

III. DUE PROCESS HEARING

The due process hearing was conducted virtually via the Zoom platform August 11-13 and August 17, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel, Sonja Kerr. Student's mother also attended the due process hearing.

Respondent continued to be represented by its legal counsel, Geneva Jones-Taylor. In addition, Dr. ***, the Executive Director of Special Education, and Mr. ***, Special Education Coordinator, attended the hearing as the party representatives for the District. Both parties filed written closing briefs in a timely manner. The Decision in this case is due on November 15, 2021.

IV. ISSUES

A. Petitioner's Issues

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

1. FREE, APPROPRIATE PUBLIC EDUCATION (FAPE): Whether the District failed to provide Student with a Free Appropriate Public Education (FAPE) during the 2017-18, 2018-19, and 2019-20 school years, including:
 - a. IEP/FAPE: Whether Student's Individualized Education Program (IEP) was developed and implemented appropriately, including:
 - whether the IEP's Present Levels of Academic Achievement and Functional Progress (PLAAFPs) inform the goals;
 - whether the IEP goals are not well designed to result in meaningful progress;
 - whether the goals are appropriately challenging;
 - whether the District has offered an insufficient amount of services, including for Assistive Technology (AT) services and training;
 - whether the IEPs carefully address Extended School Year (ESY); and
 - whether services ceased when COVID-19 began.

- b. COLLABORATIVE: Whether Student's services were provided in a coordinated, collaborative manner with key stakeholders.
 - c. RELATED SERVICES: Whether the related services provided under Student's IEPs were not adequate in meeting Student's unique needs, including: Occupational Therapy (OT), AT, speech and language.
 - d. AUTISM SERVICES: Whether the District provided Student services needed to address Student's Autism in Student's IEP.
2. ELIGIBILITY: Whether the District improperly eliminated Student's eligibility as SLD-Dyslexia.
 3. PROCEDURAL: Whether the District violated certain parental procedural rights that significantly impeded the parent's right to participate in the educational decision-making process.
 4. CHILD FIND: Whether the District timely and accurately fulfilled its Child Find responsibilities under the IDEA, particularly by failing to identify Student as a student with Autism.
 5. Other Causes of Action: Whether the District violated Student's rights under § 504 of the Rehabilitation Act of 1973 (504) and the Americans with Disabilities Act (ADA).

B. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations stated in Student's Complaint. The District also contends it provided Student with FAPE during the relevant time period and can continue to do so. Respondent asserts that Petitioner is not entitled to any of the requested relief.

The District raises the following additional issues:

1. JURISDICTIONAL: Whether the Hearing Officer has jurisdiction to resolve claims arising under any laws other than the IDEA, and whether such claims should be dismissed. The Hearing Officer does not have such jurisdiction and will formally dismiss all claims arising under statutes other than the IDEA.
2. STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued prior to June 5, 2019, should be dismissed as outside the one-year statute of limitations rule as applied in Texas. The Hearing Officer addressed this issue in

Order No. 17. All issues which arose prior to June 5, 2019, were dismissed in that order.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. The District maintain or restore Student's SLD Dyslexia eligibility.
2. The District provide Student with one hour of 1:1 Dyslexia instruction four of five days a week from a qualified person.
3. The District provide Student one hour of Speech/Language instruction four of five days a week from a qualified person.
4. The District provide one hour of OT instruction four of five days a week, including assistance with AT and from a certified OT therapist.
5. The District provide Student with ESY services.
6. The District provide Student appropriate services during the time of COVID-19.
7. The District provide Student compensatory education in an amount to be proved at trial for the timeframe as ordered in the TEA complaint, and for the 2019-2020 school year, and continuing until the Hearing Officer's decision is rendered.
8. Any other appropriate relief deemed necessary by the Hearing Officer.
9. The Hearing Officer determine Petitioner has administratively exhausted Petitioner's claims pursuant to IDEA for purposes of any ADA or 504 action in other forums.

B. Respondent's Requested Relief

The District requested dismissal of all claims arising under laws other than the IDEA. That requested dismissal will be granted.

VI. FINDINGS OF FACT

1. Student is *** years old and attends *** grade at *** in the *** Independent School District (***ISD). Student attended school in the District from the 2013-14 school year until November ***, 2020, when Student’s family moved into ***ISD. During the 2019-20 school year—the school year at issue in this case—Student was eligible for special education and related services as a student with a specific learning disability, a speech impairment, and Other Health Impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD). Student is a sweet person who loves to *** and enjoys ***. Student has friends at school and Student’s teachers enjoy working with Student.¹

Evaluation History

2. Student was initially evaluated for special education and related services in 2013 when Student was *** years old. At the time, it was determined that Student had average intelligence, did not have Autism, and had a speech impairment. The District initially began delivering special education and related services to Student during the 2013-14 school year under the eligibility category of speech impairment.²
3. The District re-evaluated Student during the 2014-15 school year. At the time, the District found Student eligible for special education and related services as a student with a speech impairment and OHI for ADHD. Student also had an outside evaluation performed at the time that determined Student did not meet criteria for Autism.³
4. The District offered an Independent Educational Evaluation (IEE) in 2016 to further evaluate Student. The evaluation concluded Student had average intelligence and age-appropriate academic skills and achievement. It did not find Student had a specific learning disability or Autism. It recommended Student continue to receive special education services as a student with a speech impairment and OHI for ADHD and that the District continue to provide OT services. It also recommended Student’s parent maintain a collaborative relationship with Student’s Admission, Review, and Dismissal (ARD) Committee. It advised Student’s parent to “keep in mind” that the District is not obligated to adopt each of her requests.⁴
5. In February 2017, Student’s physician referred Student for an additional evaluation. The same evaluator who conducted Student’s 2013 initial evaluation for special education and related services, one of the evaluations that determined Student did not have Autism,

¹ Joint Exhibit 9, at 15 (J __, at __); Petitioner’s Exhibit 15, at 6 (P __, at __); Transcript (TR) 181, 559, 589,620, 664.

² J9, at 15; Respondent’s Exhibit 10, page 2, 8 (R __, at __); R12, at 1-2.

³ J9, 15; R 10, at 2, 8; R11, at 2.

⁴ R11, at 2, 15.

conducted the February 2017 evaluation. The February 2017 evaluation concluded Student had moderate ADHD, inattentive type. While Student exhibited some “symptoms or characteristics” of Autism, there was not enough evidence to support a diagnosis of Autism.⁵

6. In January 2018, Student’s parent brought Student to an evaluator to examine whether Student could benefit from OT services. The evaluator determined Student required “direct” education-based OT services in school to assist with deficits in fine motor skills, sensory processing, motor coordination, and visual motor skills which could all affect Student’s ability to access the curriculum.⁶
7. In May 2018, the District referred Student for an IEE to determine whether Student had ***. The evaluator indicated Student demonstrated characteristics consistent with a *** determination and recommended that the District serve Student under the IDEA as a student with a specific learning disability in written expression. The evaluator noted Student was performing below grade-level in every area of written expression tested.⁷
8. In October 2019, Student’s ARD Committee referred Student for an AT evaluation. The evaluation relied on input from several sources, including two of Student’s teachers, Student’s parent, Student’s occupational therapist, and both of Student’s Dyslexia teachers. The evaluator also did direct evaluations of Student in October 2019, which included two handwriting evaluations and two typing evaluations. She also conducted two direct observations of Student on different days in Student’s classroom setting.⁸
9. The evaluation made several recommendations based on Student’s needs, including allowing Student access to a word-processing device with spelling assistance on an “as-needed basis,” access to a digital organizer to plan for writing assignments on an “as-needed basis,” and offering Student practice on Student’s keyboarding skills.⁹
10. Student’s ARD Committee referred Student for another type of evaluation in October 2019—a functional behavior assessment (FBA). The FBA evaluator interviewed Student’s parent and one of Student’s teachers; conducted two direct observations on two separate days; and reviewed Student’s IEP, attendance and disciplinary records, and teacher data.¹⁰
11. The FBA identified three target behaviors: ***. For each of the three behaviors, the FBA laid out the antecedent, current consequences, frequency of the behavior, intensity, typical

⁵ R12, at 1, 11.

⁶ R13, at 5.

⁷ R14, at 6, 8.

⁸ J7.

⁹ J7, at 7.

¹⁰ J8, at 1.

duration, three functions each particular behavior served, a recommended replacement behavior, and proposed methods for addressing the behavior.¹¹

12. The FBA also proposed three behavior goals for Student. Goal 1: ***. Goal 2: ***. Goal 3: ***. The FBA also recommended implementing a BIP to target the specific areas of Student's behavioral needs.¹²
13. On May ***, 2019, the District conducted a Wilson Assessment of Decoding and Encoding (WADE). This is an assessment of Student's ability to decode and spell words that can serve as a benchmark. The District had previously conducted WADE assessments in 2017 and 2018. The WADE was used to inform the Dyslexia services provided to Student.¹³
14. In preparation for litigation, the same evaluator who found Student did not have Autism in 2017 and 2013 conducted an evaluation to determine whether Student had Autism in April 2021 at the request of Petitioner's attorney. The evaluator found that Student did have Autism Spectrum Disorder.¹⁴

May 2019 ARD Committee meeting

15. The District held an ARD Committee meeting on May ***, 2019, before Student advanced to *** grade for the 2019-20 school year. Student continued to qualify for special education as a student with a specific learning disability in written expression, OHI, and a speech impairment. Student also continued to meet criteria to be served as student with dyslexia. Student's parent did not inform the District that she had a disability and required reasonable accommodations as a result of it before the May 2019 ARD Committee meeting or any other ARD Committee meeting.¹⁵
16. The ARD Committee reviewed Student's PLAAFPs. Student had deficits in the areas of gross/fine motor skills and attentiveness related to Student's ADHD. Student demonstrated the following issues in the area of gross/fine motor skills: ***. The District had concerns to be addressed with OT related to Student's fine motor skills, visual motor skills, and motor coordination. Regarding attentiveness, Student had difficulty maintaining focus during non-preferred activities and assignment. This has an impact on Student's ability to complete assignments.¹⁶
17. The District also noted Student's PLAAFPs in speech therapy. The District indicated Student needed continued direct speech therapy services to address several areas of

¹¹ J8, at 4-6.

¹² J8, at 6-7.

¹³ TR 720-21.

¹⁴ P5, at 1, 11.

¹⁵ J1, at 3; TR 679, 698.

¹⁶ J1, at 5.

concern. The District considered whether Student required ESY but concluded Student did not. The District offered accommodations in a number of areas for Student to address Student's disabilities, including extra time to complete assignments, giving directions in small and discrete steps, verbal or tactile reminders to stay on task, allowing Student to ***, positive and concrete reinforcement for Student, and a number of other accommodations.¹⁷

18. The District then developed IEP goals in several areas. Student had a goal of ***. Student had difficulty with written expression and had a baseline score of ***%. The goal was to get to 75% by May 2020. Student had a similar additional goal of ***. Again, Student's baseline score was ***% and the goal was to achieve a 75% success rate.¹⁸
19. Student had a reading goal to be implemented by the Dyslexia teacher of ***. Student's baseline in May 2019 was ***%. Student also had an additional writing goal of ***.¹⁹
20. Student also had goals in the area of social skills and pragmatic language. Student had a goal of ***. Student had behavior goals as well related to Student's ability to maintain attention on non-preferred tasks and settling disputes pragmatically.²⁰
21. Student needed a word processing device as AT. Student also required related services in three areas: OT, speech therapy, and special transportation. For the 2019-20 school year, Student was to receive 45 minutes of direct OT in *** out of each *** weeks plus ten minutes of indirect consultative OT services in *** out of each *** weeks. In speech therapy, Student was to receive direct speech therapy twice per week for 30 minutes per session.²¹
22. Student was to receive Dyslexia services 45 minutes per day in the general education setting. This consisted of four sessions per week of the Wilson Dyslexia program, an Orton-Gillingham-based program approved by TEA that is best for Student. The May 2019 ARD Committee meeting ended with the ARD Committee, including Student's parent, in agreement.²²

ARD Committee meetings during the 2019-20 school year

¹⁷ J1; TR.

¹⁸ J1, at 8.

¹⁹ J1, at 9-10.

²⁰ J1.

²¹ J1, at 15-17, 19; TR 820.

²² J1, at 24; TR 22; TR 764.

23. The ARD Committee next met on August ***, 2019. The purpose of the meeting was to request an AT evaluation.²³ During the meeting, Student’s parent also requested an FBA.²⁴ The ARD Committee added one additional goal related to dyslexia to be implemented by Student’s dyslexia teacher. Otherwise, the District did not make adjustments to the May 2019 IEP.²⁵
24. The ARD Committee needed to continue the meeting on September ***, 2019. The District recommended reducing Student’s OT services so Student could spend more time in the classroom without being pulled out for related services. The District felt Student was able to make progress without as much time in direct OT services. The District recommended direct OT services four times per *** weeks for 20 minutes per session while maintaining Student’s indirect OT services. Student’s parent disagreed with the recommendation. The ARD Committee meeting ended in disagreement. The District implemented its own recommendation over the objection of Student’s parent and began offering OT services four times per *** weeks.²⁶
25. The ARD Committee met again on November ***, 2019. Ms. Kerr attended the meeting as Petitioner’s attorney and Ms. Jones attended the meeting as the District’s counsel. The ARD Committee ran out of time to complete the meeting on that date and reconvened on November ***, 2019. The purpose of the meeting was to review the FBA and AT evaluation the District had recently completed at the request of Student’s parent. Student’s parent told the ARD Committee she wanted OT services to go back to eight sessions of 45 minutes each per *** weeks. The meeting ended in disagreement, but the parties agreed to reconvene at a later date after the District could consider Student’s parent’s requests.²⁷
26. The District provided Student with a brand-new Mac word processing laptop device as AT solely for Student. The District added several software programs to it so Student could access it and take advantage of the AT. The District also provided Student with a graphic organizer in accordance with the recommendations of the AT evaluation. District staff met with Student’s parent at her home and instructed how to use the AT properly. District staff observed both Student’s parent and Student using the device properly. The laptop provided was fully functional.²⁸
27. During the meeting, the ARD Committee discussed a TEA Complaint Petitioner had filed in July 2019. The TEA Complaint addressed issues that arose during the 2017-18 and 2018-19 school years. TEA’s staff substantiated several allegations, all of which arose prior to the commencement of the statute of limitations period in the instant case, in the TEA Complaint. TEA ordered the District to determine whether Student required compensatory

²³ See above, the AT evaluation was completed in October 2019.

²⁴ See above, the FBA was completed in October 2019.

²⁵ J2, at 10, 26.

²⁶ J3, at 27; TR 858-59.

²⁷ J4, at 31-32.

²⁸ TR 817, 822-25, 847.

education services as a result of the violations. The District determined it did not owe Student any compensatory education services. A special coordinator for the District stated the offer was “zero” and ignored Petitioner’s attorney’s request to discuss the offer further. Student’s parent had previously and would subsequently request that this particular special education coordinator not be involved in working on Student’s case. Student’s parent was not comfortable with him. The District did not solicit any input from Student’s parent in arriving at its compensatory education decision.²⁹

28. The parties had trouble agreeing on a date on which to reconvene for an ARD Committee meeting. The District proposed an ARD Committee meeting reconvene date of February ***, 2020. On February ***, 2020, Student’s parent sent an email to District staff alerting them that she would not attend the meeting. Based on the draft of the IEP, she believed Student’s services had been predetermined. She also stated she was uncomfortable with the presence of a particular District special education coordinator, the one about whom she had previously expressed concerns, at the meeting. Student’s parent requested that the District record the ARD Committee meeting.³⁰
29. The District held the ARD Committee meeting on February ***, 2020, without Student’s parent present and without recording the meeting despite Student’s parent’s request to do so. The meeting lasted 12 minutes and left in place the IEP developed during the November *** and November ***, 2019 meetings without making any changes.³¹
30. On May ***, 2020, the ARD Committee met for the sixth time in the 2019-20 school year. Student’s parent did not attend the meeting but gave permission for the meeting to occur in her absence. The District recorded the meeting and sent Student’s parent a copy of the recording. The meeting did not end in agreement due to Student’s parent’s disagreement.³²
31. On November ***, 2020, Student left the District and enrolled in ***ISD. Student’s parent disclosed to ***ISD that she had a disability and required reasonable accommodations to participate in the IEP process. The District offered her reasonable accommodations based on the assertion of Student’s parent.³³
32. On January ***, 2021, after getting to know Student over a couple of months, ***ISD held an ARD Committee meeting. ***ISD updated Student’s goals to reflect Student’s current PLAAFPs. ***ISD maintained Student’s OT services at the same frequency and duration at which the District had offered. ***ISD also offered Dyslexia services 45 minutes per day four days per week and speech therapy for one 30-minute session per week. ***ISD did not offer special transportation as a related service due to Student’s opting to attend

²⁹ P20; J4, at 21; TR 367, 629.

³⁰ P46; TR 58, 225-26.

³¹ J5, at 31; P47; TR 226.

³² J6.

³³ P15; TR 336.

school virtually instead of in-person. ***ISD kept the BIP developed by the District without making any changes. ***ISD also did not adjust Student's AT services. ***ISD did not recommend ESY in January 2021 or even in May 2021 after finding Student had Autism. ***ISD added some additional accommodations after seeing what might be helpful for Student. Student's parent told the ARD Committee that Student had a recent Autism diagnosis. The District needed to conduct a three-year reevaluation that spring and agreed, at the request of Student's parent, to test Student for Autism eligibility. All members of the ARD Committee, including Student's parent, agreed to the new IEP during the January ***, 2021 ARD Committee meeting. Student's parent is happy with the services Student receives in ***ISD and her collaborative relationship with ***ISD staff.³⁴

33. During the January 2021 ARD Committee meeting, Student's parent informed the ARD Committee that Student had recently been diagnosed with Autism Spectrum Disorder. Petitioner did not present evidence at the due process hearing of an Autism diagnosis prior to April 2021, but Student's parent reported to ***ISD that there was such a diagnosis prior to January 2021. ***ISD agreed to test for it during the three-year reevaluation, though ***ISD did not independently have a suspicion that Student had Autism. Student was last evaluated by the District in May 2018 and the District never identified Student as a student with Autism. In May 2021, ***ISD conducted Student's three-year reevaluation. Based on that evaluation, ***ISD added the eligibility category of Autism. The District and ***ISD did not have a reason to suspect Student would have eligibility in the category of Autism prior to that time.³⁵

Student's performance during the 2019-20 school year

34. During the 2019-20 school year, Student received all As and Bs throughout the school year. Student's end-of-year grades were ***. Student was on the A/B Honor Roll for the 2019-20 school year.³⁶
35. Student performed in the *** percentile respectively on the math, reading, and science Fall Measure of Academic Performance (MAP) standardized exams. These exams provide an opportunity to compare students both within the District and to their same-age peers nationally. MAP also allows a chance to track a student's individual progress throughout the school year. Student improved in the winter administration of MAP, scoring in the *** percentiles respectively. These scores were well-above both the District mean and the national mean. They were also unsurprising as they were consistent with Student's classroom performance, which showed progress throughout the year and command of the material.³⁷

³⁴ P15, at 8-9, 15, 24; TR 83, 319, 331-32.

³⁵ P15, at 233; TR 205, 501.

³⁶ J6, at 7, 33.

³⁷ J6; TR 613-14, 717-20.

36. In addition to Student's success as measured by standardized tests and grades, Student made progress on each of Student's IEP goals. Student mastered the IEP goals of using the writing process to compose legible texts and in each of Student's speech and language goals. The other goals could not be measured at the end of the year due to COVID-19 restrictions, but Student had made steady progress on each during the 2019-20 school year and Student continued to make progress once the District switched to a virtual model.³⁸
37. The District closed for two weeks in March 2020 before switching to a virtual model from March 30 until the end of the 2019-20 school year due to the impact of COVID-19. Student continued to receive dyslexia services four times per week in a one-on-one setting via Zoom. The District offered Student related services and accommodations to Student. Student continued to make progress toward Student's IEP goals despite school switching to a virtual model.³⁹

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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs and 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).

³⁸ R32, TR 776.

³⁹ P49; TR 776, 779-80, 862.

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁴⁰ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. 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.* Courts give “great deference” to the judgment of educational professionals in implementing the IDEA. *E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014).

C. 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 Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997). Even after the Supreme Court’s 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017)).

⁴⁰ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Indep. Sch. Dist. v. 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 a FAPE, a school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(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 Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the District "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 988, 999 (2017).

The District's obligation when developing Student's IEP and BIP is to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.320(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 District individualized Student's plan on the basis of assessment and performance. Student had a number of privately and publicly funded evaluations and the District followed the recommendations from those evaluations. The District gave Student direct and indirect OT services based on the OT evaluation. It gave Student access to a word processor and graphic organizer in accordance with the AT evaluation. The District then ensured the AT was functional and personally instructed Student's parent in how to use it. It gave Student 45 minutes per day of dyslexia instruction in accordance with Student's various dyslexia evaluations. It conducted an FBA and then, based directly on that FBA, developed and implemented a BIP.

The District based Student's goals on Student's PLAAFPs, noting Student's success rate with specificity in each area in which Student had a goal. The District then used their experience with Student to make adjustments to Student's IEP. For instance, the District cut down Student's direct OT services from eight sessions per *** weeks to four sessions per *** weeks due to Student's success accessing the curriculum. It also increased Student's speech services ahead of the 2019-20 school year. After getting to know Student, ***ISD agreed with the amount of OT and speech services Student needed.

Further, the District's decision not to offer ESY services to Student was based on its observation and assessment of Student. ESY is necessary when benefits accrued to the child during the regular school year will be significantly jeopardized if the child is not provided an educational program during the summer months. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). There is no evidence that Student's educational benefits would have been jeopardized by a failure to provide ESY. ***ISD did not provide ESY even after its May 2021 evaluation finding Student had Autism. Therefore, the District did not err in not providing ESY as part of Student's IEP.

Student made all As and Bs and progressed toward Student's IEP goals under the IEP developed by the District. The related services offered were sufficient to allow Student to make progress. Those services were based on the District's experience working with Student and the assessments conducted both by the District and outside evaluators.

2. 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). 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, resource 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 least restrictive environment, consideration must be given to:

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

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

In this case, Student was educated solely in mainstream classes. Student took a general education Dyslexia class and was pulled out of class for direct speech and OT services, but otherwise Student remained in general education classes full time. Student remained on the A/B honor roll throughout the 2019-20 school year in Student’s general education classes. This was the least restrictive environment for Student and Student was able to be “satisfactorily educated” in general education classes. *See Id.*

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 that Petitioner and the District did not have a collaborative relationship. Student's parent is happy with the services Student receives in ***ISD and agreed to Student's IEP even though the services are essentially identical to what Student received in the District. However, through five ARD Committee meetings during the 2019-20 school year and an ARD Committee meeting in May 2019 to set the IEP for the 2019-20 school year, Student's parent never agreed to an IEP during an ARD Committee meeting. Student made progress on Student's IEP goals and maintained excellent grades throughout the school year in the District. This indicates the issues that prevented Student's parent from agreeing with Student's IEP did not concern the educational services provided to Student. Rather, the issues concerned the parties' ability to collaborate with one another.

These issues dated back at least several years as the 2016 IEE gave advice to Student's parent on how best to collaborate with the District. The District, for its part, was not collaborative as collaborative as it could have been with Student's parent. The District did listen to Student's parent and incorporate her feedback to a degree. For instance, it conducted an FBA at her request and granted her IEE requests. The District also held six ARD Committee meetings during the 2019-20 school year and invited Student's parent to each one. Additionally, contrary to Petitioner's contention, the District had no obligation under the IDEA to ask Student's parent whether she had

a disability or whether she required reasonable accommodations. Student’s parent never presented evidence of a disability or need for reasonable accommodations to the District. There is nothing in statute or case law under the IDEA indicating a school district should presume reasonable accommodations for a parent are required as part of the collaborative process. Student’s parent presented evidence of a disability and need for accommodations to ***ISD—which then offered her reasonable accommodations—but not to the District.

However, the District needed to be more collaborative. It held two ARD Committee meetings without Student’s parent and did not record the February 2020 ARD Committee meeting so Student’s parent could be up to date. During the November 2019 ARD Committee meeting, when the District was to consider an appropriate compensatory education award, the District did not consider any input from Student’s parent or Student’s attorney. The District offered “zero” compensatory education and was not open to other suggestions. The District also continued to have a special education coordinator in the ARD Committee meetings with whom Student’s parent was not comfortable. The District did not explore alternatives to having that staff member present. The District did not make sufficient effort to provide educational services in a cooperative manner with Student’s parent.

4. Academic and Non-Academic Benefits

While the District did not collaborate sufficiently with Student’s parent, the evidence establishes that it did offer appropriate academic and non-academic benefit. 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).

The District provided Student academic and non-academic benefit. Academically, Student made excellent grades and made progress on Student’s IEP goals. Student was on the A/B honor roll for the entire 2019-20 school year. Student mastered several IEP goals and made progress on all of them, even once the District switched to a virtual model due to the impact of COVID-19.

Student improved significantly during the 2019-20 school year, as evidenced by Student's performance on the MAP tests at the beginning of the school year and at the end of the school year. That improvement was consistent with the observations of Student's classroom teachers. Non-academically, Student had friends and enjoyed going to school. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic benefit).

5. Conclusion

In conclusion, the District conferred a FAPE on Student. Student's education was based directly on Student's numerous evaluations and the observations of teachers working directly with Student. Student was served in Student's least restrictive environment. The District did not work collaboratively with Student's parent. However, Student still received a FAPE from the District.

The District's failure to include Student's parent sufficiently in the decision-making process did not impact the provision of a FAPE to Student. Notably, Student's parent agreed to an IEP virtually identical to the one the District offered once ***ISD offered that IEP in a collaborative manner. The ***ISD January 2021 IEP did not offer ESY, offered the reduced OT services, offered the same AT as the District, and made few other changes other than updating Student's goals and adding some accommodations to the IEP's extensive list of accommodations based on ***ISD's observations. ESY, AT, and OT services were points of significant contention in the District. Yet Student's parent agreed to ***ISD's IEP and was happy with the services ***ISD was providing.

This indicates that the District did not collaborate well enough with Student's parent. However, more importantly in a holistic FAPE analysis under the four *Michael F.* factors, it indicates that the District's offer of a FAPE was appropriate and the District's IEP met Student's needs. The District just did not offer it in a collaborative manner. Further, while the District did not record the February 2020 ARD Committee meeting after stating it would, the District also did not make substantive changes to Student's IEP during that meeting. It did not leave Student's

parent out of making key decisions at that meeting. Thus, the District's failure to coordinate appropriately with Student's parent did not affect the District's provision of a FAPE.

Student made all As and Bs and made progress on Student's IEP goals during the 2019-20 school year. Student's IEP was appropriately challenging and met Student's needs. The District provided appropriate related services. Only those related services necessary to allow a child with a disability to benefit from special education need to be provided. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 894 (1984). The District's related services allowed Student to make appropriate progress and benefit from Student's education program. They were also essentially the same related services ***ISD offered. Student's parent agreed those services provided Student a FAPE in ***ISD. The evidence shows those related services provided Student a FAPE in the District too. The District conferred a FAPE on Student.

D. Child Find

Student first qualified for special education and related services in 2015. When Student left the District, Student was eligible for special education as a student with a specific learning disability, OHI for ADHD, and a speech impairment. ***ISD maintained those categories of eligibility after getting to know Student in Student's first two months in ***ISD. When ***ISD did a three-year reevaluation, it found Student eligible for special education and related services additionally in the category of Autism. Petitioner claims the District should have discovered at an earlier date that Student had Autism and therefore violated its Child Find responsibility. However, the District did not have a reason to suspect Student should be served as a student with Autism.

1. Child Find Generally

Congress enacted the IDEA's Child Find provisions to guarantee access to special education. 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA's Child Find obligation imposes on each school district an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including “[c]hildren who

are suspected of being a child with a disability....and in need of special education, even though they are advancing from grade to grade.” 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *Richard R.R.*, 567 F.Supp.2d at 949.

The Child Find duty is triggered when a school district has reason to suspect a student has a disability and reason to suspect that special education services may be needed to address the disability. When these suspicions arise, the school district must evaluate the student within a “reasonable” time after school officials have notice of reasons to suspect a disability. *Id.* at 950; *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017); *A.L. v. Alamo Heights Ind. Sch. Dist.*, 2018 W.L. 4955220, *6 (W.D. Tex. 2018).

A school district must “identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability.” *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790-91 (5th Cir. 2020). A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period or ceases to take such steps. *O.W.*, 961 F.3d at 793.

2. The Child Find Duty in This Case

In this case, Student was already eligible for special education in three separate eligibility categories prior to the 2019-20 school year. Student was not just “progressing from grade to grade,” but was thriving. Student was on the A/B Honor Roll. Student was progressing on all Student’s IEP goals. Student’s MAP scores placed Student well within the top quarter of Student’s peers, and Student’s scores improved during the 2019-20 school year. Student had friends and seemed to enjoy school. The District had no reason to suspect Student had Autism.

Notably, after getting to know Student for two months, ***ISD did not suspect Student had Autism. Student's parent told the ***ISD ARD Committee in January 2021 that Student had a recent diagnosis of Autism and asked them to test for it in ***ISD's required May 2021 reevaluation. *See* 34 C.F.R. 300.303(b)(2) (a school district is required to reevaluate a student for special education and related services every three years. ***ISD was required to conduct a reevaluation in May 2021 since one had not occurred since May 2018.). There is no evidence ***ISD would have found Student had Autism otherwise. There is also no evidence any evaluation found Student had Autism prior to April 2021, several months after Student had left the District. That evaluation was prepared in preparation for litigation by an evaluator who had previously found Student did not have Autism. The same outside evaluator who found Student had Autism in April 2021 had found Student did not have Autism in two prior evaluations in 2013 and 2017. The District did not have reason to suspect Student had Autism.

3. Conclusion

A child experiences an “egregious loss of educational opportunity” when the child should be identified as a student eligible for special education and is not so identified. *Michael P. v. Dept. of Educ.*, 656 F.3d 1057, 1068 (9th Cir. 2011). However, in this case, Student was already eligible for special education. 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). Although ***ISD discovered Student had Autism in its three-year reevaluation in May 2021, the District did not have reason to suspect Student had Autism during the relevant time frame. However, even if it did have reason to suspect Student might have Autism, the District was still serving Student in three eligibility categories and meeting Student's needs with its IEP. The District was serving Student appropriately in the areas in which Student had a need for special education and related services. *See Id.* The District complied with its Child Find duty.

VIII. CONCLUSIONS OF LAW

1. Student was provided FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Endrew F.*, 137 S. Ct. 988.
2. The District provided sufficient related services to allow Student to access the curriculum and receive a FAPE. *Tatro*, 468 U.S. at 894.
3. The District was not required to provide Student ESY in order to provide Student a FAPE. *Alamo Heights Indep. Sch. Dist.*, 790 F.2d at 1158.
4. 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).
5. The District complied with its child find responsibilities by identifying Student as a student in need of special education and related services in a timely manner and appropriately identifying Student's eligibility categories based on the information it had at the time. *Krawietz*, 900 F.3d at 676.

IX. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED**.
2. 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.
3. 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 15, 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 § 2001.144(a-b).