and using a reduced rate of speech and increased volume while speaking. The IEP included a self-help goal in *** and a behavior goal for attention to task without ***.⁴⁵
45. The proposed May 2020 IEP included a speech goal for initiating greetings and farewells with peers and adults and behavior goals to remain seated, follow classroom routines, follow one-step directions, and follow directions for task completion. The May 2020 IEP also included a functional behavior goal related to ***.⁴⁶
46. Dr. *** indicated that Student needed instruction in sequential reasoning and patterning to help with problem-solving and comprehension. Both the May 2019 IEP and the proposed

⁴¹ JE 8 at 5, 24, 44-46; JE 16 at 10-30, 32-33, 60-62; Tr. at 644:4-13.

⁴² JE 5 at 1-2; JE 6 at 13.

⁴³ JE 8 at 8-22; JE 15, pp.10-31; Tr. at 639:15-23.

⁴⁴ JE 6 at 12, 14.

⁴⁵ JE 8 at 8-9, 12, 18, 21-22.

⁴⁶ JE 15 at 12, 26-30; Tr. at 644:17-645:13.

May 2020 IEP included goals for sequencing and identifying cause and effect—two specific examples provided by Dr. ***. The proposed May 2020 IEP also included a patterning goal.⁴⁷

47. Dr. *** recommended that Student's instruction include vocabulary from the classroom curriculum and be applied in a meaningful way to increase comprehension. Both the May 2019 IEP and the proposed May 2020 IEP included *** and science goals related to the appropriate identification of vocabulary words for each unit of study in those content areas.⁴⁸
48. Dr. *** opined that Student's goals and benchmarks should be regularly evaluated with collected data. District staff collected data related to Student's benchmarks and goals twice a week and reviewed the data with one another.⁴⁹
49. Dr. *** recommended an occupational therapy sensory motor evaluation, an augmentative technology assessment (specifically, whether the use of a *** system would be appropriate), and that Student's educational plan span both the home and school setting. Dr. *** suggested clarifying issues surrounding *** behavior and focusing on consistency and independence in this area across environments.⁵⁰
50. The District previously performed an evaluation for assistive technology, and Student used a *** system (***) as a result of that assessment. Both the District and Parents reported positive outcomes from Student's use of this system.⁵¹
51. The ARD committee considered in-home and parent training at both the May 2019 and May 2020 ARD committee meetings. The committee agreed on both occasions that viable alternatives to in-home training existed to assist Student with the acquisition of social and behavioral skills. The ARD committee considered information related to parent training and support provided by personnel with experience in Autism Spectrum Disorders and determined that Parents would be invited to group parent trainings offered by the District throughout the school year. In May 2019, the committee agreed that a picture schedule and visual task analysis of skills taught at school (specifically, with respect to *** behaviors) would be provided to Parents and that the District would also provide photos or icons for home routines and Student's communication system. In May 2020, the committee indicated that Parents would conference with teachers and service providers on successful strategies and that examples of visual supports and social and behavioral strategies would be provided upon request. Parents conferenced with staff outside of ARD committee meetings and met

⁴⁷ JE 6 at 14-15; JE 8 at 10-11; JE 15 at 11, 14-15, 17).

⁴⁸ JE 8 at 19-20; JE 15 at 24-25.

⁴⁹ JE 6 at 12; Tr. at 570:15-17, 585:10-14.

⁵⁰ JE 5 at 4; JE 6 at 12, 14-15.

⁵¹ JE 10 at 6.

with the campus principal prior to committee meetings. Members of the ARD committee did not believe that an in-home or parent training assessment was necessary.⁵²

52. Dr. *** recommended that the District provide ESY services in the areas of self-help, communication, and social skills training. The ARD committee discussed ESY services for summer 2019 and agreed that Student would receive one-on-one instruction over the course of two weeks in reading, math, and writing. The District planned to collect data during ESY for goals agreed upon by the committee. Parents declined those services because the campus Student would attend for ESY services offered a *** program, and Parents believed this to mean that Student would receive ESY services in a *** setting. In addition, the District offered related services for two weeks in the summer of 2019, but Parents were traveling and unavailable to receive those services.⁵³
53. The District offered Extended School Year (ESY) services again in May 2020—this time in a virtual setting due to COVID-19. Parents rejected the District’s offer due to the parties’ disagreement over the appropriate educational placement for Student. Parents also opted not to receive related services from the District that summer for the same reason, believing that the services would not be beneficial.⁵⁴

VII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The school district has a duty to provide FAPE to all children with disabilities ages 3-21 who reside within the jurisdictional boundaries of the school district. 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

⁵² JE 8 at 47; JE 16 at 62-63; Tr. at 442:11-443:11, 734:12-735:8.

⁵³ JE 6 at 13; JE 8, pp. 35-36, 51; Tr. at 177:16-20, 461:2-462:18.

⁵⁴ JE 15 at 49; Tr. at 177:21-25; 188:20-189:2.

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).

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁵⁵ *Schaffer ex. Rel. 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 the Petitioner to show that Respondent failed to provide Student with a FAPE and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit in the LRE. *Id.*

C. FAPE

1. The Four Factors Test

The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program meets IDEA requirements. 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 Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997). Even after the Supreme Court's decision in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), 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).

⁵⁵ 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).

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).

Parents contend in this case that the May 2019 IEP was not reasonably calculated to enable Student to make appropriate progress and that the District failed to implement it in a manner that would warrant the placement proposed in the May 2020 IEP. They assert that, with additional services and supports offered in the *** and general education settings, Student will make appropriate progress. The District, on the other hand, argues that the May 2019 IEP was sufficiently individualized and properly implemented, but that Student's unique circumstances dictate a more restrictive environment in order to confer an educational benefit.

The parties' positions require an analysis of the *Michael F.* factors with respect to both the May 2019 IEP implemented by the District and the May 2020 IEP proposed by the District.

2. Program 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 one that is 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). An IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 989.

When developing an IEP and behavior plan, a school district must consider the student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. 300.320(a)(1)(i). For a student whose behavior impedes Student's learning and that of others, the school 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).

3. The May 2019 IEP

In May 2019, the ARD committee developed academic, functional, speech therapy, behavior, and *** goals based on Student's present levels of performance as determined by teacher observations and Student performance in the classroom and on assessments as well as the *** Evaluation.⁵⁶ Because Student struggled with prompt dependence, the goals and related benchmarks were specifically tailored to measure progress as well as the level of independence achieved over each grading period. This was accomplished by specifying the number of prompts that could be counted in a successful trial towards mastery and reducing the number of prompts while maintaining the target number of successful trials across grading periods.

Student's accommodations included minimization of visual and auditory distractions, supervision during transitions, proximity control, and use of visuals for daily schedule and classroom expectations. Although the District recommended a *** setting for *** for the following school year, Parents requested a *** setting for those subjects. The District agreed to Parents' request and provided Student with instruction in those subjects in a *** setting with a one-to-one aide. Student spent the remainder of Student's instructional day in the general education classroom, working on a modified curriculum at a prerequisite skill level with the support of Student's aide,

⁵⁶ Parents disagreed with the present levels reported by the District during the ARD committee meetings in May 2019 and May 2020 and indicated that Student performed at a higher level across multiple subjects at home. Parents' disagreement focused in large part on a standardized assessment of basic skills referred to as the Brigance assessment. While the Brigance provided a baseline for Student's acquisition of some basic skills, the goals developed by the ARD committee were driven by evaluations, teacher observations, and classroom performance. Moreover, goals were often revised to incorporate Parents' input and address their concerns.

assistive technology, frequent breaks, and access to the campus ***. Student also received inclusion support during *** classes.

Consistent with the recommendations of Drs. *** and ***, Student's program offered a balance of intensive supports in an attempt to promote independence and provide opportunities to practice with non-disabled peers, incorporated ABA principles, and sought to reduce prompt dependence through, among other things, the use of a prompt hierarchy and prompt-fading. The Student's 2018 BIP focused on ***, while Student's IEP included a goal related to maintaining focused attention to tasks. The 2018 BIP incorporated prevention techniques and teaching strategies to eliminate targeted behaviors, including first/then requests, frequent reinforcement, frequent breaks, a hierarchy of prompts, and prompt-fading.

The District also offered Student ESY services for summer 2019 and agreed that Student would receive one-on-one instruction over the course of two weeks in *** and that it would collect data during ESY for goals agreed upon by the ARD committee. In addition, the District offered related services for two weeks in the summer of 2019.⁵⁷

Taken as a whole, the May 2019 IEP was individualized on the basis of Student's assessment and performance. *Klein Independent School District v. Per Hovem*, 690 F. 3d 390, 391 (5th Cir. 2012).

4. The Proposed May 2020 IEP

The ARD committee met on May ***, 2020. A review of Student's present levels of performance revealed that Student failed to make sufficient progress towards many of Student's annual IEP goals. Student continued to be prompt dependent in Student's current placement and lacked accuracy in certain skill sets. Although Parents continued to disagree with the PLAAFPs reported by the District, they worked with the District to build upon previous goals and develop

⁵⁷ Parents declined the ESY services based on their concern that the services were being provided on a campus that offered a *** program. They were also unable to take advantage of the related services due to their travel schedule.

new ones to address Student's specific needs in speech therapy, reading, math, ***, science, ***, behavior, and ***. Student's goals and benchmarks continued to be written in a manner that measured Student's progress through the filter of Student's independent ability. Under the proposed IEP, Student would continue to work on a modified curriculum and receive the necessary accommodations and supports identified above.

The District members of the ARD committee made the following recommendations for Student's placement during the 2020-21 school year: Because Student showed progress in reading and because reading was a preferred activity and Student was therefore able to attend to instruction for a longer span of time, Student would receive reading instruction in ***. Due to Student's struggles with functional routines, resulting lack of independence, and lack of progress and/or regression in math, ***, science, and ***, Student would receive instruction in those subjects in a *** setting. Student would attend *** with Student's non-disabled peers in general education.

The ARD committee also reviewed Student's BIP which had been revised to focus on two behaviors identified in the *** FBA and areas of need identified in the *** Evaluation—***. The District offered ESY services, this time on a virtual platform due to COVID-19. Parents once again declined both ESY and related services, believing that those services would not be beneficial in light of the District's placement recommendation.

The program proposed in the May 2020 IEP further individualized an already intensive program: The *** setting is tailored to meet the functional, social, ***, and communication needs of students with cognitive and adaptive behavior deficits. It is physically configured and instructionally designed to promote independence as well as acquisition, fluency, maintenance and generalization of skill sets. The continuum of settings—from general education to *** to ***—reflects a menu of opportunities and supports uniquely tailored to the needs of this particular student and is consistent with the recommendations made by the independent evaluators and Dr. ***.

Here again, this program—taken as a whole—was individualized on the basis of Student's performance and assessment. *Per Hovem, 690 F. 3d at 391.*

5. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R. § 300.114(a)(2)(i)(ii).

One of the principal issues in this case is whether the District’s proposed placement of Student in a *** program for a portion of Student’s school day comports with the IDEA’s requirement that children be educated in the least restrictive environment. To answer this question, we must consider whether Student can be satisfactorily educated in the general education setting with the use of supplemental aids and services. And if not, we must determine whether the District mainstreamed Student to the maximum extent appropriate. *Daniel R.R. v. State Bd. of Educ.*, 874 F. 2d 1036, 1048 (5th Cir. 1989).

a. Whether Student can be Satisfactorily Educated in the General Education Setting with the use of Supplemental Aids and Services.

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

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

In this case, Student is eligible for special education as a student with autism, a speech impairment, and an intellectual disability that falls in the moderate range. Student's overall ability related to cognitive functioning is in the *** range while Student's adaptive behavior is in the *** range. The District has provided Student with a one-to-one aide, a modified curriculum that allows Student to access the general education curriculum at a prerequisite skill level, *** support for *** as well as inclusion support for ***. Student has a behavior plan and receives behavioral supports and accommodations that include visual schedules and supports, first/then requests, frequent breaks, frequent reinforcement, and access to the campus *** to address sensory needs. The record also reflects that Student does not engage with peers or adults, attend to classroom instruction, or participate in small group activities in the general education setting. Student's difficulty with self-regulation and inappropriate social behavior negatively impacts Student's ability to learn and is potentially disruptive to others. Notwithstanding the modified curriculum and the intensive supports and accommodations provided, Student has remained heavily prompt-dependent, demonstrated an inability to independently engage in the functional routines necessary to navigate the general education and *** settings, and overall made minimal progress towards several annual IEP goals.

The record, thus, demonstrates that Student needs more support than what can be provided solely in the general education and *** settings.

b. Whether the Placement Proposed in the May 2020 IEP Mainstreams Student to the Maximum Extent Appropriate.

The evidence establishes, instead, that Student needs a program that incorporates ABA principles and that curriculum and learning activities should focus on functional academic skills, self-regulation, self-help skills, communication, social skills, and independent living skills. The record also shows that Student's ability to focus and pay attention should be addressed through environmental modifications, such as ensuring that the classroom environment is not overly auditorily stimulating, minimizing visual distractions, and using transition routines and cues to

minimize disruption.⁵⁸ Moreover, Student's program should include a balance of intensive support to develop Student's abilities to manage ***self with more independence along with opportunities to practice with non-disabled peers. The weight of credible evidence establishes that the placement proposed by the District in the May 2020 IEP is the least restrictive setting in which the District will be able to meet Student's needs in this regard.

The District's *** program offers a full curriculum that is modified to meet the individual needs of students with cognitive and adaptive behavior deficits. The classroom is configured to minimize distractions and support whole group instruction, one-to-one and one-to-two instruction, and individual work. It is highly structured and incorporates organizational systems designed to develop the student's ability to function independently. The program uses ABA principles throughout the day and focuses on academic needs as well as ***, functional needs, communication, vocational needs, transition planning, and social skills. Importantly, the District is not suggesting that Student be assigned to this setting for the entire school day. Rather, the District proposes additional settings along a continuum to further support Student's movement through the four levels of learning identified by Dr. *** and to provide Student with the opportunity to practice these skills with Student's non-disabled peers in the general education setting as recommended by Dr. ***. In this manner, the District's proposed placement mainstreams Student to the maximum extent possible.

6. 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

⁵⁸ Notably, the videos Parents provided at the May 2020 ARD committee meeting demonstrate Student's ability to make progress in an environment consistent with the District's placement recommendation which includes, among other things, the opportunity for instruction in a one-on-one or small group setting when appropriate while minimizing visual and auditory distractions.

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 establishes that services were provided in a coordinated, collaborative manner by key stakeholders. The District collaborated with parents. The District provided Parents with appropriate notice of proposed ARD committee meetings. Because of their busy schedules, Parents requested two to three weeks’ notice of the meetings. The District honored their request. Parents conferenced with staff outside of ARD meetings and met with the campus principal prior to ARD committee meetings. Parents were active members of the ARD committee during both the May 2019 and May 2020 ARD committee meetings. The District revised goals to incorporate Parents’ input and to address their concerns regarding Student’s education. The District made adjustments to Student’s program and agreed to Parents’ request to keep Student in a ***/general education setting for the 2019-20 school year, even though the District’s recommended placement included a *** setting. The District also provided a daily *** to Parents from August 2019 until approximately March 2020 when campuses in the District were closed due to COVID-19.

Members of the staff who worked with Student collaborated with one another. Campus education, support, and administrative staff collaborated at the beginning of each year to discuss Student’s needs, curriculum modifications, and accommodations. Student’s case manager, paraprofessional, and classroom teacher collected data on Student’s progress and reviewed it to evaluate progress. The District provided training to Student’s teachers and support staff on general ABA principles and autism. Meanwhile, Student’s case manager consulted with a program specialist in an effort to identify resources and provide support for Student learning during school closures.

Finally, as discussed more fully above, the May 2019 and May 2020 IEPs and 2020 BIP either reflected, or were consistent with, recommendations made by Drs. *** and *** and Ms.

***. Meanwhile, the District incorporated suggestions made by Dr. *** into its teaching strategies and supports for Student.

Parents argue in this case, however, that the District's efforts were insufficient. They contend that they were denied a meaningful opportunity to participate in the educational decision-making process for Student. Their argument is threefold. First, they contend that the District was obligated to provide them with a copy of Dr. ***'s report, and that it failed to do so. The *** report, however, arose out of the parties' 2018 settlement agreement which required the District to contract with an outside BCBAD to make recommendations based on in-class observations of Student. It was not an evaluation of Student's needs and abilities. Rather, it was intended to provide teachers and staff with strategies and recommendations to support Student's learning. Admittedly—while there was nothing in the parties' settlement agreement that required disclosure of the report to parents—disclosure would have been the better practice in this case. Nonetheless, there is no evidence that the District intentionally withheld the report or otherwise did so in bad faith. Moreover, the record reflects that the District followed many of Dr. ***'s recommendations and provided a daily *** to Parents during the 2019-20 school year similar to the one included in Dr. ***'s report.

Second, Parents assert that—although the District received the *** FBA on May 20, 2019—it did not discuss the FBA with them or revise Student's BIP until May 2020. The evidence establishes, however, that the District did not have a chance to review the *** FBA before Student's ARD committee meeting which occurred on the same day it received the FBA and that the parties therefore agreed to discuss it at a later date. The evidence also shows that—approximately two weeks into the beginning of the new school year—the District convened a meeting of Student's ARD committee members for a REED. The committee identified available evaluations of Student which included, among others, the *** Evaluation and the *** FBA. The committee agreed that only a speech reevaluation was necessary. As a result, the REED became the new FIE upon completion of the speech reevaluation on November ***, 2019. By January ***, 2020, the District began its attempts to schedule an ARD committee meeting with Parents. The meeting was originally noticed for February ***, 2020, but due to Parents' schedule, it did not take place until May 2020. These facts do not depict the actions of a school district that is

attempting to withhold information from parents in an effort to exclude them from the decision-making process.

Third, Parents also argue that the District predetermined Student's placement in a *** classroom. Predetermination occurs when a school district makes educational decisions so early in the planning process that it deprives the parents of a meaningful opportunity to fully participate as equal members of the ARD committee. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 769 (5th Cir. 2018) (citations omitted).

Parent's predetermination argument is based, for the most part, on entries made to the District's special education software system on or about February ***, 2020, and an email from Student's case manager to a *** program specialist requesting resources to use during school closures. Parents' arguments here are not persuasive. They overlook the fact that the District had scheduled an ARD committee meeting for February ***, 2020. Drafting documents, entering data, and preparing for an ARD meeting are logical steps to take prior to the meeting and, without more, do not denote predetermination. Parents' reliance on an email between colleagues attempting to identify resources to meet Student's needs is equally unavailing. Indeed, the third factor of the *Michael F.* analysis explicitly contemplates this type of cooperation and collaboration among stakeholders—a term which reasonably includes not only a student's teacher, but also other District staff members with different areas of experience and expertise.

The credible weight of evidence demonstrates that services were provided in a coordinated, collaborative manner by key stakeholders with respect to the May 2019 IEP. In addition, Parents failed to show that the District excluded them in bad faith or refused to listen to them.

7. 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). A student need not demonstrate both academic and nonacademic benefits. Academic benefit alone is sufficient. The evidence in

this case shows that Student made passing grades in a modified curriculum with intensive supports. It also establishes that Student met Student's speech therapy goals and made progress in reading as well as some progress over the course of the year towards IEP goals in ***, behavior, and ***. Student thus received an academic benefit from the program provided under the May 2019 IEP.

The record reflects, however, that Student struggled in math, science, ***, and even in areas where Student showed some growth. It also shows that this lack of progress is the result of Student's deficits in independence as well as the skills necessary to make progress in non-preferred activities in less restrictive settings. Under these circumstances, the District's proposed placement of Student in a *** setting for ***; a *** setting for reading; and general education for the rest of Student's school day is reasonably designed to confer academic and nonacademic benefits.

Based on the four factors of *Michael F.*, the evidence establishes that the District provided a FAPE to Student under the May 2019 IEP and has proposed a FAPE in the LRE under the May 2020 IEP.

D. Identification

The IDEA places upon school districts the obligation to identify, locate, and evaluate each student with a disability who needs special education services as a result of that disability. 34 C.F.R. §§ 300.111(a)(1), 300.201. Parents contend in this case that—although Student was eligible for special education and related services as a student with autism and an intellectual disability—the District denied Student a FAPE by failing to also identify Student with ADHD under an OHI classification. Caselaw establishes, however, that a student's category of eligibility is not determinative of the services Student receives. IDEA does not concern itself with labels, but with whether a student is receiving a FAPE. *Board of Educ. Of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982).

The record in this case reflects that the differences between attention issues tied to ADHD and those tied to autism are difficult to parse out and that whether an individual is diagnosed with both autism and ADHD is a matter presently left up to a clinician's professional judgment under

the DSM-5. In fact, prior to the current version of the DSM-5, a diagnosis of autism would “rule out” the additional diagnosis of ADHD. The evidence establishes that the services, supports, and accommodations recommended to address Student’s attention-related needs were not based on the category of Student’s eligibility, but on Student’s need for those services, supports, and accommodations. As such, Parents’ claim that Student was denied a FAPE as the result of the District’s failure to identify Student as a student with an OHI due to ADHD is without merit.

E. IEP implementation

Parents also contend that the District failed to adequately implement Student’s IEP while schools were closed in spring 2020 and request “day-for-day” compensatory services for five months—presumably from March ***, 2020, until the first day of classes in August 2020. In determining whether a school district failed to adequately implement a student’s IEP, thereby denying the student a FAPE, a hearing officer must consider whether there was a significant or substantial failure to implement the IEP under the third *Michael F.* factor and whether there were demonstrable academic and nonacademic benefits from the IEP under the fourth factor. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020). That is, petitioners must show more than a *de minimis* failure to implement all elements of an IEP. They must demonstrate that the school district failed to implement substantial or significant provisions of the IEP. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000).

Notably, Parents and the District agreed to amend the May 2019 IEP under 34 C.F.R. § 300.324 in accordance with a Special Education Emergency Contingency Plan (Plan) on or about May ***, 2020. The U.S. Department of Education explicitly contemplated the need for these types of IEP amendments in the wake of the pandemic. *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities*, 76 IDELR 104 (OSERS/OCR Mar. 21, 2020) (stating that parents and school districts could agree to amend a student’s IEP and develop a written document reflecting the amendment without a meeting if an annual ARD committee meeting had been held); *see* also 34 C.F.R. § 300.304(a)(4)(i). Parents do not dispute the validity of the amendment.

The Plan agreed upon by Parents and the District offered direct speech therapy services for 30 minutes once a week or indirect services three times per grading period. Parents requested indirect speech services. The Plan indicated that Student would receive modified work weekly and participate in learning through online tools and lessons, including ***. The plan also identified Student's accommodations and other resources that could be accessed through learning maps and District choice boards for ***.

Although Parents offered evidence to show that Student received virtual instruction during the school closure, they did not explain how this resulted in a failure by the District to implement substantial or significant provisions of Student's IEP—either as originally written or as amended.

The relevant timeframe alleged for Parents' "failure to implement" claim is problematic as well. It does not take into account the fact that Parents rejected ESY services for summer 2020 due to the parties' disagreement over the appropriate placement for Student. Thus, even if Parents had met their burden of showing that the school district failed to implement a substantial or significant portion of Student's IEP, the relevant timeframe appears to be much narrower in scope. Moreover, to the extent Parents seek day-for-day compensatory services, their request is not supported by authority in the Fifth Circuit which recognizes a qualitative—rather than a quantitative—approach to compensatory education. *O.W. by Hannah W.*, 961 F.3d at 800 (citing *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005), and stating that compensatory awards should place students in the position they would have been in if they had received the appropriate services)). Parents here failed to present any evidence at the hearing as to the nature and extent of compensatory services that might be required to meet this standard. In short, Parents' did not meet their burden on this issue.

F. Procedural Requirements

In addition to the claims asserted above, Parents argue that the District committed procedural violations of the IDEA by failing to provide prior written notice and comprehensively evaluate Student.⁵⁹

Liability for a procedural violation only arises if the procedural deficiency: (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (iii) or caused a deprivation of educational benefits. *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F. 3d 804, 812 (5th Cir. 2003). However, the IDEA does not preclude a hearing officer from ordering a school district to comply with statutory procedural requirements. *See Dawn G. v. Mabank Indep. Sch. Dist.*, 2014 WL 1356084, at *5-6, *8 (N.D. Tex. Apr. 7, 2014) (stating that a hearing officer may find procedural defects yet not find a denial of FAPE).

1. Prior Written Notice

Petitioner contends that the District failed to provide required prior written notice. Under section 300.503, written notice must be given to the parents of a child with a disability a reasonable time before the school district proposes or refuses to change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a)(1) - (2). Student was identified by the District as a student with autism, an intellectual disability, and a speech impairment in November 2016. Dr. ***'s evaluation confirmed these disabilities in January 2019. There is no evidence in the record to suggest that the identification of Student's disabilities has changed since Student was first evaluated.

Nonetheless, Petitioner argues for the first time in Petitioner's Closing Brief that the District should have provided prior written notice before removing the term OHI from the first

⁵⁹ Parents' procedural claims related to the District's alleged withholding of documents, predetermination, failure to offer a continuum of alternative placement, and failure to implement Student's IEP during school closure are addressed in Sections VII(C)(1) - (3) and (E) above.

page of Student's IEP. Petitioner's argument is without merit. Petitioner asserts that an OHI designation "simply fell off the cover page" of Student's IEP and that the District was obligated to provide prior written notice before removing that term from a section of the IEP entitled "Review of Evaluation Data and Other Information." *Petitioner's Closing Brief* at p. 4. Each of the IEPs identified by Petitioner, however, consistently state that Student "meets the eligibility criteria" for the three disabilities identified above. Because Petitioner has not offered credible evidence of any other occasion upon which the District was required—but failed—to provide prior written notice, Student has not established a procedural violation of 34 C.F.R. § 300.503(a).

2. Sufficiently Comprehensive Evaluations to Identify All Special Education and Related Services Needs

The IDEA and its implementing regulations dictate that each student with a disability must be assessed "in all areas related to the suspected disability." 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4). These areas include, "if appropriate, . . . social and emotional status, . . . academic performance, communicative status, and motor abilities." 34 C.F.R. § 300.304(c)(4). The regulations further require that evaluations must be sufficiently comprehensive to identify all of the child's special education and related services needs . . ." 34 C.F.R. § 300.304(c)(5). Parents assert here that the District should have performed a "Total Communication" evaluation and conducted assessments for in-home and parent training and an occupational therapy assessment to address Student's sensory needs. A district's failure to comprehensively assess a student in all areas related to a suspected disability can result in a procedural violation of the IDEA (unless it meets one of the three criteria identified above—in which case it is a substantive denial of FAPE). *See Amanda P. v. Copperas Cove Indep. Sch. Dist.*, 2020 WL 1866876, *4-5 (W.D. Tex. Apr. 14, 2020); *Dawn G.*, 2014 WL 1356084, at *6; *see also* 34 C.F.R. §§ 300.304(c).

We turn first to whether Respondent was obligated to provide an occupational therapy evaluation for Student's sensory needs. Both FBAs at issue in this matter indicated that Student's problematic behavior served a secondary sensory purpose, and the *** Evaluation recommended a sensory evaluation as well as the use of a sensory diet throughout the day. Although the District implemented sensory-related behavior supports, there is no evidence in the record that these

supports were provided in response to needs identified through an appropriate assessment conducted by an occupational therapist. Because the District failed to assess Student's sensory needs through occupational therapy, the District committed a procedural violation of the IDEA. For the reasons stated above, however, this procedural violation did not result in a substantive denial of FAPE.

Next, we consider whether the District improperly failed to perform an assessment for in-home and/or parent training.⁶⁰ The ARD committee considered the possible need for these related services at the May 2019 and May 2020 annual ARD committee meetings. The committee agreed on both occasions that viable alternatives to in-home training existed to assist Student with the acquisition of social and behavioral skills. The record also indicates that the ARD committee considered information related to parent training and support provided by personnel with experience in Autism Spectrum Disorders and determined that Parents would be invited to group parent trainings offered by the District throughout the school year. The committee noted in May 2019 that visual supports and icons would be provided to Parents and, in May 2020, that Parents could conference with teachers and service providers on successful strategies. Examples of visual supports and social and behavioral strategies would be provided upon request. The record also reflects that Parents conferenced with staff. These facts indicate that the ARD committee considered and took steps to address parent and in-home training needs. Thus, it cannot be said that the District failed to assess Student's needs in this regard.

Finally, Parents complain that the District failed to conduct an appropriate communication evaluation, and they request a Total Communication evaluation. Respondent, however, conducted an assistive technology evaluation, and Student uses a *** system (***) as a result of that evaluation. Both Petitioner and Respondent reported positive outcomes related to Student's use of the PCS, and none of the members of the ARD committee recommended a reevaluation of

⁶⁰ Parent's Closing Brief seeks an in-home/parent training assessment conducted by a BCBAD as a part of Petitioner's requested relief, and Parents offered testimony on the issue during the hearing. Nonetheless, the Closing Brief does not provide an argument (and the Request for a Due Process Hearing does not allege) that the District should have conducted such an assessment but failed to do so. As a result, it is unclear whether Petitioner contends that this is one of the areas of possible need that should have been assessed by the District. In an abundance of caution, the Hearing Officer assumes that it is and provides her decision on the issue accordingly.

Student's need for assistive technology when the specific opportunity came up to do so at the REED in September 2019. Nor was any mention made of a Total Communication evaluation by Drs. *** or *** or Ms. ***. As such, it cannot be said that Respondent violated the procedural requirements of the IDEA by failing to conduct this evaluation, particularly when the evidence shows that Student was receiving an educational benefit from the ***.

VIII. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).
2. Respondent provided Petitioner with a free appropriate public education and developed and implemented an appropriate IEP for the 2019-20 school year that provided an educational benefit. Petitioner did not meet Petitioner's burden of proof on this issue. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Schaffer*, 546 U.S. at 62; *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997); 34 C.F.R. §§ 300.22, 300.323 (a); 19 Tex. Admin. Code § 89.1055 (e).
3. Respondent offered a free appropriate public education and developed an appropriate IEP in the least restrictive environment for the 2020-21 school year that was reasonably calculated to provide an educational benefit. Petitioner did not meet Petitioner's burden of proof on this issue. *Id.*
4. Petitioner did not meet Petitioner's burden of proving that Respondent failed to adequately implement Student's IEP during school closure in spring of 2020 as a result of COVID-19. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).
5. Petitioner did not meet Petitioner's burden of proving that Respondent denied Student a FAPE by failing to identify Student as a student with an OHI due to ADHD. *Schaffer*, 546 U.S. at 62; 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.8 (a)(1), 300.111 (a).
6. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comprehensively assess Student's needs in the areas of assistive technology and parent and in-home training. 34 C.F.R. § 300.304(c)(4), (5).
7. Respondent violated the procedural requirements of the IDEA by failing to assess Student's sensory needs through an occupational therapy evaluation. 34 C.F.R. §§ 300.34; 300.304(c)(6).

8. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comply with student and parental procedural rights under the IDEA related to the provision of prior written notice. 34 C.F.R. §§ 300.503(a).

IX. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **GRANTED** as follows:
2. It is **ORDERED** that Respondent provide prior written notice consistent with 34 C.F.R. § 300.503 to Petitioner within 10 days of entry of this order for the purpose of performing an occupational therapy sensory evaluation by a qualified occupational therapist;
3. It is further **ORDERED** that Respondent conduct the evaluation and complete a written report, with a copy provided to Petitioner, within 45 days of receiving written parental consent pursuant to 34 C.F.R. §§ 300.9, 300.300.

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

SIGNED December 22, 2020.



Stacy May
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).